STATE OF WISCONSIN

BEFORE THE MEDIATOR/ARBITRATOR

In the Matter of the Petition of

MENOMONEE FALLS SCHOOL DISTRICT EMPLOYEES UNION LOCAL 2765, AFSCME, AFL-CIO

Case 45
No. 34144, MED/ARB-3044
Decision No. 22333-A

To Initiate Mediation/Arbitration Between Said Petitioner and

Sherwood Malamud
Mediator/Arbitrator

SCHOOL DISTRICT OF MENOMONEE FALLS

APPEARANCES

Richard W. Abelson, Representative, 2216 Allen Lane, Waukesha, Wisconsin 53186, appearing on behalf of the Union.

Mulcahy & Wherry, S.C., Attorneys-at-Law, by Gary M. Ruesch, 815 East Mason Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Municipal Employer.

JURISDICTION OF MEDIATOR/ARBITRATOR

On March 4, 1985, the Wisconsin Employment Relations Commission appointed Sherwood Malamud to serve as the Mediator/Arbitrator to attempt to mediate issues in dispute between Menomonee Falls School District Employees Union Local 2765, AFSCME, AFL-CIO, hereinafter the Union, and the School District of Menonomee Falls, hereinafter the District or the Employer. If mediation should prove unsuccessful, said appointment empowered the Mediator/Arbitrator to issue a final and binding award pursuant to Sec. 111.70(4)(cm) 6.c. of the Municipal Employment Relations Act. The mediation session was conducted on May 6, 1985 subsequent to which the Mediator/Arbitrator notified the parties that mediation had not succeeded in resolving the issues in dispute. The parties were afforded an opportunity to withdraw their final offers. They did not do so. The Arbitration hearing in the matter was conducted on May 24, 1985 at the District's offices in Menomonee Falls, Wisconsin. Pursuant to an agreement between the parties entered into at the hearing, both the Union and the District supplemented the record with additional exhibits which were received by the Mediator/Arbitrator by June 3, 1985. The original briefs of the parties were exchanged by the Mediator/Arbitrator on July 22, 1985. The parties had reserved the right to file reply briefs. By September 3, 1985, it became clear to the Mediator/Arbitrator that neither the District nor the Union would file a reply brief in this matter. Based upon a review of the evidence and arguments submitted, and upon the application of the criteria set forth in Sec. 111.70(4)(cm), Wis. Stats., to the issues in dispute herein, the Mediator/Arbitrator renders the following Award.

SUMMARY OF THE ISSUES

There are three principle issues outstanding between the parties. The first issue concerns duration. The Union proposes a two year agreement covering fiscal years 1984-85 and 1985-86. The District proposes a one year agreement commencing July 1, 1984 and expiring on June 30, 1985. This dispute over the duration of the agreement generates additional issues which are closely tied to the duration issue. In this regard, the Union proposes a

reopener for the second year of this two year agreement which is limited to wages only. As a result, the Union proposes that any increase in health insurance premiums which may occur in the second year of the agreement should be paid for by the District. Similarily, any increase in the premium for dental insurance, the Union proposes, should be paid for by the District. Furthermore, the Union proposes that the Employer pay the additional 1% increase in the employee's share of the retirement contribution which will take effect January 1, 1986.

The second major issue between the parties concerns the Union's proposal to improve the health insurance benefit for early retirees. The expired agreement permits employees who retire between the ages of 60 and 65 to participate in the group health insurance program, but they must pay the premiums for this insurance coverage. The Union proposes what it describes as a three-tier early retirement-health insurance benefit:

> (A). An employee who retires between the ages of 60 and 62 may participate in the health insurance program of the District. However, the early retiree must pay for the entire premium associated with her/his participation in the insurance program.
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> (B) An employee who elects to retire between the ages of 60 and 62, but who has at least 10 years of service in the District may participate in the health insurance program between the ages of 60 and 62 by paying the premium for such insurance. However, an employee who retires between the ages of 60 and 62 and has 10 years of service after she/he is 62 or an employee who retires at age 62 and has 10 years of service in the District, then the third tier of the Union's proposal will come into play;
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> (C) An employee aged 62 who has retired under (B) above, i.e. between the ages of 60 and 62 with 10 years of service or who retires at age 62 with 10 years of service in the District may participate in the group health insurance program of the District. However, between the ages of 62 and 65, the District shall pay the premium for such early retiree with at least 10 years of service in the District until such employee reaches 65.

The third issue relates to a proposal made by the District to delete Secs. 9.07 and 9.09 from the Agreement. Those two sections read as follows in the expired Agreement:

> 9.07 Transfers Due to Lack of Work. The District shall have the right to make lateral transfers due to reduced work loads to one or more buildings. If no employee in the affected building wishes to transfer voluntarily, such transfers shall be made in inverse order of seniority, provided that the employee so transferred is qualified to perform the work that is available. An employee so transferred shall have recall rights to his/her former position in the event that such position is again filled. Transfers made pursuant to this section shall not be subject to the posting procedure set forth in Sections 9.01 and 9.02 above.
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> . . .
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> 9.09 Other Transfers: The Employer may make lateral transfers with the mutual consent of the employees to be transferred.

In place of the above language, the District proposes that the following language be included in a successor agreement:

The District reserves the right onto itself to transfer an employee to a similar position in the same classification within the school system as the need requires. Such transfer will consider employee preference, seniority, shift assignment, and building level assignment.

Request for Transfer. All Employees may request a transfer to a different work assignment in their own classification or in any other classification by completing a request for transfer form.

The final offers of the parties contain identical proposals on wages and health and dental insurance contributions for fiscal year 1984-85, i.e., July 1, 1984 through June 30, 1985:

A wage increase of 6% effective July 1, 1984.

The District payment of $75.60 for the premium for single coverage under the medical-surgical health insurance program and $196.06 for the premium for family coverage for this program.

$10.58 for the premium for single coverage under the District's Dental program and $32.06 for the premium for family coverage under the District's dental program.[1]

STATUTORY CRITERIA

The criteria to be used for resolution of this dispute are contained in Sec. 111.70(4)(cm)7, as follows:

In making any decision under the arbitration procedures authorized by this subsection, the mediator-arbitrator shall give weight to the following factors:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interest and welfare of the public and the financial ability of unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services and with other employes generally in public employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.

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1 The District's final offer specifies the amount to be paid for dental insurance. The Union's proposal contains language which would have the District pay for any increase in the premium for dental insurance. However, both at the hearing and in their written agruments, there appears to be no dispute between the parties that no matter which proposal is selected, the dollar amounts appearing in Sec. 14.04 of the expired agreement shall be amended to reflect the dollar amounts for the single and family premium appearing in the District's offer, i.e., $10.58-single; $32.06-family.

e. The average consumer prices for goods and services, commonly known as the cost-of-living.

f. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, continuity and stability of employment, and all other benefits received.

g. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

h. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

POSITIONS OF THE PARTIES

The Union Argument

From the Union's perspective, there are three issues in dispute. (1) Duration; (2) The Union's proposal to improve the health insurance for early retirees; and (3) The District's proposal to permit transfers at the sole discretion of the Employer. The Union views the District's proposal as a radical change to a provision which has been in collective bargaining agreements between the parties for approximately 10 years.

The Union begins its written argument by asserting that its proposal to increase the level of benefit for early retirees is reasonable, and it is supported by both internal and external comparables. The Union notes that the first two tiers of its proposal are identical to the benefit already provided to retirees under the expired Agreement. Retirees with less than 10 years of service or retirees with more than 10 years of service who retire at an age between 60 and 62 may participate in the District's health insurance program provided they pay the premium. It is the third tier which contains the change. The benefit would accrue to employees with 10 years of service who are between 62 and 65 years old. The Union proposes that such an employee be eligible to have the health insurance premium paid for by the District during this three year period. The Union points to the teacher early retirement plan at the Menomonee Falls School District which provides a far more extensive and expensive benefit than the one proposed by the Union here. The Union indicates that its proposal limits the District's responsibility for the payment of health insurance premium to three years. Under the teacher plan an early retiree may have her/his health insurance premium paid for five to seven years. The teacher plan also provides for cash payments to be made to early retirees. The Union plan has no such provision. The Union also notes that because of the modest cost of the Union proposal, there is no need to limit the number of employees who may be eligible for the benefit. Furthermore, the Union asserts that very few of the current custodial staff are eligible or would be eligible for this early retirement benefit during the term of this agreement or in the near future. The Union argues that through an attractive early retirement program, the District has an alternative device to achieve its goal of additional flexibility in assigning its work force. An attractive early retirement program will encourage early retirements and thereby provide the employer with the opportunity to make changes in its work force. This alternative is far less drastic in the Union's view than weakening the transfer and job posting language, as proposed by the District.

The Union argues that the external comparables should include school districts located within Milwaukee County, such as, South Milwaukee, Cudahy, West Allis and Wauwatosa. The Union disputes the District's suggestion that Arrowhead Union High School, Pewaukee, Kewaskum, Hartford Union High School and Slinger are appropriate comparables. The Union argues quite vigorously that Menomonee Falls is not a rural district, but it is an urban community with an industrial base. It should be compared to districts of a similar size and base.

The Union deflects the legality argument put forth by the District. The Union notes that the District's argument is premised on the assertion by counsel for the District that the retiree health insurance proposal is probably illegal. The Union notes that its own attorney is of the opinion that the Union proposal is legal. Furthermore, the Union notes that the collective bargaining agreement contains a savings clause which anticipates such legality problems and questions, and it provides a mechanism for dealing with situations in which a provision of the agreement is found to be illegal or unenforceable. Furthermore, if the proposal put forth by the Union is illegal, then the Union argues that the District should have litigated the legality issue by filing a petition for a declaratory ruling before the Wisconsin Employment Relations Commission as provided for by the Med/Arb statute. The District did not do so. The Union concludes, therefore, that the legality argument should not be given any weight by the Mediator/Arbitrtor.

On the duration issue and the various proposals tied to this issue, the Union asserts that its proposal for a two year contract is reflective of the pattern of bargaining engaged in by the parties over many years. Two year contracts are the norm between this Union and this Employer. Furthermore, the Union notes how long it takes for these parties to bargain. The agreement proposed by the District has already expired. It is the employer which profits from the delay inherent in the Med/Arb process. The Union asserts that the reopener it proposes as part of its two year proposal, attempts to maintain the level of benefits enjoyed by employees under the expired agreement.

On the matter of the Wisconsin Retirement Fund and the scheduled increase in employee contribution to take effect on January 1, 1986, the Union argues that this contribution will ultimately reduce the future contributions which the employer is to make to the fund. The Union emphasizes that the wage reopener proposed by the Union permits the Employer to charge the cost of any increase in health insurance premium and the cost of the increase in contribution for the Wisconsin Retirement Fund to the total package cost of the second year of this proposal. In fact, the Union asserts that many of the comparables have resolved this issue in favor of the Employer picking up this additional 1% employee contribution.

With regard to the third and last issue, the Union asserts that the Employer's demand to delete Sec. 9.07 and 9.09 of the Agreement which provides employees with the right to post and bid for lateral transfers on the basis of seniority constitutes a demand to delete a central provision of the Agreement. The District's proposed language which it seeks to substitute for secs. 9.07 and 9.09 would permit the employer to make transfers after merely considering factors such as seniority. The Union views this dimunition of the importance of seniority in the agreement as an attempt to gut the job posting, seniority layoff and recall provisions of the Agreement. The Union asserts that the job posting provision has remained in the contract for 10 years. It has not been changed during that period of time. Furthermore, the present work force has exercised the rights provided by this provision so that present employees have posted for lateral transfers in order to obtain the positions which they prefer. The Union argues that the Employer's stated reason for its position,

is self serving and does not justify the change which it proposes. The Union argues, furthermore, that the external comparables do not justify this change.

The Union concludes that its proposal, therefore, is more reasonable. The Union urges the Mediator/Arbitrator to select its proposal for inclusion in a successor agreement.

The District Argument

The Employer states that its final offer is constructed in a manner which takes full consideration of what the District considers to be the comparables, in this case. The Employer argues that the issue of comparability for non-certified personnel should be treated differently than the determination of comparability for certified teaching personnel in school districts. The Employer cites the decisions of Arbitrator Fleischli in School District of Neillsville, (18988) 2/82 and Arbitrator Johnson in School District of LaCrosse, (16327) 9/78 who observed that the appropriate comparables for non-certified school district employees are narrower and smaller in geographic scope than the labor market used by a school district seeking to employ teachers. Therefore, this Employer concludes that it is not appropriate to look at a market any larger than the geographic region from which custodians of the Menomonee Falls School District would be hired. The Employer suggests that the primary comparables which this Arbitrator should adopt are those suggested by Arbitrator Imes in her Med/Arb decision involving the clerical employees of this district which she issued in December, 1982 (19605-A), and they are: Waukesha, Elmbrook, West Bend, New Berlin, Oconomowoc, Mukwanago, Muskego, Kettle Moraine, Hamilton, Germantown and Arrowhead Union High School. The secondary or regional comparables identified by the District are Cedarburg, Grafton, Kewaskum, Port Washington, Slinger and Mequon. The Employer emphasis on the proximity of the comparable districts to the Menomonee Falls district is rooted in taxpayer concern for the wage and benefit level of employees located in their own community or in surrounding communities rather than in communities distant from Menomonee Falls. This reflects the concerns of the residents of the District. Furthermore, the Employer notes that the enrollment of its district of 3,517 students is within 139 students of the average enrollment of the proposed comparables. The equalized value of property in the district, as well as, the full value tax rates also support the District's selection of the above listed school districts as comparables. The Employer asserts that the Union's comparables from Milwaukee County are much larger than the district of Menomonee Falls. These districts are located some distance from Menomonee Falls, and these Milwaukee County districts do not compete for employees in the same labor market.

With regard to the duration issue, the Employer argues that the Union's proposal for a two year Agreement is unreasonable. The Employer concedes that this District and the Union usually negotiate two year agreements. However, the Union reopener is very narrow and restricts the District's ability to effectively negotiate over economic items which may increase during the second year of the agreement. Health and dental insurance premiums may increase and the District, under the Union's proposal, will have to absorb the additional cost of the 1% increase in the employee's share of retirement without a meaningful opportunity to bargain the economic impact of such increases.

The Employer cites Arbitrator Rothstein in School District of Kewaskum (18991-A) 8/82 in which he observed that a multi-year agreement precludes taxpayer participation in the decisions inherent in a collective bargaining agreement which cost money and commit the resources of the district to employees' salaries. The Employer notes further that few of the 19 comparable school districts have settled for 1985-86. Therefore, the District's one year

proposal is preferable to that of the Union's.

The Employer argues further that the Union's demand that the District pay for any increase in health insurance premiums in order to justify its two year proposal is not supported by either internal or external comparables. Both the teacher bargaining unit and the clerical bargaining unit pay a portion of the health insurance premiums. In fact, this issue of contribution towards insurance premiums was a central issue in Mediation/Arbitration between the District and its teachers before Arbitrator Seitz. The clerical employees voluntarily agreed to share the cost of health insurance premiums. The District and the custodians proceeded to arbitration over this very same issue. Of the 11 primary external comparables, 9 of those school districts do not pay any increase in health insurance under the terms of their collective bargaining agreements.

With regard to the Union's demand that the District pay the 1% increase in employee contribution to become effective on January 1, 1986, the Employer asserts this demand is unjustified, as well. There are no external comparables to support this demand. Pewaukee, a comparable district reached a voluntary settlement wherein the parties agreed that the Employer would continue to pay only 5% of the employees' share of the retirement cost. Furthermore, the comparables for 1984-85 support the 5% figure which is currently paid by the District.

On the issue of early retirement, the Employer observes that the Union's proposal makes a significant change in the present benefit level. The change is so significant that it will have an economic impact in the future as well as the present. The District asserts that the Union's proposal fails to pass muster on the first of the statutory criteria, i.e., "the lawful authority of the Employer". In fact, during the course of bargaining, the Employer notified the Union that its proposal may violate the Age, Discrimination in Employment Act and the Wisconsin Fair Employment Act. In this regard, the legal opinion of the District's counsel and negotiator states:

> Turning to the Union's final offer concerning early retirement and health insurance benefits, that proposal provides that an employee electing to retire early shall receive the District's health insurance coverage at the Board's expense, until the employee reaches the age of sixty-five (65). Under the Union's proposal, an individual who retires at age sixty-four (64) would enjoy the District's insurance benefits until age sixty-five (65). One year after retirement. It is possible that another individual with the same number of years with the District could retire at age sixty-two (62) and would then receive the maximum amount of the Board's paid insurance, three years. A third individual could retire after age sixty-five (65) and not be eligible to receive any of the Board's paid health insurance coverage. The different periods for which these indivudals received benefits are based solely on their age, age 65--which is within the protected age category of age 40 and up.

The District points out that the criterion, the lawful authority of the employer, permits the District to raise this issue before the Mediator/Arbitrator. The Med/Arb provision of the Municipal Employment Relations Act does not require the Employer to litigate the legality of any particular issue before the Wisconsin Employment Relations Commission. The District strenously asserts that it may be forced to litigate and support a proposal which it did not voluntarily agree to place in the collective bargaining agreement.

The internal comparables do not support the Union's proposal, the Employer insists. The teacher contract contains an early retirement program which is limited to no more than three employees per year. The provision also contains a savings clause which protects the district in case the program is too costly or the program is found to be illegal by a court, other tribunal or arbitrator. Furthermore, the teachers' voluntary early retirement program requires that a teacher serve 15 years in the District rather than this Union's proposal to require but 10 years of service in the District.

The Employer argues that the external comparables do not support the Union's demand to significantly change the voluntary early retirement benefit. Nine of the 19 comparables provide no early retirement benefit. Nine of the remaining ten comparables permit employees to participate in the health insurance program at the employee's expense.

With regard to the District's proposal to change the transfer language, the District asserts that the added flexibility this would provide is necessary for the efficient operation of the District. Enrollments continue to decline in this District. The Thomas Jefferson School will be closed. The Lincoln Building which at present houses the Recreation Department, will be closed, as well. Due to school closings which have occurred in the recent past, the Board requires additional flexibility in the deployment of its staff. The District asserts that it has no intention of engaging in wholesale transfers.

Furthermore, the District proposal is supported by external comparables. The Arrowhead Union High School, New Berlin, West Bend and Waukesha School Districts have no contractual language restriciting the right of the Boards' of Education of those districts from transferring their employees. At the Elmbrook School District, the right to transfer is at the District's discretion. In Germantown and Hamilton School Districts, there is no restriction on the Board's right to transfer employees. Similarily, the Oconomowoc School District has no such restriction. A review of the secondary comparables further supports the District's proposal to obtain additional flexibility. Even if the Arbitrator finds that the Board langauge is not reasonable, since the District proposes only a one year agreement, the parties will have an immediate opportunity to renegotiate and correct any elements missing from the Board's transfer language which it proposes here.

The Employer concludes its argument with a reference to the criterion, the "interest and welfare of the public." The District urges that criterion favors its offer. The local taxpayers will be disenfranchised if the Union's two year proposal is adopted. The lawful authority of the Employer criterion also favors the District's offer. The Union's proposal on voluntary early retirement may well be illegal. With regard to the comparability criterion the internal and external comparables all favor the final offer submitted by the District over that of the Union. Therefore, the District urges the Arbitrator to select its final offer for inclusion in a successor Agreement.

DISCUSSION

Introduction

There is no dispute in this case concerning the wages to be paid employees from July through June 1984-85. Neither is there any dispute concerning the dollar amounts to be contributed by the District for health and dental insurance from July 1984 through June 1985. The final offers of the Union and the Employer are identical on these matters. Furthermore, it is noteworthy, that the resolution of the wages and health insurance issue for fiscal year 1985 has little impact on the remaining issues in dispute between the parties which are to be determined and resolved through the processes of

Mediation/Arbitration.

The preliminary issue to the determination of this mediation/arbitration case is the identification of the school districts comparable to the School District of Menomonee Falls and its collective bargaining unit of custodial employees. In the discussion below, this threshold issue is first analyzed, and then the Arbitrator discusses the Voluntary Early Retirement Program proposed by the Union. The discussion of the District's proposal to alter the transfer language in the expired agreement is then considered. Then, the Arbitrator considers the duration issue and its attendant subissues of whether or not the Employer should pick up any increase in the health and dental insurance premiums for 1985-86 and pay the additional 1% in Wisconsin Retirement effective January 1, 1986. The Discussion section of this Award concludes with the selection of the final offer to be included in a successor Agreement.

The Comparables

This is not the first time that this Union and the District have participated in a mediation/arbitration proceeding which has gone to Award. In 1982, the clerical unit was the subject of a decision issed by Arbitrator Imes (19605-A) 12/82 in which she was confronted with the same comparability issue presented in this case. In the clerical unit case, the lists of comparables submitted by both the Union and the Employer contained eleven school districts which appeared on both lists. In that case, as in this one, the Union suggested additional comparables located in Milwaukee County. The Employer suggested additional comparables which are located in Waukesha, Washington or Ozaukee counties. The list in the Imes Award and the districts upon which the parties agreed in this case vary with regard to only one school district, i.e. Arrowhead Union High School. The combination of the list of comparables from the Imes Award and the districts agreed upon by the parties in this case yields a list of comparables containing twelve school districts. This provides more than an adequate numerical base upon which to decide the issues in dispute herein.

One problem concerning the agreed upon school districts set forth by the parties is that these agreed upon comparables are quite broad. Arbitrator Imes noted in her Award that this range of comparables of agreed upon school districts when measured by student population, tax-equalized value, and geographic proximity would justify the inclusion of many other school districts not agreed to as comparables but districts proposed by the Union and the Employer. Nonetheless, this Arbitrator, as did Arbitrator Imes, uses he group of comparables agreed upon by the parties through their suggested lists of comparables presented at the hearing. The comparables used in this case are: Waukesha, Elmbrook, West Bend, New Berlin, Oconomowoc, Mukwanago, Muskego-Norway, Kettle Moraine, Mequon-Thiensville, Hamilton, Germantown and Arrowhead Union High School.[2]

Voluntary Early Retirement

health insurance benefit at the applicable cost of that benefit during the early retiree's 62nd through 65th birthday, provided the early retiree had 10 years of service with the District at the time of her/his retirement.

The District raises a threshold issue concerning the legality of the Union's proposal. It argues that the Voluntary Early Retirement Program suggested by the Union is not supported by the criterion, "The lawful authority of the Employer". The District asserts that the Union's proposal violates the Age Discrimination in Employment Act and the Wisconsin Fair Employment Act. The Union counters and questions whether the legality issue is an appropriate subject for this Mediation/Arbitration forum?

This arbitrator reads the statutory scheme underlying the Mediation/Arbitration process to provide that in the first instance, the Mediator/Arbitrator should not make determinations of the legality or illegality of proposals. As a last resort, however, the statutory scheme permits the Mediator/Arbitrator to make such determinations. This in the first instance and as a last resort analysis requires further explication.

In the First Instance-No

"The lawful authority of the Employer" is but one of eight criteria by which final offers of Unions and Employers are to be measured and weighed for the purpose of determining which offer is to be included in a successor agreement. Did the legislature intend the Mediator/Arbitrator serve as a one person employment relations commission or court of law in determining the legality of proposals contained in final offers?

This arbitrator does not think so. The legality of a proposal, the mandatory or permissive nature of a proposal made by an employer or a union are issues which the statute would have the Wisconsin Employment Relations Commission decide under the declaratory ruling procedure set forth in the Med/Arb statutory scheme.

There are other reasons for this Arbitrator's view. The criterion "The lawful authority of the Employer" is just that. It is a criterion to be used by arbitrators in their analysis of proposals contained in final offers. In this Arbitrator's view, the criterion directs the attention of the Arbitrator to the scope of authority of the Employer. For example, does a proposal force an employer to tax or to borrow beyond some statutory limit. Does a proposal force an employer to act within but at the very limit of its authority? Is the municipality one with a civil service commission and the subject of special legislation in that regard? How does a proposal mesh with such a legislative scheme? This interpretation of the criterion permits an analysis beyond the legality of a proposal.

This case presents a peculiar problem. The Employer argues that the Union's proposal may violate a statute which is not administered nor is it enforced by the Wisconsin Employment Relations Commission. Nonetheless, it is the WERC which administers the Municipal Employment Relations Act and its Med/Arb provision. Certainly, the WERC is in a better position than a mediator/arbitrtor to brings its judgment to bear on the question of the legality of the proposal, even one where the legality issue is based upon the Age Discrimination in Employment Act and the Wisconsin Fair Employment Act.

As a result, the Employer's lament is understandable. If the Union's proposal were included in the Agreement, the District might be forced to litigate the legality of such a proposal before other forums, such as, other administrative agencies or state and federal courts. However, it may bring the Union into such litigation if such ligitation develops. In that instance, the policies and intent of such legislation would be interpreted and enforced

by the agencies or judicial bodies intended by the legislation rather than by a single individual, a mediator/arbitrator.

For the above reasons, this Arbitrator believes that the parties should not look to a mediator/arbitrator to interpret and enforce any and all statutes of the United States of America and the State of Wisconsin in the process of selecting the final offer of one side or the other.[3]

As a Last Resort-Yes

There may be an instance where through oversight or by tactical design a proposal slips through the various mechanisms of the Med/Arb statutory procedures and the issue of the legality percolates up at the hearing before the Mediator/Arbitrator. The issue is raised in the context of the legal authority of the Employer to carry out the proposal put forth by the Union, as in this case. In that instance, certainly, the Mediator/Arbitrator may apply the criterion of the "lawful authority of the Employer", but in this Arbitrator's view he/she should find a proposal illegal, if and only if, there is a clear demonstration that the proposal is in fact illegal. The party arguing that a proposal is illegal should have the decision of an agency or a court which had found a similar proposal identical on all fours to the one at issue to be illegal. In this manner, the Mediator/Arbitrator would be applying principles and policies established by agencies and or courts charged with the duty of administering and enforcing such laws in the first instance. The Mediator/Arbitrator to the extent that he/she is convinced that the proposal in question was indeed found to be illegal may then find that a proposal present in a final offer before him/her is illegal.

Now turning to the early retirement proposal in this case, counsel for the Employer notified the Union that its proposal may be illegal. The Employer maintains that position before the Mediator/Arbitrator. However, there is no showing in this record that any agency or court has found such a Voluntary Early Retirement Plan to be in violation of either the Age Discrimination in Employment Act or the Wisconsin Fair Employment Act. This Arbitrator concludes, therefore, that the Union's proposal is within the lawful authority of the Employer to implement--should the Mediator/Arbitrator find that the Union's offer be included in a successor agreement.

With regard to the substance of the proposal, the record evidence demonstrates that only one of the comparable school districts, i.e., Waukesha, pays the premium for health insurance for early retirees. The external comparables clearly do not support the further improvement of the Voluntary Early Retirement Program detailed in the expired agreement.

The internal comparables do not support the improvements of the Early Retirement Program proposed by the Union. The Union argues that its proposal is far less costly than the early retirement program in effect for teachers in this school district. As a result, many of the safeguards and limitations negotiated into that early retirement program are not necessary under the early retirement program proposed by the Union. Because its proposal is less costly, the Union asserts that no limit on the number of employees who may take advantage of the program is necessary in this case. The Union further asserts that if its offer is selected, the Voluntary Early Retirement program would be effective July 1, 1984 and be available to an employee who has already retired prior to the proceedings before this Mediator/Arbitrator. The Union asserts that given the length of service of employees in the district

3 Contra, Brown County Sheriff's and Traffic Departments (17155-A) 2/80. Weisberger.

and their ages, few employees during the term of this Agreement would be in a position to take advantage of this new benefit.

However, if the Union's proposal is selected, this provision may remain in the Collective Bargaining Agreement for a long time. The Union's offer does not provide the Employer with a limit as to the number of employees who may seek early retirement and paid health insurance. In this regard, the Union's plan differs significantly from that of the teacher program. Although the Union's proposal costs less than the teacher's program, such a limitation may be appropriate.

More importantly, the program proposed by the Union in its final offer, permits employees with five fewer years of employment in the district, i.e., ten years of employment with the district as opposed to 15 years of employment with the District under the teacher program, to qualify for participation in this early retirement program. The Arbitrator can see no basis for custodians working fewer years in the District to be eligible for an early retirement program than the teachers of this school district.

The above analysis clearly demonstrates that the improvement in the Voluntary Early Retirement Program contained in the expired agreement as proposed by the Union in its final offer is not supported by the external comparables nor is it justified under the internal comparables. The Union's proposal deviates markedly from the early retirement program of the teachers. The Union failed to demonstrate with regard to the length of service in the district requirement why custodians should only work ten years when teachers are required to work 15 years in the District in order to become eligible for the early retirement program. Accordingly, the Mediator/Arbitrator concludes that the District's opposition to any amendement of the current program is preferable to the Union's proposal contained in its final offer.

TRANSFER LANGAUGE

The District proposes to delete of Sec. 9.07 and 9.09 of the present agreement and substitute language which would afford the Employer much greater latitude in the assignment of its staff. The District claims that this proposal is necessary, in part, because the District will close one or two school buildings during the term of this agreement. The closing of schools will necessitate the movement of personnel. The District asserts that the present language does not provide the kind of flexibility necessary to effectively use its personnel.

The District seeks to remove language contained in the agreement for a period of 10 years. The District attempts here to change the negotiated status quo. In a recent Mediation/Arbitration decision in Wheatland Center Schools, Arbitrator Petrie (22190-A) 7/85, quoted other mediator/arbitrators on the notion of changing the negotiated status quo. Just one of the four quotes provided in that award clearly enunciates the arbitral principal relevant here. Arbitrator R. J. Miller in Greenwood School District (20350) 7/83 stated that:

> It is axiomatic in interest arbitration that the party proposing to change existing language must demonstrate a 'need' for modification. In the instant case, the current language regarding Staff Reduction was voluntarily agreed by the Parties approximately 3 or 4 years ago. During this time, the provision has never been implemented since the School District has not laid off any teachers. The Association, therefore, has not met its burden of need as the language is untested and the Association has not been subjected to any abuse by the School District or administrative imperfections in its utilization.

Has the District, here, demonstrated the need and justified the change it seeks? There is no evidence in this record to indicate this language has provided any problem to the District in the past. Sec. 9.07 which comes into play when transfers are necessary due to lack of work has not prevented the District from effectively assigning the work force included in this custodial unit. There is no indication in the record that employees were placed into positions where they lacked the qualifications to perform the necessary work. In fact, Sec. 9.07 provides for a re-assignment in inverse order of seniority provided the employee is qualified to perform the work that is available. The Arbitrator concludes that the District has failed to demonstrate the need for the change. In light of this failure, the Arbitrator need not consider what comparable districts provide in their agreements with regard to transfer. Only if the need for a change were demonstrated, would consideration of the comparables be necessary. Accordingly, the Union's proposal for no change to the contract language is the preferable position, on this issue.

DURATION

Duration is an important issue in this dispute. Under the Employer's proposal, the contract which is the subject of this dispute has already expired six months ago. Under the Union's proposal, this Agreement will be in effect for approximately eight more months. Arbitrators have judged the duration issue under the criterion interest and welfare of the public.[4]

One of the goals of this process is to stabilize the parties collective bargaining. That stability is usually enhanced, if the parties are not in continuous negotiations. Therefore, as a rule of thumb, a multi-year agreement is to be preferred to a one year agreement. There are circumstances which tip the scale against this rule of thumb in a mediation/arbitration proceeding. Without enumerating all the instances which may tip the scale, there is one limitation which comes into play in this case. Here, the reopener is very restrictive. It impairs the ability of the District to negotiate and bargain over a matter which from its point of view has not been settled in the bargaining to date, increases in the cost of health insurance premiums. The District is forced to reflect the cost increases in health insurance and the pick up of an additional 1% in retirement in its monetary offer on wages. This may force the District to make an offer on salary which may not be competitive, because of the added costs already included in the second year of the Union's proposed reopener. The District, on the other hand, could have proposed a two year agreement with a broader reopener. Instead, it chose to submit a final offer with a duration of one year.

In conclusion, ordinarily, this arbitrator would provide great weight and a strong preference to a two year agreement. In this case, the Union's reopener is far too restrictive. The Arbitrator would have selected a District proposal for a two year agreement with a broader reopener. But no such offer was made. In light of the Union's overly restrictive reopener, the Arbitrator finds that the proposal of neither the Union nor the District is to be preferred.

SELECTION OF THE FINAL OFFER

In the discussion above, the Arbitrator concludes that the Union's

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4 School District of Kewaskum, (18991-A) 8/82 Rothstein; Wautoma Area School District, (22199-A) 6/85 Zeidler, where both Arbitrators found a one year agreement preferable to a two year agreement.

proposal to improve the Voluntary Early Retirement program, although it may be legal for purposes of this proceeding, is not justified by the comparability criterion. The Union's proposal fails on the criterion of other factors under which arbitrators consider the internal comparability question.

However, the District proposed to change the negotiated status quo by proposing the deletion of language from the agreement which has been in effect for in excess of ten years. The District failed to demonstrate a need for this change.

On the duration issue, neither proposal was preferred for the reasons stated above.

The selection of the final offer to be included in the agreement pits the proposal of the Union for an improvement of a benefit which is not justified against the proposal of the District to change contract language where it has failed to demonstrate a need for the change. Both proposals change the status quo. However, the Arbitrator believes that the transfer proposal of the District is a far more radical change to that status quo. It affects the entire unit. It impacts on the established right of employees to post to preferred positions. The Voluntary Early Retirement Program, for now, affects few employees. Accordingly, the final offer of the Union is to be preferred and included in a successor agreement.

On the basis of the above discussion, the Mediator/Arbitrator issues the following:

AWARD

Based upon the statutory criteria found in Sec. 111.70(4)(cm)7 a-h of the Municipal Employment Relations Act, the evidence and arguments of the parties and for the reasons discussed above, the Mediator/Arbitrator selects the final offer of the Menomonee Falls School District Employees Union, Local 2765, AFSCME, AFL-CIO which is attached hereto and which is to be included, together with the stipulations of the parties in a collective bargaining agreement which shall be effective from July 1, 1984 through June 30, 1986, between the Union and the School District of Menomonee Falls.

Dated at Madison, Wisconsin this 5th day of November, 1985.

Sherwood Malamud
Mediator/Arbitrator

U. Ex # 1

UNION FINAL OFFER

LOCAL 2765, AFSCME, AFL-CIO

CUSTODIAL/MAINTENANCE EMPLOYEES

1. Amend Section 14.01, Hospital and Surgical Insurance, to read:

"For the contract year 1984-85, the District agrees to pay a maximum of $75.60 per month toward the cost of the premium for hospital and medical insurance for single employees, and $196.06 per month toward the cost of the premium for hospital and medical insurance for family plan employees eligible for such insurance. The District will pay any increase in the stated amounts for the 1985-86 contract year."

(Section 14.01 A, No Change)

2. Amend Section 14.01 B, as follows:

"Early Retirement: a. Employees retiring after age sixty (60) but before age sixty-five (65), with less than ten (10) years of regular employment with the School District, shall be allowed to continue to subscribe to the group hospitalization and surgical insurance plan. Such employees must prepay the monthly premium to the Employer, who will in turn, forward premiums to the insurance carrier. The Employer assumes no liability for payment of the premium if said premium is received from the employee on or after the first day of the month in which the premium is due and payable. Early retirees are eligible for this benefit until their sixty-fifth (65th) birthday."

b. Employees retiring after age sixty (60), but before age sixty-two (62), who have ten (10) years or more of regular employment with the School District, shall be allowed to continue to subscribe to the group hospital and medical insurance plan. Such employees must prepay the monthly premium to the Employer, who in turn will forward the premiums to the insurance carrier. The Employer assumes no liability for payment of the premium if said premium is received from the retired employee on or after the first day of the month in which the premium is due and payable. Upon attaining age sixty-two (62), an employee with a minimum of ten (10) years of service shall be eligible for benefits as set forth in paragraph (c) below.

c. Employees retiring after age sixty-two (62), but before age sixty-five (65), who have ten (10) years or more of regular employment with the School District, shall have the premium for the group hospitalization and surgical insurance paid in full by the District, until the age of sixty-five (65).

3. Add a sentence to Section 14.04, Dental Insurance, as follows:

"The District will pay any increases in the stated amounts for the 1985-86 contract year."

4. Amend Section 15.01, Retirement, to provide for the Employer to pay up to six percent (6%) of the employee's gross monthly earnings (as the employee's share) effective January 1, 1986.

5. Wages: Six percent (6%) across-the-board effective July 1, 1984.

6. Duration: July 1, 1984 to June 30, 1986.

Amend Section 28.03 as follows:

"Re-opening Contract: Either party may reopen this Agreement for negotiating changes to become effective July 1, 1985. The subject of such negotiations shall be limited to "Wages- Appendix A". The party requesting negotiations shall notify the other party in writing of its desire to reopen negotiations on or before April 1, 1985."

Submitted on behalf of the membership and executive board of Local 2765, AFSCME, AFL-CIO,

Richard W. Abelson, Representative
AFSCME, Council 40, AFL-CIO