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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of GREEN BAY MUNICIPAL EMPLOYEES (PUBLIC HEALTH R.N.'S), LOCAL 1672-A, WCCME, AFSCME, AFL-CIO To Initiate Mediation/Arbitration Between Said Petitioner and CITY OF GREEN BAY	Case CVIII No. 29587 MED/ARB-1622 Decision No. 19841-B

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing on behalf of Union.

Mr. Mark Warpinski, Assistant City Attorney, City of Green Bay, and Michael, Best & Friedrich, Attorneys at Law, by Mr. Thomas P. Godar, appearing on behalf of Employer.

ARBITRATION AWARD:

On August 23, 1982, the undersigned was appointed Mediator/Arbitrator by the Wisconsin Employment Relations Commission, pursuant to Section 111.70 (4)(cm), 6. b. of the Municipal Employment Relations Act, in the matter of a dispute existing between Green Bay Municipal Employees, (Public Health R.N.'s), Local 1672-A, WCCME, AFSCME, AFL-CIO, referred to herein as the Union, and City of Green Bay, referred to herein as the Employer, with respect to certain issues as specified below.

Prior to any mediation or arbitration proceedings in the matter, the Union filed a motion with the Mediator-Arbitrator requesting an order that the Employer allow Professor George Hagglund access to the work site for the purpose of collecting information to perform job evaluations on the positions in question. On February 2, 1983, the undersigned granted the motion. (A copy of the decision is attached to this opinion). The Employer appealed the decision of this Mediator-Arbitrator to the Wisconsin Employment Relations Commission on February 24, 1983, and the Commission on April 7, 1983, determined that this issue was not ripe for consideration. (Green Bay Municipal Employees (Public Health R.N.'S), and City of Green Bay, Decision No. 19841 (April 7, 1983)).

Thereafter, on December 22, 1983, the Mediator-Arbitrator met with repre-

sentatives of the Union and the Employer, and pursuant to statutory responsibilities the undersigned conducted mediation proceedings between the Union and the Employer on that day at Green Bay, Wisconsin. During the course of the mediation, the parties agreed to terms that settled the dispute between them in committee, subject to the ratification of the City Council and the Union membership. The City failed to ratify the agreement, and as a result, the Union filed prohibitive practices, alleging violations of Sections 111.70 (3) (a) (1) and (4), Wisconsin Statutes. Thereafter, the parties agreed that the undersigned would serve in the capacity of Arbitrator for the purposes of selecting the final offer of the parties. The City and the Union on March 19, 1985, entered into the following agreement with respect to the matter now pending before this Mediator-Arbitrator:

1. The parties agree that the pending dispute over the Collective Bargaining Agreement for the years 1982, 1983 and 1984 will be submitted to Arbitrator Jos. B. Kerkman for resolution consistent with the provisions of Section 111.70 (4)(cm), Municipal Employment Relations Act on the first date made available to the parties by Arbitrator Kerkman.

2. The parties agree that the amended final offers for the purposes of resolution before Arbitrator Kerkman shall also contain proposed amendments to the 1982-84 Contract for inclusion in a successor Agreement for the year 1985. The Arbitrator shall consider both the 1982-84 offer and the 1985 offer as a single package. The Arbitrator's decision shall be final and binding as to both contracts, and both parties hereby waive any appeal of the Award, except to the extent that such Award is premised upon the principles of comparable worth.

3. The parties agree that the above referenced final offers shall be submitted to Arbitrator Kerkman no later than March 29, 1985. The City agrees to implement the monetary aspect of the offer of their final offer effective as of that date. Such implementation will result in the issuance of retroactive pay checks, and pay checks reflecting an increase in wage rates on April 19, 1985. The implementation of the City's final offer and acceptance of that implementation by the Union will not be an admission or operate to prejudice either party's position in mediation-arbitration.

Consistent with the Agreement of the parties reached on March 18, 1985, the parties filed their final offers with the undersigned by March 29, 1985. Subsequently, hearing was convened for the purpose of taking evidence with respect to

the dispute. Hearing was conducted at Green Bay, Wisconsin, on May 7, 8, 19, 20, 22; July 2, 3, 10, 11, 12; August 9, 15, 16; and September 5, 1985. On all of the foregoing hearing dates, the parties were present and given full opportunity to present oral and written evidence, and to make relevant argument. The proceedings were transcribed, and briefs were filed in the matter. Final briefs were received by the Arbitrator on December 21, 1985.

THE ISSUE:

The sole issue before the Arbitrator is which party's final offer should be accepted with respect to wage rates for Public Health Nurse I and Public Health Nurse II for the years 1982, 1983, 1984 and 1985. The final offers of the parties with respect to said rates are as follows:

EMPLOYER FINAL OFFER:

The following is the final offer of the City of Green Bay for the above mentioned years:

	Public Health Nurse I*	Public Health Nurse II
1982	1558/mo.	1735/mo.
1983	1651/mo.	1839/mo.
1984	1732/mo.	1929/mo.
1985	1827/mo.	2035/mo.

*$35.00 per month additional pay if certified, per 1981 agreement.

UNION FINAL OFFER:

January 1, 1983 thru December 31, 1984
SALARY SCHEDULE-COMMUNITY HEALTH NURSES

	Probationary	Job Rate
Effective 1/1/82		
Community Health Nurse I	$1461	$1538
Community Health Nurse II	$1627	$1713
Effective 6/27/82		
Community Health Nurse I	$1491	$1569
Community Health Nurse II	$1660	$1747
Effective 1/1/83		
Community Health Nurse I	$1590	$1674
Community Health Nurse II	$1759	$1852
Effective 2/1/83		
Community Health Nurse I	$1764	$1857
Community Health Nurse II	$1872	$1970
Effective 1/1/84		
Community Health Nurse I	$1850	$1947
Community Health Nurse II	$1957	$2060

Effective 1/1/85

Community Health Nurse employees shall receive wage parity as follows:

Community Health Nurse I	Wage parity with Sanitarian I
Community Health Nurse II	Wage parity with Sanitarian II

POSITION OF THE PARTIES:

UNION POSITION:

The Union makes the following argument:

1. The Union's proposal is reasonable; the City's proposal is unreasonable per se because:

a) The fact that seasoned negotiators, Miller and VanderKelen, entered into a tentative agreement establishing parity of pay between nurses and sanitarians is good evidence that the agreement was reasonable.

b) The admission on the part of VanderKelen to Miller several days after the tentative agreement had been reached that the agreement reflected findings of a study done by Hay Associates in evaluating these positions, confirms the reasonableness of the tentative agreement and the Union position in this matter.

c) The Employer final offer would sharply increase the gap of pay between the nurses and sanitarian wage rates, and for the first time the wage rate for a Public Health Sanitarian I would be higher than the wages paid to a Community Health Nurse II, and absent any showing in the record to suggest a substantial decline in nurses' duties or level of responsibility or an increase in sanitarians' duties or levels of responsibilities the City's final offer is unreasonable per se.

2. In comparison with the wages paid to Community Health Nurses in comparable communities in Wisconsin, the Union's proposal is the more reasonable. In making the foregoing comparisons, the Union argues that its selected group of comparables is the more appropriate than the group of comparables selected by the Employer.

3. In comparison with wages paid to other employees performing similar services for the City of Green Bay, in particular the Public Health Sanitarians employed by the City, the Union's proposal is the more reasonable proposal. Union argues that the foregoing is supported in the record by:

a) The testimony and reports received in evidence from Professor George Hagglund in which he compares via job evaluation techniques the relative worth to the Employer of the position of Public Health Sanitarians and Public Health Nurses.

b) The record evidence which establishes that the cities of Fond du Lac and Eau Claire, and the counties of Outagamie and Brown pay nurses the same wages as sanitarians, and that the City of Racine pays its nurses more than sani-

tarians. The foregoing record evidence, the Union argues, leads to the inescapable conclusion that a wage rate for public health nurses, which minimally is equal to the wage rate paid to sanitarians, is justified.

c) The City's own policies support the proposition that comparisons among existing job classifications within the City are appropriate where its policies read: "1. The salary and benefits provided by the City to its employees are for the purpose of obtaining and retaining competent individuals to perform services the City is required to provide its citizens. The City will provide these salaries and benefits on the basis of internal equity and external competitiveness if fiscally feasible. 2. The City subscribes to the concept of equal pay for equal work. Therefore, jobs of equal overall complexity should be paid within the same range, and differences in job complexity should be appropriately recognized by differences in compensation. This concept is referred to as internal equity."

d) The fact that the City's Community Health Nurse Supervisor is paid in a wage level which is three salary ranges higher than the Sanitarian Supervisor is indicative of the relative complexities and worth of the respective jobs.

e) The results of a job evaluation study done for the City of Green Bay by Hay Associates determined that the overall complexity of the Community Health Nurse job exceeded that of the Sanitarian job in every way as it concerned know-how, problem solving and accountability, thereby confirming the conclusions reached in the Hagglund study.

In reply to the Employer brief, the Union makes the following argument: Rhetorically, the Union argues: "What justification is there for the City's reneging on the agreement negotiated by its experienced and certainly capable Labor Negotiator on December 22, 1983?" and "What basis is there for the City's dramatic turning away from the past practice of at least a decade, whereby the nurses and the public health sanitarians were paid approximately the same wages from 1971 to 1981?" The Union further argues in reply that instead of addressing the foregoing questions the City blows smoke when it asserts that the Union's wage proposal is substantially in excess of the wage increases granted other City employees, and that the City's proposal is consistent with the wage hikes offered and voluntarily accepted by the unions representing hundreds of other City employees. Union contends that the foregoing argument relied on by the Employer is not sup-

ported by the evidence of record, in that the record fails to disclose what other City employees may have voluntarily accepted. The Union makes similar arguments with respect to the City's argument that the fringe benefits afforded the employees in this bargaining unit militate a finding for the City's position.

The Union further argues in reply to the City brief that its selection of comparables is inappropriate, and that it is apparent that the City's proposed wage comparisons are less appropriate than those proposed by the nurses, who have proposed comparables among public health nurses who are doing the same work in communities of appropriately comparable size, wealth and significance within the state.

Finally, in response to the City's argument that the Hagglund study is flawed and deserves little or no weight, Union argues that there is nothing particularly mysterious about the job evaluation process. It simply requires the consistent application of an appropriate standard (one that reasonably can be applied to the jobs being evaluated) to job descriptions that fairly identify the salient attributes of the jobs in question. This was done here. Union accuses the City of "nit picking" the Hagglund report, and argues that Hagglund's summarization at page 26 of his report, and his substantiations at Appendices III and IV fairly reflect the work done by nurses and sanitarians, regardless of how he acquired the information that is detailed in job descriptions included as Appendix I to his report. In support of the argument, Union points to testimony in the record wherein both nurses and sanitarians testified that the job descriptions reasonably and accurately described their jobs, citing the July 3 transcript at pages 6, 7, 23, 56, 63, 92 and 144, and the July 10 transcript at page 81; except to the extent that Hagglund may have overstated the complexity of the sanitarians' job, citing the July 3 transcript at pages 67, 68, 70 and the August 15 transcript at pages 113 and 114.

Union further argues in reply that the testimony of witness Judith Harrington, is of no value in this record, in that her sole testimony was "to play the role of 'naysayer' relative to Professor Hagglund's study rather than to offer any positive testimony one way or the other concerning the actual merit of his conclusions." Union argues that her testimony provides no support for the City's argument that the positions in question are not similar or that the nurse's job

in terms of over-all complexity is not the more complex of the two, because she offered no opinion as to the relative worth of the respective jobs.

Union argues in reply that the City's argument with respect to the court decisions it cites in its initial brief mistates the impact of the decisions when the City argues they stand for a rejection of any job comparison; Union arguing that the court decisions merely stand for the proposition that job comparability, standing by itself, does not prove the existence of an unlawful intent to discriminate between employees based on their sex as it concerns any wage differences. Union then argues that the instant matter is not a sex discrimination case. To the extent it involves the comparison of relative complexity of the nurse and sanitarian jobs, it simply involves the application of certain basic principles concerning the establishment of pay rates that the City itself has laid down.

EMPLOYER POSITION:

In its principal brief, the City makes the following argument:

1. The City's last offer compares favorably with the rates paid to public health nurses in comparable communities. The City argues that the comparable communities which it selected in its exhibits are the appropriate communities, however, even if one were to accept all of the communities embodied in those espoused by the Employer, as well as those espoused by the Union, the City's offer would still be preferable under this criteria.

2. The City's voluntary settlements with its other represented employees at a wage increase consistent with its last offer herein should be given deference.

3. The over-all compensation received by the public health nurses, pursuant to the City's offer, is reasonable.

4. The moderate rise in the cost of living for the period relevant to these proceedings justifies selecting the City's offer.

5. The private sector comparables favor awarding the City's last offer.

6. The Union's comparable worth study does not support its proposal, since the theory has been discredited, and the application itself is flawed so as to make the study immaterial in these proceedings. Employer argues that the theory of comparable worth is flawed not merely as a basis for determining discrimination but also as a basis for making conclusions regarding wage decisions. Employer further argues that the use of such a report in the context of interest arbitration

in Wisconsin is improper, further contending that while the City recognizes the Arbitrator has ruled on the admissibility of the report and received it into evidence, the City maintains its position that it is improperly admitted; further arguing that the testimony of Ms. Harrington, a bona fide expert in the field of job evaluation , as contrasted with comparable worth, makes it abundantly clear that Hagglund was absolutely right when he admitted that this study was not for the purpose of installing a job evaluation plan, and the Arbitrator's acceptance of this report as a job evaluation may have been premature.

7. The concept of comparable worth as a wage setting tool has been roundly discredited as without empirical support, citing Donald Tryman's treatise published by the National Academy of Science in 1979, wherein he opined:

A. The choice of factors and factor weights can have strong effects on the relative ranking of jobs;

B. Evaluations ultimately rest on the subjective judgments (although systems differ in the degree of subjectivity involved); and

C. The use of different job evaluation claims for different segments of our organization's work force precludes comparisons of the relationship of pay to job work sectors.

Employer cites the following case law in support of its contention that comparable worth is not a useful approach in determining whether a wage rate is appropriate as follows: County of Washington vs. Gunther; EEOC vs. Akron National Bank and Trust Co., 23 EPED, ¶31, 102 (N.D. Ohio, 1980); Christenson vs. Iowa, 563 f. 2d, 353, 15 EPD, ¶27835 (8th Cir. 1977); Lemons vs. City and County of Denver, 22 EPD ¶30, 852 (10th Cir. 1980); Gerlach vs. Michigan Bell Telephone Co., 501 F Supp. 1300, 1321 (E.D. Mich. 1980); Power vs. Barry County, 30 EPD ¶33, 232 (W. D. Mich. 1982); Balding vs. University of Washington, 672 f. 2d 1232 (9th Cir. 1984); AFSCME vs. State of Washington, 770 f 2d. 1401 (9th Cir. 1985); Briggs vs. City of Madison, 536 f. Supp. 435, 443 (W. D. Wis. 1982); American Nurses Association vs. Illinois, 606 f. Supp. 1313, (E. D. Ill. 1985).

8. The methodology employed by Professor Hagglund is so flawed that it offers no support for the Union's comparable worth theory. In support thereof, Employer argues that the testimony of Judith Harrington establishes that Hagglund failed to follow the twelve appropriate steps which he delineates in his prepara-

tions of his evaluations. Employer argues that the drafting of the job description by Hagglund was flawed by the inclusion of unimportant information and the exclusion of important information and other material errors, Employer citing 55 errors in Hagglund's collection of the data. Employer points out that Hagglund is criticized by the hearing examiner in Alaska State Commission for Human Rights ex rel Janet Bradley vs. State of Alaska, at pages 44 and 45 (11/23/84) as follows: "Most striking in this context was the inclusion of the PHN descriptions of every activity ever mentioned by such employees, irrespective of the frequency of or the authorization to engage in such conduct." Employer further argues that Hagglund supplied the criteria of the systems which he had employed, citing numerous examples of the Employer's contention that the criteria was misapplied. Employer further argues that the bias of the evaluator fatally flaws Hagglund's comparable worth report, and that the two assistants employed by Dr. Hagglund in writing his reports were unfamiliar with and untrained in the job evaluation process.

In reply to the Union's argument, the City responds as follows:

1. The Union's request that the Arbitrator rely on a tentative agreement among the parties should be rejected, citing DeSoto Area School District, Dec. No. 21184-A (7/27/84); D. C. Everest Area School District, Dec. No. 21941-A (2/25/85); Stevens Point Area Public School District, Dec. No. 20952-A (5/8/84); Juneau County Courthouse Employees, Dec. No. 21418-C (10/16/84) and Randolph School District, Dec. No. 21013-A (4/4/84).

The Employer further responds to the Union argument that while the City disputes that the relative ranking of the PHN's and Sanitarians has ever been a controlling factor in bargaining, even if this is an appropriate consideration, the City's offer maintains the numerical relationship between these two groups, contending that the PHN's have been paid at a level varying from 89.5% to 94.5% of the sanitarian rates dating as far back as 1972.

The City accuses the Union of attempting to "blow smoke" on the compelling evidence that the City's offer is reasonable when they improperly attempt to rely on evidence not in the record by the submission of an article from a publication entitled "Isthmus" dated October 15 through October 31, 1985. The City further responds that contrary to Union assertion the City has provided information

necessary to permit comparison between the nurses in the communities proposed by the City and Green Bay PHN's. The City takes issue with Union argument that the degree requirements required of PHN's employed by the Employer warrant a higher level of wages for these employees, citing the fact that as recently as 1982 the Employer had a non-degreed nurse as a Public Health Nurse II, and continues to have less than 90% of its nurses degreed. The City opposes the Union argument that Outagamie County and the cities of Fond du Lac and Madison should be the primary areas to look to for the purpose of comparison because Outagamie County and the City of Fond du Lac nurses are not represented, and the City of Madison nurses for 1985 are paid $1.06 per hour less than the Employer's offer here, and that the only suggestion the record contains that Madison receives higher pay is possible only if one were to look at 1986 wages for Madison. The City further argues that it is the Union, not the Employer, who seeks to manipulate the comparables. The City further argues in reply to the Union brief that a comparison between the PHN's and Sanitarians as advanced by the Union is of no value in this arbitration.

DISCUSSION:

The undersigned is mindful of his responsibilities that he is to select the final offer of one party or the other, and that in considering which party's final offer he is to adopt, weight should be given to the factors found at 111.70 (4)(cm) 7, a through h. The undersigned, in evaluating the parties' offers will consider the offers in light of the foregoing statutory criteria, based on the evidence adduced at hearing, and the arguments advanced by the parties in their briefs.

While this dispute is limited solely to one of wages, it has gone on for an inordinate length of time. The proceedings first came to this Arbitrator on August 23, 1982, when the Wisconsin Employment Relations Commission appointed him Mediator-Arbitrator in the matter. Subsequent to the initial procedural rulings and the mediation, the proceedings lasted through fourteen days of hearing, which generated in excess of 2,000 pages of transcript, and 132 pages of argument, as well as 100 multi-paged exhibits. The record is indeed burdensome and exhaustive. Notwithstanding the laborious task, the undersigned undertakes to apply the aforementioned statutory criteria to resolve this prolonged dispute between the parties.

THE COMPARISON OF WAGES IN THE SAME COMMUNITY AND IN COMPARABLE COMMUNITIES

The statute directs the Arbitrator to consider under 4 (cm) 7, d the comparison of wages, hours and conditions of employment of municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services 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. The undersigned will consider each of the foregoing statutorially directed comparisons for the purpose of determining which party's final offer is preferred, based on this criteria. In making these comparisons, the undersigned will make the comparisons based on the respective wage offers of the parties as they impact salary levels for 1985, because that is the ending point of the years in dispute in these proceedings, and that is the area to which the parties have focused their evidence and argument in these proceedings as well.

Considering first the comparison of wages among similar employees in the same community in public employment, the evidence establishes that the sole comparison that is available is public health nurse in the employ of Brown County. The final offers of the parties establish that the Union proposal would create a $13.28 per hour rate to Public Health Nurse II's, and the Employer offer would create a rate of $12.52 per hour for the same position. Union Exhibit No. 25 establishes that Public Health Nurse II's employed by Brown County are paid $12.07 per hour for 1985. Based solely on the comparison of wage rates to Public Health Nurse II's in public employment in the same community, it is obvious that the Employer offer is closer to the rate paid by Brown County than that of the Union. Solely on that comparison the Employer offer is obviously preferred. The question of wage leadership on the part of the instant Employer is not considered in making the foregoing comparison, however, and will be considered later in the Award, since Union Exhibit No. 25 indicates Sanitarian II's employed by Brown County are paid $12.07 per hour, the same rate as Public Health Nurse II, whereas, Sanitarian II's employed by the instant Employer are paid $13.28 per hour. The foregoing suggests a wage leadership position for public health employees by employees employed within the City of Green Bay. These considerations will be

addressed later, since the criteria now under consideration is a straight wage comparison.

Turning to a consideration of wage comparisons for employees performing similar services in comparable communities in the public employment, the undersigned must first resolve the question of what are the appropriate comparables. The Union, in its Exhibits 25 and 28, proposes the appropriate comparables should include the cities of Fond du Lac, Madison, Kenosha, Eau Claire, Oshkosh, Racine, Sheboygan and Manitowoc, as well as Outagamie County. The Employer proposes that the appropriate comparables should be the City of Oshkosh, City of Sheboygan, Sheboygan County, City of Manitowoc, County of Manitowoc. (Employer Exhibit No. 2) The undersigned finds it unnecessary to resolve the dispute with respect to the comparables for the purpose of wage comparisons only, because even by accepting the Union's comparables, their offer, considering only a straight wage comparison, is not justifiable. The evidence establishes that the City offer in this matter of $12.52 per hour for 1985 is exceeded only by the City of Fond du Lac, Outagamie County and City of Kenosha. The evidence further establishes that the City of Eau Claire pays precisely the same amount as the City offer. Significantly, among those employees who equal or exceed the City offer in this matter, none of the employees employed by those employers are represented by unions, and the evidence establishes that at least in certain of the foregoing communities the top rate is reached by merit rather than by a definitized wage schedule. The undersigned, therefore, is persuaded that because the Employer offer here exceeds the wages paid in 1985 for PHN II's in eight "comparable" communities, the Employer's offer is preferred. The undersigned is further persuaded that the Employer offer of $12.52 per hour is justifiable when considering a comparison to the average of all of the foregoing comparable communities, which calculates to $11.97 per hour. Furthermore, the undersigned concludes that the Union position of $13.28 per hour for PHN II's is not justified when considering solely a dollar wage comparison even among the comparables that the Union asserts here. Consequently, based on this comparison of wage comparisons only, not considering the question of wage leadership referred to in the preceding paragraph, the Employer offer is preferred.

The undersigned now turns to a comparison of wages paid to similar employees in the private sector. The Employer has adduced evidence with respect to private

employers in two categories. The two categories are registered nurses in the employ of local hospitals, and nurses in the employ of local nursing care providers. The undersigned will consider the comparison of salaries in each of the foregoing. The evidence establishes, from City Exhibit No. 3, that for 1985 wage rates paid to Registered Nurses in the four hospitals in the community range from $11.28 minimum to $13.72 maximum. Compared to the final offers of the parties, the Employer offer here of $12.52 compares most favorably to the wages paid to Registered Nurses in local hospitals in the Green Bay community. While the top rate of $13.72 is paid in one of the local hospitals, the evidence establishes that it takes twenty years for nurses employed there to reach the maximum, compared to a six month period to reach the maximum rate with the instant Employer. For that reason, and because the Employer offer here exceeds three of the four maximum wage rates paid to Registered Nurses in local hospitals, the undersigned concludes that these wage comparisons also favor the Employer offer. In arriving at the foregoing conclusion, the undersigned has considered the argument of the Union, which is supported by the evidence that the nurses employed by this Employer are required to have a nursing degree, and that there is not that requirement of Registered Nurses in the employ of hospitals. Notwithstanding the foregoing, the undersigned concludes that the duties of the respective nurses are sufficiently similar so as to make a valid comparison as to wage rates. The undersigned further concludes that the Employer offer of $12.52 per hour is sufficiently above the wage rates paid in the hospital to take into account the difference in the educational requirements.

Turning to the question of wage rates paid to nurses in the local nursing care provideers, the undersigned is unpersuaded that there is sufficient similarity between the responsibilities in local nursing care providers and nurses in the employ of the instant Employer, because the evidence fails to satisfy the undersigned that the same level of nursing proficiency and certification is required from nursing care providers as those which are required by the City of Green Bay. The undersigned, therefore, considers the comparisons to be invalid for the foregoing stated reasons.

From all of the foregoing, the undersigned concludes that when considering solely a wage comparison among comparable employers in the public and private

sector in the same community and in comparable communities, the Employer offer is preferred.

THE COST OF LIVING CRITERIA

111.70 (4) (cm) 7, e directs the Arbitrator to consider the average consumer prices for goods and services commonly known as the cost of living. The evidence establishes that the Employer offer here creates wage increases in the amount of 9.4% for 1982; 6.0% for 1983; 5% for 1984 and 5.5% for 1985. The CPI increases, from the Urban Wage Earners and Clerical Workers Revised and New Series, establishes that the CPI increases were 8.2% for 1982; 3.5% for 1983; 3.6% for 1984 and 3.3% for 1985. Thus, the total accumulation of increase in cost of living from January, 1981 to January, 1985, totaled 18.6% compared to a total wage increase offer of the Employer amounting to 26.9%, adequately compensates the employees for the increases in cost of living over this period of time. Since the Union's offer results in a wage increase of significantly higher percentages than the Employer offer, it is obvious that when considering the cost of living criteria the Employer offer more accurately immunizes the employees from increases in the cost of living and, therefore, the Employer offer is preferred when considering this criteria.

OVERALL COMPENSATION

Criteria f of 111.70 (4) (cm) 7 directs the Arbitrator to consider overall compensation presently received by 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. At hearing, the City adduced evidence (City Exhibit No. 1) establishing the value of the wage rates and fringe benefits paid to the employees at issue here. From the foregoing, the Employer argues that when considering the overall compensation criteria found at f of the statute, its offer is preferred. The undersigned concludes that the Employer argument in this regard is misplaced. The record contains insufficient data to permit this Arbitrator to make a comparison of the relative value of the fringe benefits of the employees involved in the instant dispute with fringe benefits among other employers in the community or in comparable communities. The undersigned concludes that such a comparison is essential in determining whether the overall compensation criteria favors the offer of one party or the other. Since the record contains insufficient data, the undersigned is unable to make the comparisons required to reach a conclusion

under this criteria and, therefore, none is made.

The undersigned recognizes that there is in evidence (City Exhibit No. 33) data which sets forth the comparative total wages which includes average hourly fringe benefits comparing total wages, including fringe benefits, for nursing care providers in Brown County compared to the total hourly wage, including fringe benefits, for the Employer and the Union offer. Since the undersigned has earlier concluded that the evidence with respect to comparative wages which compare nurses in the employ of private nursing care providers is unpersuasive in making wage comparisons with Public Health Nurses of this Employer, it follows that the total compensation data contained within City Exhibit No. 33 is also unpersuasive to the Arbitrator.

CRITERIA a, b, c and g

Criteria a directs the Arbitrator to consider the lawful authority of the municipal employer. Criteria b directs the Arbitrator to consider the stipulations of the parties. Criteria c directs the Arbitrator to consider the interest and welfare of the public and financial ability of the unit of government to meet the cost of any proposed settlement. Criteria g directs the Arbitrator to consider changes in any of the foregoing circumstances during the pendency of the arbitration proceedings. The undersigned has reviewed the record thoroughly, as well as the argument of the parties, and finds no evidence or argument from the parties directed to these specific criteria. The undersigned, therefore, concludes the foregoing criteria cannot be applied in the instant dispute, and no conclusions with respect to the foregoing criteria are made with respect to this dispute.

OTHER FACTORS

Criteria h directs the Arbitrator to consider "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." As it relates to the matter at bar, the other factors criteria found at h of the statute include the patterns of settlement; the wage leadership question; the question of wage parity; bargaining history; and a review of the historical differentials between the positions of community health nurses and sanitarians. Each of the

foregoing other factor considerations will be addressed serially.[1]

PATTERNS OF SETTLEMENT

In making the comparison of wage rate to wage rate among comparable employers in and out of the community, in both private and public sector, the undersigned has relied exclusively on the wage rate in force for 1985. In considering the patterns of settlement, however, it would be inappropriate, in the opinion of this arbitrator, to do that, because it would ignore the patterns of settlement previously established for the earlier years which are disputed here, i.e., 1982, 1983 and 1984. The undersigned considers it essential to consider the patterns of settlement that have been established internally as well as externally as compared to the final offers of the parties. The record evidence establishes that the Employer final offer represents an increase of 9.4% for 1982, 6% for 1983, 5% for 1984 and 5.5% for 1985. There is testimony in the record from Donald VanderKelen, Labor Negotiator for the City, at pages 132 and 133 of the transcript of the proceedings of May 7, 1985, which establishes that the Employer here has extended an offer which is consistent with the settlements it has bargained with all other units for the same time period as the period covered by the final offers in the instant proceedings. VanderKelen testifies as follows:

> Q. What understanding, if any, do you have as to whether the proposal of the City of Green Bay is, in this particular case, is consistent with what other for the years in question?
>
> A. As to fringe benefits?
>
> Q. Both fringe benefits and pay increases.
>
> A. It's entirely consistent. It's consistency that determines the offer.

From the foregoing testimony of VanderKelen, which is unrefuted in this record, the undersigned concludes that the offer of the Employer here follows the internal pattern of settlements over the same years which are at issue in this proceeding. Consequently, the undersigned concludes that when considering the internal patterns of settlements for the years at issue here, the Employer's offer is preferred.

Turning to the patterns of settlement that have been established among

1/ The authority for each of the foregoing described categories to be considered under the statutory criteria h "Other Factors" is found at Elkouri & Elkouri, How Arbitration Works, 4th edition, pages 803-851.

comparable employers, the undersigned relies for that comparison on City Exhibit No. 2. City Exhibit No. 2 sets forth the wage increases among the City comparables compared to the wage increases for the years at issue here. The undersigned is unable to find evidence in this record with respect to patterns of settlement for comparables proposed by the Union for the periods of 1982 through 1985. Consequently, the undersigned can only rely, for the purposes of comparing patterns of settlements, on City Exhibit No. 2. City Exhibit No. 2 establishes that for the years at issue here, the Employer offer for 1982, 1983, 1984 and 1985 establishes a wage increase of $2.76 per hour, and the Union offer establishes a wage increase of $3.52 per hour. The Employer offer calculates to a 28.28% increase, and the Union offer calculates to a 36.07% increase when using the wages in effect January 1, 1981, compared to the wage rates which would be effective January 1, 1985. The patterns of settlement among the cities of Oshkosh, Sheboygan, County of Sheboygan and City of Manitowoc show that the Employer offer more nearly matches the patterns of settlement in those comparable communities. The City of Oshkosh increase over the span of time at issue here calculates to 26.42% and results in an hourly wage increase of $2.52 per hour. The City of Sheboygan, over the same relevant period, has increased its wages for Public Health Nurses in the amount of 23.9%, which resulted in a $2.11 per hour increase. The County of Sheboygan, for the same relevant time period, increased the wages for Public Health Nurses in the amount of 23.5%, which resulted in an hourly wage increase of $2.20 per hour. The City of Manitowoc, for the same relevant time period, increased its wages to Public Health Nurses in the amount of 22.75%, which resulted in an hourly wage increase of $1.69 per hour. From the foregoing, it is clear to the undersigned that the patterns of settlement over the relevant time period at issue here favor the adoption of the Employer final offer when considering only the patterns of settlement.

The undersigned concludes that the Employer offer here mirrors the patterns of settlement among other units with which the Employer bargains, and further has concluded that the City offer here more nearly conforms to the patterns of settlement among the comparables as set forth in City Exhibit No. 2. It remains to be determined, however, whether the patterns of settlement should be imposed upon the Union involved in this dispute, or whether there are sufficient reasons under the remaining criteria so as to warrant the adoption of the Union offer.

WAGE LEADERSHIP

Union has argued that since Green Bay is the third largest city in the State of Wisconsin, and ranks third in the state in the aggregate full value of its property base; and because the aggregate assessed property and the per capita full value of all taxable income also ranks third; and because the average wage paid in the community of Green Bay is the fifth highest in the state; the Union's final offer should be adopted. The undersigned views the foregoing argument of the Union to be in the nature of a wage leadership argument.

The undersigned looks to City Exhibit No. 2 to determine which offer is preferred when considering the wage leadership argument. City Exhibit No. 2 sets forth the rates of pay and the average rate of pay for nurses among the City proposed comparables for 1981, the year preceding the present dispute. The average nurse's pay among the City comparables was $8.74 for 1981. The rate of pay for nurses in the City of Green Bay for 1981 was $9.76. Furthermore, the exhibit establishes that the City of Green Bay paid its nurses $0.22 more than the next highest paid nurses among those comparables. Without question, therefore, the City of Green Bay is a wage leader when considering the City's comparables. Expressed as a percentage, the City of Green Bay assumed a leadership position of 111.67% above the average wages paid to nurses in the City proposed comparables.

The Employer offer here calculates to a wage rate of 113.82% above the average among those comparable communities contained in City Exhibit No. 2, and the Union wage rate calculates to 120.73% above the average rate among comparable communities which were in effect January 1, 1985. From the foregoing data, it is obvious that both the offer of the Employer and the Union in this matter would increase the wage leadership position when considering the City's proposed comparables. Because the Union final offer escalates the City's leadership position from 111.67% in 1981 to 120.73% in 1985, the Union final offer is not justified, based on a wage leadership criteria.

BARGAINING HISTORY

Union argues the bargaining history with respect to the tentative settlement entered into between the parties for 1982, 1983 and 1984 is evidence that the Union proposal in this matter is the more reasonable of the two. The evidence establishes that the Union proposal here for 1982, 1983 and 1984 is the

proposal to which the parties agreed in committee when they tentatively settled their dispute on December 22, 1983. Union argues that since parity on base rate between nurses and sanitarians was reached in that tentative agreement, and because it merely seeks to continue that parity arrangement for 1985, it is persuasive proof of the reasonableness of the Union position in this matter.

The Employer opposes any consideration of bargaining history and the tentative agreement which the City rejected when it was brought before its Personnel Committee. The City argues that any consideration of a tentative agreement would have a chilling effect on the bargaining process because parties would be reluctant to enter into tentative agreements which are subject to the ratification of the respective constituencies. In support of its position, the City cites DeSoto Area School District, Dec. No. 21184-A (7/27/84); D. C. Everest Area School District, Dec. No. 21941-A (2/25/85); Stevens Point Area Public School District, Dec. No. 20952-A (5/8/84); Juneau County Courthouse Employees, Dec. No. 21418-C (10/16/84); Randolph School District, Dec. No. 21013-A (4/4/84).

The undersigned has reflected on what weight if any should be given to the tentative agreement that the parties entered into on December 22, 1983, and concludes it would not be proper to consider that tentative agreement. The authority cited by the Employer is persuasive. Furthermore, earlier interest arbitration awards support the foregoing conclusion. In Head of Lakes Electrical Cooperative Association, 65 LA 843 (10/10/75), Arbitrator Sembauer opined at page 842 as follows:

> The Cooperative also objects strenuously to anything being imported into this record concerning what it regards as the fourth 'unofficial' negotiation session, on grounds that this involves 'settlement discussions'. It is true that arbitrators and courts generally follow the rule of not receiving evidence concerning efforts at settlement between the litigants, for to do so might discourage all such efforts in the future. It is highly important that disputants feel free to discuss compromise and settlement in the hope they may be able to reach understandings between themselves, and this Arbitrator fully subscribes to that proposition. Accordingly, he has not considered any matters relative to efforts at settlements of their disputes by these parties.

There is, however, some authority for the consideration of prearbitration negotiations, offers, counter-offers and tentative agreements. The Fourth Edition of Elkouri and Elkouri entitled How Arbitration Works at page 844 reflects that in interest arbitration matters, tentative agreements of the type

which was reached in this matter are properly to be considered by the arbitrator or board of arbitrators. (See cases cited therein) The undersigned has considered the several schools of thought, and because of the heavy weight of authority in public sector mediation-arbitration decisions as cited by the Employer, the undersigned concludes that the tentative agreement which the parties reached on December 22, 1983, should be given no weight in this matter. To do so, in the opinion of the undersigned, is likely to make parties reluctant to enter into such an agreement if it were later to be used adversely against them, and, therefore, would result in a chilling effect on the bargaining process. Consequently, the undersigned puts no reliance on the tentative agreement which was reached between the parties on December 22, 1983, for the purpose of determining the reasonableness of the parties' offers.

HISTORICAL DIFFERENTIALS BETWEEN THE POSITIONS

The undersigned will consider the pay relationships that have emerged over the years between the positions of Public Health Nurses and Public Health Sanitarians. The City in its reply brief opposes consideration of the relationships between the two positions over the years, because it has never been a controlling factor in the bargaining, and further argues that even if it is an appropriate consideration the City's offer maintains the numerical relationship between these two groups of employees. The undersigned has considered the City's opposition to consideration of the respective relationships of the positions of Sanitarians and Nurses, and concludes that the consideration is appropriate. Elkouri and Elkouri in How Arbitration Works, Fourth Edition, at page 816, clearly establishes that the consideration of historical differences between wage rates is an appropriate consideration when setting wage rates in interest arbitration matters. For that reason, the undersigned concludes that a study of the historic relationship between the positions of Sanitarians and Nurses is appropriate in order to determine the reasonableness of the final offers of the parties.

In order to make a determination as to the relationship of the positions, the undersigned has constructed the following table from City Exhibit No. 32 and Union Exhibit No. 35. The following table represents the percentage of pay that the Nurses are paid compared to Sanitarians for 1971 through 1985. The years 1982, 1983, 1984 and 1985 in the following table are calculated pursuant to the

final offer of the Employer. Further, the following table displays the dollar differences between the positions of nurses and sanitarians for the same period of time.

TABLE I

PAY DIFFERENTIALS SANITARIANS AND NURSES (1971-1985) Employer Offer

	% Nurse II to Sanitarian II	$ Difference Nurse II to Sanitarian II	% Nurse I to Sanitarian I	$ Difference Nurse I to Sanitarian I
1971	93.13%	$ 55.00	89.12%	$ 80.00
1972	93.45	55.00	89.16	84.00
1973	92.61	65.00	88.47	94.00
1974	91.72	77.00	87.75	106.00
1975	91.80	83.00	87.33	120.00
1976	92.10	84.50	91.67	87.00
1977	96.86	37.00	92.09	88.00
1978	96.74	41.00	92.18	93.00
1979	95.61	60.00	92.15	100.00
1980	95.66	64.00	92.16	110.00
1981	95.63	71.00	90.13	156.00
1982	93.03	130.00	88.93	194.00
1983	93.35	131.00	88.91	206.00
1984	93.64	131.00	88.96	215.00
1985	94.30	123.00	89.34	218.00

The foregoing table satisfies the undersigned that from the period 1971 through 1981 the nurses, when compared to sanitarians, both Sanitarian I or II, narrowed the gap of wages between the positions. The table establishes that in 1971 Nurse II's were paid 93.13% of the Sanitarian II wage, and in 1981 they were paid 95.63% of the sanitarian wage. Thereafter, if the City's offer is implemented for the four years in question, the relationship will deteriorate to 94.3% beginning with 1985. Similarly, when considering percentage comparisons, the same result is displayed when comparing a percentage of Nurse I wages to Sanitarian I wages for the same period of time. In 1971, Nurse I's were paid 89.12% of the Sanitarian I wage rate, and by 1980, the wage percentage differential was reduced to 92.16% of the Sanitarian I wage rate. In 1981, the percentage was reduced to 90.13%. If the City final offer for nurses were adopted, the wage rate comparison on a percentage basis would be reduced to 89.34% commencing with 1985. Similarly, when considering a dollar difference, Table I shows that in 1971 Nurse II's were paid $55.00 per month less than Sanitarian II's. By 1981, the differential was $71.00 per month in the sanitarians favor. Commencing with 1982, pursuant to the final offer of the Employer, the monthly differential between Sanitarian II's and Nurse II's increases to $130.00 per month, and remains

approximately that level pursuant to the Employer final offer through 1985. Similarly, when comparing Nurse I's to Sanitarian I's the dollar difference in 1971 was $80.00 in favor of Sanitarian I's. By 1981, the dollar difference had increased to $156.00 per month, and if the Employer final offer is implemented the dollar difference swells to $218.00 per month for the year 1985.

Given the data from Table I, the undersigned concludes there has been a pattern established between 1971 and 1981 which narrowed the percentage differences between nurses and sanitarians. The final offer of the Employer considerably widens that gap. As stated earlier in the Award, the Union final offer in this matter would establish parity, i.e., exactly the same wage rate for Nurse I's and Sanitarian I's, and for Nurse II's and Sanitarian II's. It would appear from the foregoing that until 1981 the parties were attempting to more nearly approach parity between the respective wage rates. Since the Employer offer now regresses from that approach to parity; and because there is no explanation in this record as to why the gap should be widened, the undersigned concludes that the Union offer is favored when considering the historical pay differentials between the two positions disputed here.

The foregoing conclusion is buttressed when considering the comparison of Sanitarian I wages to Public Health Nurse II wages. Union Exhibit No. 35 makes the comparison of Sanitarian I to Nurse II wages for the period commencing with 1971 through 1975, based on the Employer offer. The exhibit clearly establishes that except for two years (1974 and 1975) Nurse II position has historically been paid a higher wage rate than the Sanitarian I wage rate. If the Employer offer is implemented in this dispute, the result would be that the Sanitarian I wage rate would be significantly higher than the Nurse II wage rate. The historical comparisons between Sanitarian I's and Nurse II's satisfies the undersigned that the Nurse II position, based solely upon the historical relationships, should be paid in excess of the Sanitarian I position. Consequently, the foregoing conclusion that the Union offer is preferred when considering the historical relationships of the positions is buttressed by this data.

WAGE PARITY

The Union here seeks parity of wages of nurses to sanitarians. Its final offer for 1985 establishes the same wage rate for Nurse II's as is paid to Sanitarian II's, and the same wage rate for Nurse I's as is paid to Sanitarian I's. The Employer has objected to any consideration of wage parity because the Em-

ployer asserts that the issue before the Arbitrator is a comparable worth issue, and there is no basis for an arbitrator to consider that under the criteria. The undersigned denied Employer motions to exclude evidence with respect to comparable worth at hearing, and received into evidence the study done by Professor George Hagglund, which compared the relative worth of Sanitarians and Nurses. In its brief, the Employer renews its objection at page 30, footnote 8, when it states:

> While the City recognizes that the Arbitrator has ruled on the admissibility of this report, the City would maintain its position that it was improperly admitted. Furthermore, the testimony of Mrs. Harrington, a bona fide expert in the field of job evaluation, as contrasted with comparable worth, makes it abundantly clear that Hagglund was absolutely right when he admitted that this study was not for the purpose of installing a job evaluation plan and the arbitrator's accepting this report as a job evaluation may have been premature.

The foregoing footnote is an expansion of the Employer argument found at page 29 of its brief, wherein the Employer argues that: "Secondly, the use of such a report in the context of interest arbitrations in Wisconsin is improper."

Initially, it must be determined precisely the nature of the Union's claim of pay parity between nurses and sanitarians. The Employer, in its brief at pages 35 and 36, recognizes that there is a distinction between the instant matter before this Arbitrator and a "classic comparable worth case" when it argues: "While these cases arise in the context of civil rights law, their lesson is no less appropriate here since the basic claim, that some experts' value judgment, offered without ties to the market is not a sufficient criteria for disturbing present wage patterns." Perhaps the most publicized comparable worth case is that of <u>County of Washington vs. Gunther</u>, 452 U.S. 161, 166 (1981). Clearly, the ingredients of a classic comparable worth case carries with it the allegation that there has been de facto sex discrimination, male vis a vis female, by paying female dominated jobs less money than male dominated jobs that are found to be comparable in worth. The claim in <u>Washington vs. Gunther</u> included a plea for back pay by reason of the discriminatory treatment. None of the foregoing ingredients of a "classic" comparable worth matter are contained in the case at bar. Here, the Union's assertion is merely for pay parity, and contains no allegation of de facto discriminatory treatment of nurses based on their gender. Furthermore, no back pay claims are involved. Thus, the undersigned concludes that the matter before him is not a "classic" comparable worth matter. Notwithstanding

the foregoing, the issue of pay parity does require a comparison of the relative worth of the jobs. That is precisely what Union Exhibit No. 3, the Hagglund report, attempts to do.

The Employer renews its position that comparable worth considerations are not proper under the Wisconsin Statutes at 111.70 (4) (cm). The undersigned ruled on that question at hearing on May 20, 1985. (See transcript May 20, 1985, pages 44-50) In that ruling the undersigned held that questions of pay parity were properly considered under the statutory criteria found at 111.70 (4) (cm) 7, h, which directs the Arbitrator to consider 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. The undersigned concluded that the question of wage parity is a factor normally and traditionally taken into consideration in these circumstances. Because the Employer essentially renews its objections to the consideration of parity under the statutory criteria, the undersigned reviews the evidence which caused him to conclude that the consideration of wage parity is appropriate under criteria h. Initially, the undersigned stresses that the final offer of the Union speaks precisely to the issue of wage parity. The final offer of the Union for 1985 specifically reads: "Effective 1/1/85 Community Health Nurse employees shall receive wage parity as follows; Community Health Nurse I wage parity with Sanitarian I; Community Health Nurse II wage parity with Sanitarian II." The foregoing final offer of the Union for 1985 leads to the inescapable conclusion that the issue before this Arbitrator is one of wage parity. Having so concluded, it would follow that if questions of wage parity are factors normally or traditionally taken into consideration in the determination of wages, etc., then the issue before the Arbitrator here is properly ripe for consideration under criteria h.

The record satisfies the undersigned that the issue of wage parity has traditionally been considered by this Employer when bargaining with other units. At hearing on May 7, 1985, Donald VanderKelen, Labor Negotiator for the Employer, testifies: "We have a firemen and police parity." (TR. 5/7/85, page 130) From the foregoing testimony, the undersigned concludes that the issue of pay parity

has been bargained between firemen and policemen within the employ of this Employer. The undersigned further concludes that the questions of pay parity of employees within the employ of this very Employer are things that are traditionally considered at the bargaining table, and consequently, the undersigned concludes that the questions of pay parity properly fall under the considerations of criteria h of the statute.

The foregoing conclusion is buttressed when considering other authority. Elkouri and Elkouri at page 107 of the Fourth Edition of How Arbitration Works specifies the following: "Many arbitration awards have undertaken to reduce or eliminate inequalities, such as inequalities between related industries, inequalities within an industry, inequalities between comparable firms or work within a specified area, and inequalities within the plant itself." In the opinion of the undersigned, the wage proposal of the Union seeking parity is designed to eliminate a perceived inequality on the part of the Union between the wage rates of sanitarians and nurses. Since said inequalities are standards normally considered in interest arbitration matters, it buttresses the undersigned's foregoing conclusion that the consideration of the parity proposal of the Union here is a proper consideration under criteria h.

Furthermore, Elkouri at page 817 states: "Nonetheless, where a historical parity had existed between the pay of policemen and firemen, an arbitrator acted firmly to maintain it." The foregoing reinforces the undersigned's conclusions that questions of parity claims are properly included within the criteria found at 111.70 (4) (cm) 7, h.

Finally, the undersigned looks to the record evidence found at Union Exhibit Nos. 5, 6 and 17. Union Exhibit No. 5 is a proposed salary administration policy for City of Green Bay, and at subparagraph 1 of the general provisions reads:

> The salary and benefits provided by the City to its employees are for the purpose of obtaining and retaining competent individuals to perform services the City is required to provide to its citizens. The City will provide these salaries and benefits on the basis of internal equity and external competitiveness if fiscally feasable.
>
> 2. The City subscribes to the concept of equal pay for equal work. Therefore, jobs of equal overall complexity should be paid within the same range, and differences in job complexity should be appropriately recognized by differences in compensation. This concept is referred to as internal equity.

While the foregoing proposed policies to the City Council are referenced to employees who are not represented by existing bargaining units, the undersigned, nevertheless, concludes that the City has adopted a policy of consideration of internal equities and, therefore, the question of the equity of parity between sanitarians and nurses is properly before the Arbitrator.

The foregoing is buttressed when considering Union Exhibit No. 17, Chapter I, Section I B:

> Purpose. The general purpose of this manual is to establish a system of personnel administration that meets the social, economic and program needs of the City of Green Bay. The system herein established shall be consistent with the following merit principles.
>
> * * *
>
> B. Establishing pay rates consistent with the principle of providing comparable pay for comparable work.

The foregoing is excerpted from City of Green Bay personnel policies and procedure manual. Since the City subscribes to the proposition of comparable pay for comparable work; and since the City further subscribes to the proposition that internal equity should be considered in establishing wage rates; and because the undersigned has concluded that questions of wage parity are issues that are normally taken into consideration at the bargaining table or in mediation, or in arbitration; the undersigned reaffirms his ruling at hearing that the question of wage parity is properly before the Arbitrator under the statutory criteria of 111.70 (4) (cm) 7, h.

Buttressing all of the foregoing conclusions with respect to the propriety of the consideration of the Hagglund report, and the issue of pay parity, is the record evidence found at Union Exhibit No. 34. Union Exhibit No. 34 is the award of the mediator-arbitrator in Waukesha County (Dept. of Public Health), Case LXXIV, No. 29487, MED/ARB-1600, Dec. No. 19515-A. At page 15 of the opinion, Arbitrator Rothstein held as follows: "While the County continues to maintain that comparable worth is not an appropriate factor for consideration under Section 111.70 (4) (cm) 7, the undersigned Arbitrator is firmly of the belief that a valid statutory basis exists for the recognition of this type of data." Thus, there is authority in proceedings of these types with respect to the appropriateness of considering the wage parity question under the statutory criteria.

The question remains as to what weight, if any, should be given to the

Hagglund report, and his expert opinion testimony given through the multitude of pages of testimony in this record. The Employer argues that no weight should be accorded to the Hagglund opinion for various reasons. Employer argues that the theory of comparable worth is flawed because job evaluation is not an appropriate tool to establish a comparable worth claim. Employer cites authority supporting its view. Employer relies on E. Robert Livernash in Comparable Worth: Issues and Alternatives; an Overview; Equal Employment Advisory Council, 1980, pages 19 and 20, as follows: "Comparable worth is based on a rejection of traditional job evaluation plans and market rate standards which would substitute in their place some undetermined form of bias-free or value-free job evaluation. Support for such an approach fails to appreciate the realities of how job evaluation procedures actually operate . . . " The Employer cites a multitude of other authorities supporting the same proposition. (See Employer brief, pages 30-37) Notwithstanding all of the foregoing authority as cited by the Employer, the undersigned concludes that the City itself relies on the type of evaluation process contained within the Hagglund report as described in his testimony at hearing. At pages 138 and 139 of the transcript of the proceedings of May 7, 1985, VanderKelen, Labor Negotiator for the City, testifies as follows:

Q. Would it be fair to say that in looking at these pay adjustments, as well as establishing wage levels for your employees, you took -- you do take into account the worth of the job or the value of the job to the City?

A. Do I take it in those -- do I take it in? No, that's not my function. My function is negotiating, so I negotiate what my guidelines are. I go to the evaluation of the job to the Personnel Department. By allegation, I may (inaudible).

Q. To the best of your knowledge, do the personnel people look at the value of the job?

A. They are expected to, and I'm sure they do; otherwise, the unions wouldn't agree to the adjustments that we reach.

Q. As a general proposition, would it be fair to say that the City would not pay more for providing less of a service to the City?

A. You're asking whether they want to do that?

Q. You try to pay them a wage that relates to their value.

A. That's the anticipation, that the wage relates to what the generally accepted pay are for that position.

Q. And that is to be hoped to be some relationship to the service that is being provided, isn't that true?

A. We hope that, but I don't make that judgment.

From the foregoing testimony of VanderKelen, the undersigned concludes that the Employer, through its personnel department, makes the type of job analysis, comparisons, and evaluations to which the Employer now objects in these proceedings. Since the evaluations of these types are historically performed by the Employer for the purpose of determining the relative values of the job, the undersigned concludes that it is proper for the undersigned to consider evidence on evaluations in order to determine whether the evidence supports a conclusion that pay parity between sanitarians and nurses should be achieved.

Having concluded that the technique used by Hagglund is one that the City itself uses for the purpose of making pay adjustments, it remains to be determined what weight, if any, the Hagglund report should be accorded. Employer argues that Hagglund's expertise in job evaluation is severely limited as is his expertise in applying MRA or NMTA job evaluation plans, so his opinions must be given little, if any, weight. At hearing, the undersigned qualified Professor Hagglund as an expert witness over the objection of the Employer. The undersigned is satisfied from the record that Dr. Hagglund has expertise in the field, and that his opinions should be considered as expert in the area of job evaluations. The foregoing conclusion is supported by the opinion of Arbitrator Rothstein in Waukesha County (Dept. of Public Health) (supra), where at pages 15 and 16 of the Award Rothstein holds: "At the outset, it should be noted that Professor Hagglund's qualifications are not at issue here. The record is clear that Dr. Hagglund is an expert in the field of job evaluation. The objections that have been raised deal with Mr. (sic) Hagglund's methodology in performing the job evaluation and in his use of the job evaluation instrument." Therefore, by reason of the undersigned's judgment that Dr. Hagglund has qualified as an expert in the field of job evaluation; and because that conclusion is supported by the conclusions of Arbitrator Rothstein; the Employer's argument that Hagglund's opinion should be given little or no weight because his job evaluation expertise is severely limited is rejected.

Employer further argues that Hagglund has limited expertise in applying MRA and NMTA job evaluation plans and, therefore, his opinion should be given little weight as well. In Hagglund's report it is clear that his primary reliance is neither on MRA or NMTA. The report and Hagglund's testimony establishes, to the satisfaction of the undersigned, that his reliance in reaching his con-

clusions that nurses were at least equal to sanitarians for the purpose of pay comparisons was based on what Hagglund describes as a four factor system, wherein he used a set of definitions prepared by the U. S. Department of Labor as defined by the Bureau of National Affairs in Fair Employment Practices Manual. At page 27 of Union Exhibit No. 3, the Hagglund report, the document itself makes it clear that the MRA system and the NMTA system were used by Hagglund merely to verify the conclusion reached using the four factor system. Consequently, the alleged lack of expertise that Hagglund may have in making the application of the MRA system and the NMTA system is dimished, because that was not the primary tool which he used in reaching his conclusions that parity of pay is supported by his evaluations.

The four factor system employed by Hagglund makes a comparison of the respective jobs based on the four factors of skill, responsibility, effort and working conditions. The Employer argues that the four factor system is not a recognized system for the purpose of job evaluation, and, therefore, should not be considered by the undersigned. The undersigned has considered that Employer argument and disagrees. There is testimony in this record from Judith Harrington, Vice President Compensation Services, MIMA. Ms. Harrington was qualified as an expert witness in job evaluation in giving her testimony on behalf of the Employer. At pages 97 and 98 of the transcript of the proceedings of August 15, 1985, Harrington testifies as follows:

Q. You heard Dr. Hagglund's testimony, I think it was the first day he testified, where he testified to the different means or methods of doing job evaluations.

A. Yes, sir.

Q. And do you recall his testimony with respect to what I believe he termed, or what I would term, a similar ranking system?

A. Yes, sir.

Q. Would you agree that's a valid form of job evaluation?

A. I would agree that is a system which has been used for years and years. It's certainly well known. I don't know of much literature that would indicate that it's more valid or as valid as some of the more formal processes.

Q. Would you describe job ranking -- would it be fair -- to describe a job ranking system as the least sophisticated of all job evaluation techniques?

A. Yes, sir.

Q. Then turning to the Department of Labor four-factor guidelines, would it be fair to ascribe to that system a higher degree of sophistication than that of mere job ranking?

A. No, sir, I don't think so. And I guess the reason is, that when you're job ranking, an individual has in mind those factors, whether he or she

> specifies them as factors or not. They have in mind some reason that they are selecting Job A as being higher than Job B. From what I have read and heard of Dr. Hagglund's approach with the Department of Labor guidelines, there is not much difference between someone using their own ideas of what constitutes higher or lower ranking with some factors that are in mind versus some factors that carry a very brief, vague description, with no other interpretation of that information. I don't see much difference between what Dr. Hagglund did in terms of the Department of Labor approach or definitions that he used, and an unsophisticated ranking.

From the foregoing testimony of Ms. Harrington, it is obvious to the undersigned that job ranking is a form of job evaluation. Furthermore, the testimony of Ms. Harrington clearly establishes that the four factor system, in her expert opinion, is the equivalent of a job ranking system. Since job ranking is a recognized tool in making job evaluations, and because the Employer's expert witness testifies that the four factor system is the equivalent of an unsophisticated ranking system, it follows that the primary methodology employed by Hagglund is a recognized and acceptable method for evaluating positions. While the methodology used in the four factor system may be comparatively unsophisticated, it, nevertheless, is recognized as a method of evaluating the relative worth of one job to another within a unit.

The Employer argues that Hagglund's overall methodology was unacceptable in arriving at a properly informed judgment as to the evaluations of the jobs of sanitarians and nurses. The Employer then argues that because the methodology is so suspect, Hagglund's report is entitled to no weight in these proceedings. Specifically, Employer argues that the Hagglund report is flawed because: 1) he failed to take an organizational study to determine the appropriate unit of jobs to be studied; 2) he failed to select an appropriate plan which fairly and equitably evaluates all jobs within the unit; 3) he failed to hold an orientation to explain the purpose and procedure of job evaluation; 4) he failed to provide the incumbents in the job with structured questionnaires or to ask structured interview questions; 5) he failed to interview supervisors, using the previously completed questionnaires as a base and to properly secure other data through the use of appropriate techniques from supervisors; 6) he failed to provide a review of two levels of supervision for accuracy and completeness of the job descriptions; 7) he failed to use appropriate guidelines and controls in assigning factors in degree points in the MRA and MIMA plans; 8) he failed to have the assignment of the degrees reviewed by at least two levels of supervision; 9) he failed, as a

result of the job evaluation, to reconcile his results with the external market factors.

The undersigned has evaluated all of the record testimony with respect to the foregoing Employer arguments, and finds that the methodology employed by Dr. Hagglund leaves open to question the accuracy of his opinion that the nurses' positions are at least equal in value to the sanitarian positions.

The conclusion that the methodology employed by Dr. Hagglund leaves open to question the accuracy of his opinion that the disputed positions are at least equal does not dispose nor discredit entirely the Hagglund opinion. The undersigned looks to other evidence in this record which would corroborate Hagglund's opinion, or discredit it. An examination of the record establishes that there is other evidence in the record to support Hagglund's conclusions. The undersigned first considers the results of the Hay study. The Employer commissioned Hay and Associates to perform a job evaluation for all employees. Charles Grapentine, Personnel Director for the City of Green Bay at the time the Hay study was initiated, testifies that Hay and Associates were commissioned to perform the job evaluation for all represented and nonrepresented employees within the employ of the City, except for police and fire employees. Grapentine further testifies that all employees of the City, represented and nonrepresented, furnished Hay and Associates with returned questionnaires for the purpose of evaluating the positions. Grapentine further testifies that all positions were evaluated within the hierarchy of the organization, and the organizational structure was considered for study for both represented and nonrepresented employees. Some time during the process of the Hay study, due to the objections of the City negotiator, and representative for AFSCME Union, James Miller, the City determined they would not complete the Hay study for represented employees. The study was completed, and the pay plans were implemented, as a result of the evaluations performed by Hay and Associates for the unrepresented employees. Grapentine's testimony establishes that Hay and Associates made a preliminary recommendation with respect to the relative ranking of represented jobs, but they did not complete the corroborative portions of the study for represented positions by consulting with supervisors and restructuring the rankings pursuant to said objections. Thus, the Hay study was not completed for represented employees.[2]

2/ Testimony of Charles Grapentine, TR. July 12, 1985, pages 100-122

Union Exhibit No. 7 contains the point evaluation awarded by Hay in its preliminary studies to the position of Community Health Nurse and the position of Sanitarian. Union Exhibit No. 7 establishes that the total number of points awarded by Hay to the position of Community Health Nurse for the factors of know-how, problem solving, accountability, totalled 298 points. Union Exhibit No. 7 establishes that for the position of Sanitarian the preliminary Hay study awarded 233 points for the factors of know-how, problem solving and accountability. The record testimony of Dr. Hagglund, as well as Union Exhibit No. 8, Hagglund's interpretation of the Hay information, is unrefuted in the record, and established that the foregoing materials provided by the Hay study evaluates the nursing position higher than that of the sanitarians.

The Employer has argued that the Hay study was incomplete and never implelmented and, therefore, is unpersuasive. The undersigned disagrees. While the undersigned recognizes that the foregoing evaluation of Hay was preliminary in nature, nevertheless, a well established and respected job evaluation firm, which the City employed to do the complete job evaluations for its unrepresented employees, made an initial determination that the position of Community Health Nurse ranked higher in the hierarchy of jobs than that of Sanitarian. While the ranking may have changed had the entire process been completed, the undersigned believes that result to be unlikely in view of a careful scrutiny of Union Exhibit Nos. 7 and 8. In the opinion of the undersigned, it is unlikely that any further supervisory review would have resulted in a changing of the order of ranking between nurses and sanitarians because of the considerable disparity in points awarded to the two positions on a preliminary basis. The undersigned, therefore, concludes that the preliminary Hay study, in evaluating the two positions, when considering the entire hierarchy of jobs which the City has established, corroborates the Hagglund opinion as to the relative worth of the two positions in question here. Furthermore, there is testimony in this record from James Miller, representative for the Union, which is corroborated by the testimony of VanderKelen, Chief Negotiator for the Employer. At the hearing of September 5, 1985, Miller testifies at page 124 and 125 as follows:

> Q. Following that, the parties reached that tentative agreement in December, 1983, did you have any conversation with any representative of the City regarding the relationship of the Hay study to the tentative agreement that had been reached at that time?
>
> A. Yes.

Q. And when was that?

A. It was either that day or it was a few short days after that.

Q. And who did you have the conversation with?

A. With Don VanderKelen.

Q. What was the conversation?

A. The conversation was how the settlement was worked out and what factors were taken into account and the City agreed.

Q. And what bearing did the Hay study have on that?

A. That was mentioned as one factor.

Q. Did Mr. VanderKelen indicate whether the Hay study suggested a contrary result, or a similar result to that which had been negotiated by the parties regarding the nurses' wages?

A. Similar result.

At pages 126 and 127 of the transcript of the proceedings of September 5, Donald VanderKelen, Chief Negotiator for the City, testifies as follows:

Q. Do I understand you correctly, Mr. VanderKelen, that regardless, you did not use the Hay study, that was not a consideration in reaching a tentative agreement on December 23, 1983; but do I understand correctly that at least the Hay numbers seemed to be consistent with a tentative agreement that you did reach?

A. Somewhat similar, but I was aware of it only after. Consistent with Jim's testimony, we exchanged that several days after.

The foregoing testimony of Messrs. VanderKelen and Miller establishes to the satisfaction of the undersigned that the tentative agreement which had been reached in December, 1983, which essentially established parity between nurses and sanitarians conformed to the results of the Hay study. The undersigned concludes that the Hay study and the foregoing discussion between VanderKelen and Miller corroborates the results of the Hagglund study and report.

There is additional corroborative materials in this record. Union Exhibit No. 6 establishes the pay range for unrepresented employees. Among the positions ranked in salary ranges of unrepresented employees are the positions of Sanitarian Supervisor and Community Health Nurse Supervisor. The exhibit establishes that the Sanitarian Supervisor is ranked in Range 40, and the Community Health Nurse Supervisor is ranked in Range 44. The record establishes that the Sanitarian Supervisor is the supervisor of the Sanitarians to whom the Nurses compare themselves in these proceedings. The record also establishes that the Community Health Nurse Supervisor is the supervisor of the Nurses who are the subject of these

proceedings. Union Exhibit No. 6 establishes that at the time of its adoption Range 40 carried a salary range of $16,718 to $22,406, and Range 44, the range for the Supervisor of Community Health Nurse carried a range of $18,425 to $24,704. The record evidence, then, establishes that when comparing the rates of pay for the Supervisors of the positions at issue here, the Supervisor of the Nurses is in a range four ranges ahead of the Supervisor of the Sanitarians and is paid a higher wage level. The undersigned believes that to be an evaluation of the comparative worth of the two supervisory positions, and further concludes therefrom that, since the Supervisor of Nurses is evaluated higher than the Supervisor of Sanitarians, the positions which they supervise also should be ranked in the same hierarchy. Therefore, the foregoing evidence corroborates the conclusions reached by Professor Hagglund.

As further corroboration of the Hagglund study, the undersigned looks to Union Exhibit No. 27. Exhibit No. 27 sets forth the employers who pay Public Health Nurses the same, less than, or more than Sanitarians in selected communities throughout the state. The selected communities conform to the proposed comparables selected by the Union as discussed earlier in this Award. The undersigned considers this evidence relevant in view of the testimony of Peter LaMere, Health Commissioner for the Employer. At pages 52 and 53 of the transcript of the proceedings of August 9, 1985, LaMere testifies as follows:

> Q. I take it from your testimony that you have a general familiarity with the content of nursing responsibilities in -- and that public health nurses in all of the municipalities and cities around the State, is that an accurate inference that I have drawn?
>
> A. In my opinion, yes.
>
> Q. Now, would the same -- would you respond the same if I asked you the same question with respect to sanitarians?
>
> A. Yes. Generally, you did include the work 'generally', did you not?
>
> Q. Yes. Now, is it your opinion that public health nursing duties are generally the same from community to community through the State?
>
> A. Yes, that is my opinion.
>
> Q. And would the response be the same if I asked you that with respect to sanitarians?
>
> A. In a general sense, yes. There are specific program entities that differ and many are similar.

From the foregoing testimony, the undersigned concludes that for the purpose of determining the question of parity of pay between Sanitarians and Nurses, it is

appropriate to consider the pay practices with respect to those communities that are in evidence here. The evidence from Union Exhibit No. 27 establishes that Brown County, Eau Claire, Fond du Lac and Outagamie County pay Public Health Nurses and Sanitarians the same wage rates. The evidence further establishes that in the City of Racine the Public Health Nurses are paid a higher wage rate than that of Sanitarians. Finally, the evidence establishes that in Kenosha, Madison, Manitowoc, Oshkosh and Sheboygan, Sanitarians are paid more than Public Health Nurses. The foregoing evidence suggests to the undersigned that Hagglund's opinions with respect to the relative worth of Sanitarians and Nurses is supported by the fact that at least in half of the communities set forth in Union Exhibit No. 27 Public Health Nurses are paid the same as or more than Sanitarians.

Finally, the undersigned considers the state of the record with respect to any evidence which would refute Hagglund's opinion as to the relative worth of sanitarians and nurses. The undersigned has reviewed the record, and finds there is no evidence in this record to refute the expert opinion of Professor Hagglund with respect to the central issue here. At page 100 and 101 of the transcript of the proceedings of August 15, 1985, Judith Harrington, job evaluation expert, testifying on behalf of the Employer, testifies as follows:

> Q. Are you in a position, based on the testimony you have heard, to make a determination how you would rank one against the other?
>
> A. I have not done a job analysis of these positions.
>
> Q. You have no opinion on that at the moment?
>
> A. One of the reasons I have such difficulty is, I don't believe there is one nursing job here and I don't believe that there is one sanitarian job. In fact, I believe that the testimony represents that there is a -- I'm very positive that there is more than one sanitarian position here, for the purposes of job evaluation. And I have not done any kind of a formal study of these jobs, and the testimony here simply is not enough for me to make a decision with respect to the ranked order of these positions.
>
> Q. So may I conclude from your testimony that it's conceivable that the nurses' position, it was done properly, in your judgment outranks a sanitarian position?
>
> A. Absolutely, yes. It's very possible.
>
> Q. Is it conceivable that if a job evaluation was done properly that the sanitarian would outrank the nurse job?
>
> Arbitrator's reply: I assumed that, counsel.

The Employer had the opportunity to refute that evidence by expert testimony from its own witness, and failed to do so. The foregoing is sharply contrasted when

considering the decision of the Alaska State Commission for Human Rights in Alaska State Commission for Human Rights ex rel Janet Bradley, et al, Complainants vs. State of Alaska, Department of Administration, Department of Health and Social Services, Case D-79-0724-18-E-E, et al. The undersigned takes notice of the foregoing decision, which was furnished post hearing by Counsel for the Union. In Alaska State Commission for Human Rights, the complainants were Public Health Nurses, and they were comparing themselves to the position of Physician Assistant. In that proceeding there was expert testimony from a complainant's witness and expert testimony from a respondent's witness. The complainant's witness in that case was Dr. George S. Hagglund, the author of the Hagglund report in these proceedings. The respondent's witness was Norman Willis, a management consultant who had previously been associated with Hay and Associates, the firm which performed the job evaluations for the unrepresented employees in the employ of the Employer here. In those proceedings, the respondent adduced testimony from its expert, in which he testified that pursuant to his method of evaluating jobs, the Physician Assistant position outranked that of Public Health Nurse II. The Alaska State Commission for Human Rights in its decision, however, discredited the expert testimony of Willis, and credited that of Hagglund. The significance of the foregoing is not the fact that Dr. Hagglund's testimony was credited therein. The significance is that the respondents, through its expert witness, attempted to adduce testimony to establish that the position of Physician Assistant outranked that of Public Health Nurse II. Here, the record is barren of any such evidence, and, therefore, the undersigned needs to make no determination as to which expert's testimony should be credited with respect to the relative worth of the two positions at issue here. The very fact that the record is barren of any evidence to support the Employer's contention that the two positions at issue here should not be paid the same fails to refute and, therefore, indirectly supports the credibility of the Hagglund study which is in evidence in these proceedings.

From all of the foregoing, then, the undersigned concludes that when considering the issue of pay parity, the Union has proven to the satisfaction of this Arbitrator that the Nurse position should be paid on a parity with that of Sanitarian.

SUMMARY AND CONCLUSIONS:

The undersigned has evaluated all of the evidence pertaining to the statutory criteria. In the foregoing sections of this Award, the undersigned has concluded that when considering criteria d, the comparison of wages in the same community and comparable communities, the Employer offer is favored. Similarly, the cost of living criteria, criteria e, also favors the Employer offer. The Mediator-Arbitrator has considered criteria a, b, c and g, and has concluded there is no evidence or argument in this record with respect to the foregoing criteria, consequently, the foregoing criteria cannot be applied in the instant dispute. When considering criteria f, the evidence fails to establish a preference for the final offer of either party.

Criteria h directs the Arbitrator to consider other factors 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. Pursuant to this criteria, the undersigned has considered the patterns of settlement, the bargaining history, the wage leadership question, the historical differentials between the positions of Community Health Nurse and Sanitarian, and the question of wage parity. In deliberating over the foregoing factors, the undersigned has concluded that the patterns of settlement, and the wage leadership question, favor the Employer position in this dispute. The undersigned has further concluded that the bargaining history should not be considered with respect to this dispute. Finally, the undersigned has concluded that the historical differentials between the positions of Community Health Nurse and Sanitarian and the question of wage parity favor the Union position.

It remains to be determined then which of the criteria should take the predominant posture in controlling the outcome of this dispute. It is the opinion and conclusion of this Arbitrator that the Union offer should be adopted in this dispute because the Employer offer would widen the pay differential between Nurses and Sanitarians, which had previously been narrowed through the process of bargaining over approximately the ten preceding years. Even more significantly, however, is the question of wage parity. The undersigned has concluded that the Union has proved up its case that Nurses are entitled to equal standing from a wage

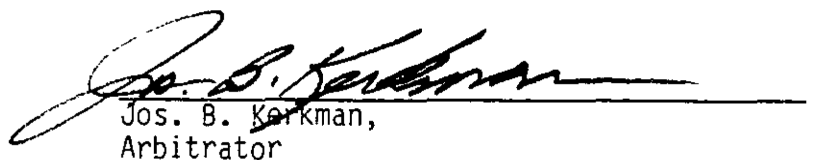
point of view with Sanitarians. Furthermore, the Employer in its own policies, subscribes to the proposition that internal equities are a significant consideration in setting wage rates. Significantly, the Employer's Personnel Manual sets forth that proposition when it states: "The system established shall be consistent with the following merit principles: . . I. Establishing pay rates consistent with the principle of providing comparable pay for comparable work." Furthermore, as far back as January 15, 1980, the Employer adopted a philosophy of internal equity when its personnel committee reported a proposed salary administration policy for the City of Green Bay, which included the proposition that jobs of equal overall complexity should be paid within the same range, and differences in job complexity should be appropriately recognized by differences in compensation. This concept is referred to as internal equity. Since the Arbitrator has concluded that the Union has proven its case for wage parity between Nurses and Sanitarians; and because the City subscribed to the proposition of "internal equity", the Arbitrator concludes that this dispute should be, and, therefore, is resolved by awarding the final offer of the Union for the years 1982 through 1984 and the year 1985.

Therefore, based on the record in its entirety, and the discussion set forth above, after considering all of the statutory criteria and the argument of the parties, the Arbitrator makes the following:

AWARD

The final offer of the Union for the years 1982 through 1984, and for the year 1985, is to be included in the parties' written Collective Bargaining Agreement.

Dated at Fond du Lac, Wisconsin, this 22nd day of May, 1986.



Jos. B. Kerkman,
Arbitrator

JBK:rr

STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of GREEN BAY MUNICIPAL EMPLOYEES (PUBLIC HEALTH R.N.'s), LOCAL 1672-A, WCCME, AFSCME, AFL-CIO To Initiate Mediation-Arbitration Between Said Petitioner and CITY OF GREEN BAY	Case CVIII No. 29587 MED/ARB-1622 Decision No. 19841-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of Union.
Mr. Mark A. Warpinski, Assistant City Attorney, City of Green Bay, appearing on behalf of Employer.

ARBITRATION AWARD:

On August 23, 1982, the Wisconsin Employment Relations Commission issued an order appointing the undersigned Mediator-Arbitrator in the above entitled matter. On August 30, 1982, the undersigned set proceedings in mediation for Thursday, September 16, 1982. Thereafter, on September 8, 1982, the mediation proceedings were rescheduled for October 22, 1982. Subsequently, on October 12, 1982, representative for Union made a telephone request for indefinite postponement of the mediation phase of the proceedings in order to provide an opportunity to the Union to submit motions to the Mediator-Arbitrator with respect to certain procedural matters. The foregoing telephone request was confirmed in writing on October 14, 1982, and the postponement which was requested was granted.

On October 21, 1982, counsel for Union filed written motion with the Mediator-Arbitrator, a copy of which was served on the Employer. The motion reads:

> Please take notice that at a time and place to be set by the Arbitrator this Union will move for an Order allowing George Hagglund, Director, School for Workers, University of Wisconsin-Madison ingress to the work site as well as access to various employees for the purpose of conferring and consulting with respect to their job duties and responsibilities.

On October 26, 1982, the undersigned suggested to counsel for the Employer and counsel for the Union that the Mediator-Arbitrator rule on the motion without conducting evidentiary hearing in the matter after receiving argument in the form of written briefs from both parties; and on October 27, 1982, counsel for Employer advised his concurrence with the suggestion, and on October 29, 1982, counsel for the Union advised of his concurrence to the suggestion. Thereafter, on November 2, 1982, the Mediator-Arbitrator advised counsel for Union and Employer of the following procedural schedule:

> 1. On November 22, 1982, Mr. Graylow is to file a statement of facts giving rise to the motions he is bringing and written argument in support of said motions. Mr. Graylow is to file a copy of the facts and argument directly with Mr. Warpinski.
>
> 2. On December 13, 1982, Mr. Warpinski is to file a statement setting forth his agreement or disagreement with the facts filed by Mr. Graylow, and his written argument with respect to the City's position on the motions.

Mr. Warpinski is to file a copy of his response to the facts and argument directly with Mr. Graylow.

3. On December 29, 1982, Mr. Graylow may file any written reply argument he may wish to make in this matter. Mr. Graylow is to file a copy of his reply argument directly with Mr. Warpinski.

4. With respect to all dates set forth above postmark dates will govern.

The foregoing procedure assumes that there will be no disputed facts in this matter. Should it become apparent that the facts are disputed, it will be necessary to set evidentiary hearing for the purposes of taking testimony with respect to the facts.

Briefs were received pursuant to the foregoing schedule, the final brief being received from Union on January 3, 1983, and no evidentiary hearing was set in this matter since the facts are undisputed.

THE ISSUE:

Should Professor Hagglund, Director, School for Workers, University of Wisconsin-Madison, be allowed ingress to the work site as well as access to various employees and supervisors for the purposes of conferring and consulting with them with respect to their job duties and responsibilities, and for the purposes of observation and completion of job analysis?

UNDISPUTED FACTS:

On September 27, 1982, James Miller, Field Representative of the Union, representing the local in the instant matter, requested that Professor George Hagglund of the University of Wisconsin be allowed access to the work site, requesting specifically that Professor Hagglund have access to employees, job sites, supervisors, records and other pertinent information needed for the survey during the regular business hours. On October 5, 1982, Ernest M. Johnson, Personnel Director for the Employer, responded to Miller's request, denying access to Employer's premises for Professor Hagglund, and offering to provide specific pieces of information that are a matter of public record concerning either of the positions which Hagglund wished to study. The positions which Hagglund wished to study and compare are those of public health nurses and sanitarians.

The matter remained unresolved between the parties, giving rise to these proceedings.

PERTINENT STATUTORY PROVISIONS:

Section 111.70 (4) (cm) 6. d. Before issuing his or her arbitration decision, the mediator-arbitrator acting as arbitrator shall, on his or her own motion or at the request of either party, conduct a meeting open to the public for the purpose of providing the opportunity to both parties to explain or present supporting arguments for their complete offer on all matters to be covered by the proposed agreement. The mediator-arbitrator acting as arbitrator shall adopt without further modification the final offer of one of the parties on all disputed issues submitted under subd. 6. a, except those items that the commission determines not to be mandatory subjects of bargaining and those items which have not been treated as mandatory subjects by the parties, and including any prior modifications of such offer mutually agreed upon by the parties under subd. 6. b, which decision shall be final and binding on both parties and shall be incorporated into a written collective bargaining agreement. The mediator-arbitrator acting as arbitrator shall serve a copy of his or her decision on both parties and the commission.

Section 111.70 (4) (cm) 6. e. Mediation-arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time.

Section 111.70 (4) (cm) 7. 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.

Section 111.70 (4) (cm) 8. "Rule-making." The commission shall adopt rules for the conduct of all mediation-arbitration proceedings under subd. 6, including rules for the appointment of tripartite mediation-arbitration panels when requested by the parties, the expeditious rendering of arbitration decisions, such as waivers of briefs and transcripts, and proceedings for the enforcement of arbitration decisions of the mediator-arbitrator. Chapter 298 does not apply to such arbitration proceedings.

PERTINENT EMPLOYMENT RELATIONS COMMISSION RULES:

ERB 31.17 Arbitration by mediator-arbitrator.

(4) Scope of Meeting. The arbitration meeting shall concern pertinent matters necessary for the mediator-arbitrator to issue a compulsory and final and binding arbitration award by selecting the final offer and mutually agreed upon modifications thereof, of either party. In making such selection the mediator-arbitrator shall give weight to the factors set forth in s. 111.70 (4) (cm) 7, Stats., and the parties shall be prepared to present evidence and argument relative to the factors involved.

(5) Meeting Procedure Before the Mediator-Arbitrator Acting as Arbitrator. Meetings before the mediator-arbitrator acting as arbitrator shall be within the control of the mediator-arbitrator and shall be as expeditious as the nature of the dispute will allow. In conducting same, the mediator-arbitrator shall have the power to:

(a) Administer oaths and affirmations;
(b) Issue subpoenas in the name of the commission;
(c) Rule on offers of proof and receive relevant evidence;
(d) Regulate the course of the meeting; and
(e) Dispose of procedural requests and similar matters.

(7) Issuance of Award. The mediator-arbitrator shall issue the arbitration award in writing as expeditiously as possible following the receipt of final arguments or briefs, if any. If the award is issued by a panel of mediator-arbitrators each member thereof must execute same, either affirming or dissenting from said award. Upon the execution and signing of the award, copies thereof, as well as a statement reflecting fees and expenses, if any, shall be submitted to the parties and to the commission.

DISCUSSION:

The Employer argues that these proceedings are not several things; that they are not a prohibited practice proceeding; that they are not fact finding proceedings; and that they are not Federal Equal Pay Act claims as that term is defined under Title 29, USCA,Section 206 (d). The Employer then argues that since these proceedings are none of the foregoing, discovery of the type sought by the Union's motion here is not contemplated within the mediation-arbitration statute as found at 111.70 (4) (cm); nor is it provided for in the Commission rules at ERB, 31.17 (5) which set forth the procedure to be utilized by the mediator-arbitrator at the arbitration meeting.

The undersigned agrees with the Employer that the proceedings before the Mediator-Arbitrator are neither prohibited practice proceedings, fact finding proceedings, nor proceedings for Federal Equal Pay Act claims. The motion brought by the Union falls within the jurisdiction of the Arbitrator as established by the statutes and Commission rules. The statutes provide at 111.70 (4) (cm) 8 that the commission shall adopt rules for the conduct of all mediation-arbitration proceedings . . . , the expeditious rendering of arbitration decisions. Pursuant to the foregoing statutory provision the Commission adopted rules at ERB 31.17 (5)

which establish the jurisdiction of the arbitrator to include that meetings before the mediator-arbitrator acting as arbitrator shall be within the control of the mediator-arbitrator and shall be as expeditious as the nature of the dispute will allow. In conducting same the mediator-arbitrator shall have the power to: . . . (c) rule on offers of proof and receive relevant evidence; . . . (e) dispose of procedural requests and similar matters. The undersigned concludes that motion of the Union which is brought here falls within the purview of a procedural request which Commission rule at ERB 31.17 (5) addresses; and, therefore, the undersigned concludes that he has subject matter jurisdiction over the motion filed by Union. While it might be argued by Employer that motion of the Union is premature because the motion preceded any mediation efforts on the part of the undersigned, and the foregoing Commission rule deals with procedures and powers of the mediator-arbitrator while acting as arbitrator; the undersigned concludes that the motion of Union here is not premature for two reasons. First, in establishing a date for the mediation phase of these proceedings with the consent of the parties, both parties agreed that mediation and arbitration, if necessary, would be conducted on the same day. Consequently, the undersigned concludes that it would be impractical under the foregoing circumstances to defer ruling on Union's motion until after the mediation phase of these proceedings is completed. Furthermore, both the statute at 111.70 (4) (cm) 8 and the rules at ERB 31.17 (5) speak of expediting the proceedings, and ruling on the Union's motion at the present time fulfills the expeditious requirement of the statute. Secondly, assuming arguendo that Union's motion would be granted, a deferral of the Union making the type of study it seeks here until after the mediation phase of the proceedings have been concluded, would tend to defeat what the undersigned concludes to be the underlying objective of the mediation-arbitration statute. It is the opinion of the undersigned that the mediation-arbitration statute is to encourage voluntary settlements by the parties and the information which the Union seeks by reason of its study of the two positions, R.N.'s vis a vis sanitarians, could well lead to a voluntary settlement by the parties without need for evidentiary hearing in a mediation-arbitration setting. Therefore, for both of the foregoing reasons the undersigned concludes that he has authority, and it is in the best interest of the parties, to rule upon Union's motion presently.

In its argument Employer compares the procedural scheme found at ERB 25 for hearings in fact finding with the procedural scheme outlined in ERB 31.17 (5), and concludes that the WERC in establishing its administrative rules and regulations under Section 31.17 (5) saw fit not to include any premeeting discovery for the parties. While premeeting discovery is not a part of the specific powers conferred by Commission rules, the rules do provide, as discussed supra, the authority of the Mediator-Arbitrator to rule on procedural requests which the undersigned has concluded confers jurisdiction on him to determine whether the motion brought by Union should be granted.

The undersigned has agreed with Employer's comments that this is not a prohibited practice proceeding. The undersigned, however, notes that the subject matter of the motion brought by Union could well be framed as an allegation that Employer has committed a prohibited practice in violation of 111.70 (3) (a) 4 under an allegation that the Employer's refusal to permit access of Union to work site to examine the contents of the job violates the Employer's derivative duty to bargain collectively. The undersigned is aware of no Commission case law with respect to the foregoing issue, nor have the parties cited any. The undersigned, however, concludes that if this issue were decided as an allegation of a prohibited practice, the purposes of mediation-arbitration could well be frustrated. The foregoing conclusion is based on the provisions of the statute at 111.70 (4)(cm) 6.e. which provides that mediation-arbitration proceedings shall not be interrupted or terminated by reason of any prohibited practice complaint filed by either party at any time. In all likelihood these proceedings in mediation-arbitration would long since be concluded prior to any determination of the merits of a prohibited practice complaint filed in this matter. Consequently, if the Commission were to uphold a Union's allegation that the Employer, as part of his duty to bargain, must permit entry of the Union expert onto his premises for the purposes described in the motion, there would be no remedy as it went to the evidentiary proceedings before the mediator-arbitrator. Consequently, the undersigned concludes that the motion should be addressed on its merits by this Mediator-Arbitrator.

The undersigned is aware of no WERC case law addressing the issue raised by the Union here. Furthermore, the parties have cited no case law germane to this issue. There is, however, private sector case law before the NLRB which would support the Union's motion in this matter. In Fafnir Bearing Co., 146 NLRB 1582 (1964), the Employer was held to have violated his duty to bargain when he refused to permit a Union time study expert to enter his plant to observe and take time studies over a disputed opera tion. In determining that the Employer had violated his duty to bargain by refusing access to the plant, the NLRB applied the test as to whether or not the information sought by the Union was available to them through alternative channels, and concluded that it was not. Similarly, in Winn-Dixie Stores, Inc., 224 NLRB 1418 (1976), the Employer was found to have violated his duty to bargain by denying Union representative's access to inspect sanitary and safety equipment, applying the same reasoning as found in Fafnir Bearing. The foregoing standard appears sound and reasonable to the undersigned. Therefore, the undersigned will consider whether the Union has available to it alternative channels for the information which it seeks here. After reviewing the reasons set forth in Union Exhibit No. 4 in the letter from Professor Hagglund to counsel for Union, the undersigned concludes that there are not available alternative channels to the Union to provide all of the information which it seeks. This is particularly true in this matter where Employer representative Johnson in his letter to Miller dated October 5, 1982, asserts that there is no study which resulted in the establishment of a classification and compensation plan for Union employees. The foregoing response buttresses the undersigned's conclusion that the information sought by Union in its motion is not available to them through alternative channels.

Employer has further argued that permitting Professor Hagglund to observe the R.N.'s and sanitarians in the performance of their job duties may well violate the statutory protected rights of the patients as it goes to confidentiality. The undersigned is of the opinion that safeguards can be taken to protect the confidentiality of patients as provided for in statutes by excluding observations of duties performed while with patients and excluding from Professor Hagglund the identities of any written reports as it bears on condition or status of patients. Alternatively, if patients waive any statutory protection with respect to confidentiality, Hagglund then could have access to these confidential situations.

For all of the reasons stated above, the undersigned concludes that the Union's motion should be granted. In granting the Union motion, however, the undersigned further concludes that certain reasonable procedural restrictions may be established by the Employer. Specifically, the undersigned holds: 1) that the Employer may designate a representative to accompany Professor Hagglund at all times during his observations and interviews on Company premises; 2) that the Employer may take whatever reasonable precautions are necessary to protect the confidentiality of information relating to patients; 3) that Professor Hagglund's entrance to the work site be made by prior appointment with the Employer at a time convenient to the Employer; 4) that reasonable procedures may be established so as to provide for a minimum disruption of the Employer's regular work efforts on his work site.

The undersigned, therefore, grants the Union motion within the limitations set forth immediately above, and enters the following:

ORDER

The Employer is directed to permit ingress of Professor George Hagglund, Director, School for Workers, University of Wisconsin-Madison, for the purpose of conferring and consulting with various employees with respect to their job duties and responsibilities, and for the purpose of observing the employees at their work, and for the purpose of interviewing employees and supervisors with respect to their job duties, within the limitations set forth in the discussion section of this opinion.

Dated at Fond du Lac, Wisconsin, this 2nd day of February, 1983.

Jos. B. Kerkman, Mediator-Arbitrator

JBK:rr