In the matter of the dispute between DELAVAN-DARIEN BOARD OF EDUCATION DELAVAN, WISCONSIN and DELAVAN-DARIEN SCHOOLS SECRETARIES AND AIDES ASSOCIATION	ARBITRATION WERC Case VII No. 29793 MED/ARB-1689 Decision No. 20054-A Richard Pegnetter Arbitrator July 12, 1983

APPEARANCES

For the District

Kenneth Cole, Director of Employee Relations Services, Wisconsin Association of School Boards

For the Association

Betty Thronson, Director, Southern Lakes United Educators/ Council 26

Having reached an impasse in their efforts to negotiate terms for their 1982-83 contract, the District, Delavan-Darien Board of Education, and the Association, Delavan-Darien Schools Secretaries and Aides Association, selected the undersigned as Mediator-Arbitrator through the procedures of the Wisconsin Employment Relations Commission. Pursuant to Section 111.70 (4) (cm) 6.b of the Municipal Employment Relations Act, the undersigned conducted a mediation effort on April 8, 1983 in Delavan, Wisconsin. Settlement was not reached in mediation and an arbitration hearing was commenced immediately after mediation. During the hearing, the parties were given full opportunity to present evidence and argument. Both parties filed briefs after the conclusion of the hearing. The parties listed a single Issue at Impasse for final determination by the Arbitrator: FAIR SHARE AGREEMENT.

Position of the Association. The Association final offer was to add a "fair share" clause to the agreement. The clause would obligate employee support for the bargaining representative as follows:

ARTICLE III

E. Fair Share Agreement: The Association as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, Association and non-Association, fairly and equally, and all employees in the unit will be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be made available to all employees who apply consistent with the Association constitution and bylaws. No employee shall be denied Association membership because of race, creed, color, sex, handicap or age.

The employer agrees that effective thirty (30) days after the opening of school, it will deduct from the earnings of all employees in the bargaining unit, in equal installments, from pay due on the following six pay days: Sept. 15, Oct. 1 and 15, Nov. 1 and 15, and Dec. 1, and

amount of money equivalent to the dues of the Association as certified by the Association. The Board shall remit once a month, October through January, the amount deducted from each pay period to the treasurer of the Association at the same time other bills are paid.

The employer shall provide the Association with a list of employees from whom deductions are made with each remittance to the Association.

In the event an employee leaves the employ of the district before the six equal installments have been deducted, or in the event an unforeseen circumstance causes the individual to receive no paycheck or a paycheck which is not sufficient to cover the dues deduction before the six equal installments have been deducted, the Association shall assume the responsibility for any further dollar amounts due them.

The employer shall notify the Association when an employee is hired after the opening of the school year. The amount of dues to be deducted and the number of and times for deductions shall be forwarded to the employer by the Association.

The Delavan-Darien Secretaries and Aides Association and the WEA do hereby indemnify and save the School District of Delavan-Darien Board of Education harmless against any and all claims, demands, suits or other forms of liability including court costs that shall arise out of or by reason of action taken or not taken by the Board, which Board action or non-action is in compliance with the provisions of this Agreement and in reliance on any list or certificate which has been furnished to the Board pursuant to this Article, provided that any such claims, demands, suits or other forms of liability shall be under the exclusive control of the WEA and its attorneys.

By the 1st Wednesday after Labor Day the Association will provide the Administration with a list of employees requesting dues deduction.

The Association provided several foundations for its fair share proposal. First, the Association reviewed the philosophy and goal of fair share or agency shop clauses. The Association stressed that the agency shop clause does not require membership in the employee organization, only financial support for the Association's role as bargaining agent. The Association argued that, under an agency shop clause, employees in the bargaining unit are not forced to participate as members in the Association. The Association claimed that the requirement to contribute financial support to the employee representative was appropriate because of the statutory obligation the Association had to represent all members of the bargaining unit. The Association emphasized that the act mandated that all unit members, irrespective of their membership or non-membership in the Association, were to be represented fairly and equally by the exclusive bargaining agent, in this case the Association. The Association provided extensive detail regarding both the benefits accruing to all unit members and the costs and responsibilities borne by the Association for such representation.

Second, the Association noted the posture of Wisconsin law regarding agency shop or fair share for public employees. Wisconsin Statute 111.70 specifies that agency shop clauses are mandatory bargaining subjects, indicating that a fair share requirement is recognized by the legislature as a labor-management issue which is

in the public interest as an inclusion in collective contracts. Further, the statute provides for a Wisconsin Employment Relations Commission (WERC) election to revoke an agency shop clause if such a provision is not acceptable to a majority of bargaining unit members. Consequently, the Association contended that the fair share concept was established public policy and incorporated sufficient democratic protections for a balance of individual and majority rights.

Third, the Association submitted numerous arbitration awards wherein the arbitrators had awarded the addition of fair share clauses in disputes involving education employees. The Association cited passages from these awards to show that arbitrators acknowledged the need and proper role for agency shop in public labor-management relations (Association Exhibits 6 through 18).

Finally, the Association maintained that comparability supported the offer of the Association. The Association provided evidence from several different comparison groups to show that a substantial majority of units in Walworth County (which includes Delavan-Darien), the Southern Lakes Athletic Conference, and CESA #18 provide fair share clauses in their collective bargaining contracts (Association Exhibit 3). The Association stressed that the criterion of comparability was a factor to be given great weight by the arbitrator in an interest dispute under the Act. The Association submitted that the comparability evidence clearly demonstrated the strength of the Association final offer.

Position of the District. The District proposed no addition of a fair share clause to the contract. The District stressed the issue of significant majority support in its presentation. The District posited that it had no philosophical objection to the concept of agency shop. The District submitted that its agreement with teachers in Delavan-Darien contained an agency shop clause, hence the evidence demonstrated that the District would enter into fair share agreements under the proper circumstances. Regarding the unit for secretaries and aides, the District felt there was not a proper foundation for negotiating an agency shop clause.

The District contended that the imposition of a fair share requirement on all members of the unit should occur only when there was substantial support within the bargaining unit for such a requirement. Here, there was great division among unit members on the issue of representation by the Association. The District submitted data to show that the number of members utilizing dues deduction was less than half the total number of employees in the bargaining unit (District Exhibit 12). The District further noted that a significant number of bargaining unit members had petitioned the District with requests to bargain separately from the unit represented by the Association. These requests complained of the Association's activities on their behalf and the cost of Association membership (District Exhibits 6, 7, 9, 10, and 11). The District claimed that the dissident unit members specifically did not want to be obligated to a fair share contribution for the Association (District Exhibit 8). The District argued that it could not agree to a fair share clause given these views among employees. The result would be to improperly impose required support for the Association on a significant number of employees who object to the representation role of the certified bargaining agent.

The District also emphasized that a large portion of arbitration awards cited by the Association which granted fair share were done in situations where the bargaining representative had the support of a substantial majority of the unit members. For example, Flambeau, WERC Case No. 23314, MED/ARB-168, (R.J. Miller); 55 of 57 employees were members of the employee organization. The District submitted that, since no such level of majority support for the Association exists in the instant case, the award of fair share through arbitration should be denied. The District urged that evidence of support among bargaining unit employees should be a controlling extenuating circumstance in the Arbitrator's selection of the District's final offer.

Discussion. There is probably no issue in collective bargaining in either the public or private sectors of the economy which has the potential to arouse more sensitivity than union security. The philosophical and personal arguments which have been made on both sides of the issue are myriad and will not be detailed here. It is sufficient to simply note that there are basically three approaches commonly taken in collective bargaining contracts, allowing for some variation in accordance with the particular statute under which the negotiations occurred. One, a union shop clause, which requires membership in the employee organization after a certain grace period as a condition of employment. Two, an agency shop or fair share provision, which requires a financial contribution to the bargaining representative, but not membership, as a condition of employment. And, three, the absence of any required membership or contribution involving the bargaining agent. Here, the Association proposal is for the second form, a requirement that all unit members pay an agency fee to the Association as a condition of employment. The form of the Association proposal is what is often referred to as a "full" fair share clause. It does not exempt current non-members from payment requirements and require only current Association members and all future employees to pay under a "grandfathered" fair share. Nor does the Association offer provide that the clause will become operational in the contract only after approved through a special referendum on the matter of a fair share obligation. Rather, the Association proposal is an immediate contract implementation of specified agency fee for all members of the bargaining unit.

Various factors are frequently advanced for consideration by arbitrators charged with deciding fair share issues. One is the form of the fair share clause, i.e., whether it should be a full fair share provision or provide for grandfathering or a referendum. Another is the particular group of employers which should be used as the basis for comparison. Neither of these factors were raised by the parties in this dispute. The District did not contend that a lesser form of fair share would be more acceptable or that one comparison group advanced by the Association was less useful than some group proposed by the District.* Further, no question was raised which might contest the basic notion of agency shop. It was acknowledged that agency shop clauses, including the type proposed by the Association here, are a legal matter of public policy in Wisconsin and that as mandatory subjects of bargaining they appear in numerous public employment contracts across the state. It was also uncontraverted that awards by interest arbitrators have frequently determined the addition of fair share provisions to public sector contracts under the statutory impasse procedure.

Rather, the controversy in the instant dispute focuses on one central issue. That is, should comparability be used to determine the fair share matter when there is a question regarding the Association's role as majority bargaining representative? As an initial effort to distill the evidence offered, I find that the pattern of comparison data itself is unrefuted in support of the Association position. While I do find that the evidence from teacher bargaining units is not totally dispositive since it does not reflect

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*The District did, however, argue that no weight should be given to the teacher unit data regarding fair share in comparable schools, since the Association was representing non-professional employees here.

circumstances for employees providing similar services, the data from non-professional service employee units in education is pursuasive. A composite of the three comparison groups advanced by the Association shows the following for non-teacher units:

TABLE 1

Contracts With Fair Share	Contracts Without Fair Share
Elkhorn Service Personnel	Twin Lakes Custodians
Lake Geneva Custodians	Delavan-Darien Sec. and Aides
Burlington Scretaries	
Union Grove Custodians (2)	
Union Grove Secretaries	
Wilmot School Employees	

Consequently, it is clear that most contracts for education support personnel in comparable schools have some form of fair share provision obligating financial support from non-employee organization members who are in the bargaining unit.

This leaves the balance of weight between comparability and the majority nature of the Association to be determined. Here, I find that question regarding the level of support for the Association and its bargaining goals cannot be the controlling factors in evaluating the appropriateness of a fair share clause in this dispute. First, it is not clear that the Association does not speak for the majority of bargaining unit members on the fair share issue. With the elimination of aide Jerbie, as discussed in the hearing for the instant proceedings, Association Exhibit 19-A reflects a slight majority of regular members in a 33 person bargaining unit.

Second, the evidence from the arbitration awards cited by the Association reflects a mixture of arbitral postures regarding the level of majority support in awarding fair share. As noted by the District, some arbitrators, for example Arbitrator Mueller in West Bend, WERC Case XXV, No. 25711, MED/ARB-420, find it significant in awarding fair share that the employee organization has a high portion of union members among the unit membership. Others, such as Arbitrator Grenig, Appleton, WERC Case XXIX, No. 30100, MED/ARB-1825, find it sufficient that less than two-thirds of the unit employees belong to the employee organization in granting fair share. The larger group of Association cited cases show the arbitrators making no reference to union membership strength as a factor considered in their deliberations; see for example Arbitrator Yaffe in Winter, WERC Case XXIV, No. 24736, MED/ARB-429. Consequently, it is not evident that arbitrators only award fair share on the basis of a showing that a substantial majority of unit members support the union and union security provisions.

Third, and the most critical aspect of any measure of majority support, is the notion of exclusive bargaining representative in collective bargaining law. The Association has been accorded majority representative status for the unit of aides and secretaries employed by the District. That status cannot be held to fluctuate in strength, dependent on how much documented support the union can show for each individual issue presented during negotiations. Nor can the employer negotiate to a tentative agreement on a matter with the majority representative and then change its position in response to presentations made by a minority group of employees. The bilateral negotiations contained in the Wisconsin law and its impasse procedure could not function as sound public policy under such a fragmented system. Until determined otherwise by the WERC, the Association speaks with full authority for the total bargaining unit on all mandatory subjects. If a substantial group of employees want separate representation, as is suggested by evidence here, they may avail themselves of statutory procedures directed by WERC to seek another bargaining unit configuration. The solution is not to be found in requesting the employer to bargain with them separately from the contract covering the unit in which they are now located. Further, it must be noted that

any fair share provision can be made subject to a referendum on petition by 30% of the members of the bargaining unit. Thus, the Wisconsin law provides special procedures for democratically determining whether a fair share contract provision will be continued or revoked. The law would appear, then, to contain two adequate safeguards which balance the interests of groups in the bargaining unit with the stability inherent in exclusive representation.

Consequently, I find that the extenuating circumstances cited here by the District are not sufficient to prevail over the evidence of comparability. The data show that most similar and/or nearby schools which have contracts with support personnel include fair share clauses. While the undersigned would have encouraged some incremental development to the full fair share proposed by the Association, this arbitration involves the selection of only one of the parties' two final offers. The Association position provides a common form of agency shop and is better supported by evidence from comparable schools than the offer of the District.

Therefore, in accordance with the above discussion I hereby make the following

AWARD

The Final Offer of the Association is selected by the Arbitrator to be included in the terms of the 1982-83 agreement between the parties.

Richard Pegnetter

Iowa City, Iowa
July 12, 1983

Richard Pegnetter
Arbitrator