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WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

BEFORE THE MEDIATOR-ARBITRATOR

In the Matter of the Petition of

RIVERDALE EDUCATION ASSOCIATION

To Initiate Mediation-Arbitration Between Said Petitioner and

RIVERDALE SCHOOL DISTRICT

Case 19
No. 35794 MED/ARB-3546
Decision No. 23294-A
Stanley H. Michelstetter II
Mediator-Arbitrator

Appearances:

Karl L. Monson, Consultant, appearing on behalf of the Employer.
Kenneth Pfile, Executive Director, appearing on behalf of the Association.

MEDIATION-ARBITRATION AWARD

Riverdale Education Association, herein referred to as the "Association", having petitioned the Wisconsin Employment Relations Commission to initiate Mediation-Arbitation pursuant to Section 111.70(4)(cm), Wis. Stats. 1/, between it and the Riverdale School District, herein referred to as the "Employer", and the Commission having appointed the Undersigned as Mediator-Arbitrator on March 19, 1986; and the Undersigned having conducted mediation June 17, 1986, and having conducted hearing, both in Muscoda, Wisconsin, on August 25, 1986; the parties having filed briefs and reply briefs the last of which was received December 3, 1986.

ISSUES

The instant dispute involves the terms to be included in the parties 1985-87 collective bargaining agreement. The parties final offers are incorporated by reference. The Employer's final offer is attached hereto and marked Appendix A. The Association's final offer is attached hereto and marked Appendix B. The current salary schedule and selected provisions from the current collective bargaining agreement is attached hereto and marked Appendix C. The following is a summary of the differences between the parties.

1. TERM: The Association proposes a one year collective bargaining agreement from July 1, 1985, to June 30, 1986. The Employer proposes a two year term from July 1, 1985, to June 30, 1987.

2. WAGES 1985-86: The Employer proposes to increase the current base $13,900 to $14,800 and retain the current salary schedule structure. The Association proposes to increase the base to $15,000 and modify the current salary structure to increase the current education increment from 3% of base to 3.1% of base and otherwise retain the current structure. Current increments are 4% of the base. The Employer costs its proposal at 8.1% salary increase, $1,586.64 per returning teacher, 8.11%, total package, $2,125.97 total increase per returning teacher. It costs Association,s proposal at 10.72% salary only increase, $2,010.93 salary only increase per returning teacher, 11.18% total package increase, $2,932.60 average total package increase per returning teacher. The Association cost the Employer proposal at 8.09 salary increase, $1,583 salary only increase per returning teacher. It costs its own proposal at 10.25% salary increase, $2,008 salary only increase per returning teacher. Association did not present total package costing.

1986-87: The Employer proposes to increase in 1985-86 base $15,700 and retain the current schedule structure. It costs its proposal at 8.08% salary increase, $1,668.80 salary only increase

1/ Section 111.70, Wis. Stats., has since been amended, but the amendment is not effective for this dispute.

per returning teacher, 8.43% total package increase, $2,324.94 total package per returning teacher. The Association cost this at 7.63% salary increase, $1,566 salary increase only per returning teacher.

3. HEALTH INSURANCE: The Association proposes to change the current specification of the amount of health insurance premium the Employer will pay (which, in fact, was the full amount of health insurance under the contract) to "full cost."

4. DENTAL INSURANCE: Similarly, the Association proposes to change the current specification of the amount of dental insurance premium the Employer will pay to "full cost."

5. LONG TERM DISABILITY: The Association proposes that the Employer establish a long term disability program purchasing insurance providing for 90% of gross salary payable after the first 60 days of illness. The Employer opposes this.

6. WISCONSIN RETIREMENT CONTRIBUTION: The Employer proposes to increase the specification of the amount of employee contribution it will pay to 6% which is the amount now required to be the full employee contribution. The Association seeks to have the amount specified at the "... full teacher's required contribution...."

7. VOLUNTARY EARLY RETIREMENT: Both parties propose to create a voluntary early retirement program. The parties agree that volunteers for early retirement will receive five years of payments of $2,500 per year and that the Employer will pay the full cost of health insurance for up to five years. Both parties provide that to be eligible an employee must have up to fifteen years of service with the Employer. However, the Employer would require that the employee be between the age of 57 and 62. The Employer would also provide the health insurance benefits cease upon the Employee reaching the first of becoming 65, qualifying for medicare or qualifying for any other federal insurance program. Additionally, the Employer would provide that there would be no duplication of coverage if the retiree is covered by another employer's health insurance plan, and that retirement benefits would be decreased by the amount of any unemployment compensation a retiree might receive from the Employer's fund. The Employer would add separate provision specifying that this provision would not apply to new applicants if it is found unlawful.

8. TRAVEL PAY: Both parties propose to continue the current travel payment of $.24 per mile for the duration of the collective bargaining agreement.

9. M-TEAM PAY: The Employer proposes to retain the current M-team payment provision under which unit employees receive a fixed $12 payment for M-team meetings which are scheduled after 4:00 p.m. or which, if scheduled before 4:00 p.m., extend more than one hour past 4:00 p.m. The Association proposes to change this to a payment of $15.00 per hour for all time spent in M-team meeting beyond 4:00 p.m.

10. TEACHING HOURS AND CLASS LOADS: The Association proposes to change the junior high school class structure from an eight period day to the seven period day such as the structure currently used in the high school. As in the high school teachers who are assigned to work the seventh period would be paid $1,600 per year. Currently, junior high teachers who are assigned a eighth period in the eight period structure receive $1,400 additional annual compensation. Under the current contract teachers who are assigned duties during their preparation time are paid $8.00 per period. The Association proposes to revise this for elementary teachers to one-half the teacher's individual hourly rate of pay. Language with respect to non-elementary teachers is eliminated. Preparation time under the current agreement for elementary teachers occurs at times when students are with auxiliary personnel. The Association proposes to revise the current agreement to specify that teachers receive a minimum of 225 minutes per week (one-half hour at a time) of preparation time. Under the Association's proposal

teachers at any level may not be required to substitute for other teachers during their preparation time. Those who do will be paid $12 per period. Teachers in charge of study halls or classes which are assigned such students in addition will also be paid $12 per period. The Employer proposes to change the current high school from a seven to eight period day although teachers would continue to be assigned six periods. The Employer proposes to change the current payment for an overload in the junior high school to $1,600 per year. The Employer proposes to increase the current $8.00 payment for additional duty assignments to $9.00 per period. The Employer proposes to delete the current $850 per year provision for paying teachers assigned split/combination classes.

11. VACANCIES, TRANSFERS AND REASSIGNMENTS: The Association proposes to completely revise the current posting procedure, substantially tightening it. The Association also proposes that in the event of an involuntary transfer to a vacant position, the least senior, qualified teacher shall be transferred. The current agreement can be viewed as reserving to the Employer the unfettered right to transer at its discretion. The Employer proposes to add language to the existing Article XVII, specifiying that teachers will be assigned only in the areas in which they are, or can be, certified. It also proposes to provide a notice to teachers it contemplates involuntarily transferring and an opportunity for the teacher to meet and confer with the Employer.

12. EXTRA ASSIGNEMENTS: The Association proposes to increase ticket sales and supervision from the currrent $12 per exent to $15 per event. The Employer would make no change. Both parties agree to adjust base salary related payments to reflect the new base.

DISCUSSION

Pursuant to Section 111.70(4)(cm), Wis. Stats., it is the responsibility of the mediator-arbitrator to to select the final offer of one party or the other. The mediator-arbitrator may not compromise, but must select the offer which is deemed by him or her to be more appropriate after giving consideration to statutory criteria to be applied in making that judgment. The statutory criteria in effect for this dispute are the following:

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

a. The lawfull authority of the municipal employer.

b. Stipulations of the parties.

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

d. Comparison of wages, hours and conditions of employment of the municipal 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.

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, the continuity and stability of employment, and all other benefits received.

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

h. Such other factors, not confined to the foregoing, which are normally 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."

While the statutes specify the factors to be applied it does not specify the weight to be attached to any particular factor or issue in a specific dispute. That matter is left to the mediator-arbitrator. In this case all of the factors have applicability in this dispute.

Wages

i. Positions of the Parties

The Association takes the position that the prime issue is the general wage increase. It relies upon the comparability critereon to support its position for the 1985-86 school year. While it concedes that the parties have ordinarily used the 7 schools of the Southwest Athletic Conference in collective bargaining. While three of the seven schools have settled for 1985-6, these settlements all are the second year of two year settlements. In its view, these ought not be given the same weight as first year settlements because since these settlements occurred, the legislature provided this area a substantial increase in state aid. On this basis, it offers comparisons to other schools of comparable size in the same area. It notes that schools of Southern Eight Athletic Conference will be merging with the schools of the Southwest Athletic conference, excluding Viroqua, in the 1987-88 school year. The schools it has selected, Darlington, Iowa-Grant, Dodgeville, Southwestern, and Mineral Point, are all of the same size and in the same geographic area. It notes that Plattville is also a comparable Southern Eight school, but it, too, is in the second year of a two year agreement. Based upon this view, it argues that its proposed increase both from a percentage and dollar amount at each of the traditional benchmarks generates an increase which is closest to the size of increase generated by the comparable districts. It also argues that its proposal is closer to the dollar amount size of increase given administrators and their level of benefits. It believes the public interest supports giving unit employees a comparable increase. Further, it also takes the position that the other economic factors should be weighted in accordance with the comparability critereon. It denies that the district can have any ability to pay problem since; 1.,it has been increasing its year end fund balance steadily over the years, ending 1986 with $515,551 (an increase of 112% since 1983); 2., state credits more than offset the increase in local levy. the Association denies that Riverdale is a primarily agricultural district, in that only 22.7% of its per capita income in 1980 was derived from agriculture. Other data was submitted for the proposition that farmers in this area are financially in a far better position than farmers in other parts of the state.

With respect to the 1986-87 salary issue, it views its proposal to reopen negotiations as far more practical since no other school district is settled for 1986-7 and the offer of the Employer is very low when considering the size of increases granted in 1985-6.

The Employer takes the position that unit employees are comparably paid and deserve an appropriate general increase. It relies on the comparison critereon, specifically arguing the Southwest Athletic Conference is the most appropriate comparison group because the parties have historically used it and it is statistically and geographically closest. With respect to this comparison group it argues that Riverdale is one of the smallest school districts in the comparison group, yet it has one of the highest per pupil costs by virtue of the geographic size of the school district. The Employer denies that the comparison group offered by the Association is appropriate, because the new athletic conference has not yet been formed and the parties have not

agreed to the new comparison group. Based on these comparisons, it argues that Riverdale teachers have had an excellent salary history in the last few years and by comparison in the last agreement, Riverdale ranked well at BA base, BA6, MA base and MA9. It admits the only districts in the conference settled for 1985-6 are the three which are in the second year of a two year agreement. These schools are Fennimore, Boscobel and Viroqua. It argues that its proposed settlement for 1985-6 compares more favorably with the average of these settlements, both by percentage and dollar amounts at each of the benchmarks, than the Associations's even though all of the schools except Viroqua have traditionally paid less than Riverdale. It notes that if the final offers of all of the employer's in the unsettled conference schools were adopted, the Employer's offer would improve the position of the district among all comparables, whereas, if the Associations' final offers were adopted, Riverdale's Association's final offer would unjustifiably increase the relative rank of Riverdale. Thus, it is arguing that the Association's offer is higher than the final offers in arbitration of the various unions in the other conference schools, while the Employer's offer is more generous than the other employer final offers. It notes that for 1984-5 Riverdale was far above average and, in fact, among the better paying districts in CESA 3. Specifically, Riverdale is the highest paying district at the MA9 benchmark in CESA 3. It notes that there has been a 1.2% change in the consumer price index for the 1985-6 school year and that by any standard, its offer compares more favorably with this factor. It notes that its offer exceeds private sector first year increases nationally and certainly exceeds increases,if any, which others in this area will receive. It argues that Riverdale shares in the farm crises in Wisconsin and that Richland County has suffered the biggest loss in farm value of any county in the southwest portion of the state. Finally, it notes that in both 1985 and 1986 unemployment in this area was significantly higher than the rest of the state.

Wage Discussion

Both parties agree that the Southwest Athletic Conference is an appropriate comparison group and has been the parties primary comparison group at all relevant times in the past. The additional comparisons proposed by the Association of schools from the Southern Eight Athletic Conference of Darlington, Iowa-Grant, Dodgeville, Southwestern, Platteville, and Mineral Point are comparable with respect to size, economic characteristics, tax base and location, although some of these schools are more distant than Southwest schools. At the very least, this group forms a very strong secondary comparability group.

A wage comparison for the 1984-5 school year indicates that Riverdale pays well by comparison to the other districts in the conference. (Note that the parties have an abbreviated BA column and both propose retaining that structure. Therefore, BA Maximum benchmark is given no weight in this proceeding.)

1984-5 Southwest Conference Comparison

	BA Min.	BA 7	BA Max.	MA Min.	MA 10	MA Max	Sch. Mx.
Boscobel	13,600.	17,208.	19,357.	14,700.	20,923.	23,535.	23,535.
Fennimore	13,400.	16,100.	17,450.	14,730.	20,130.	21,930.	23,690.
Pr.Du C.	13,800.	17,220.	21,780.	15,237.	20,952.	24,127.	24,747.
Rich.Cen.	14,000.	16,832.	20,136.	15,200.	20,645.	23,065.	23,825.
Riv. Val.	13,850.	17,174.	19,944.	15,235.	20,720.	23,767.	25,262.
Viroqua	14,518.	18,002.	22,467.	15,652.	21,405.	25,631.	n.a.
av w/o R.	13,861.	17,089.	20,189.	15,125.	20,795.	23,675.	24,211.
av steps (Riverdale)			11.5(7)			13.3(11)	
Riverdale	13,900.	17,236.	17,792	15,568.	21,172.	22,418.	23,619.
rank	(3)	(2)	(6)	(2)	(2)	(3)	(6)

(Unit employees are distributed primarily at the BA columns, BA maximums, and MA 10 and maximum areas.)

It should be noted that Fennimore is the lowest paying school district of these comparisons.

Three of the conference schools have settled for 1985-86.

Both parties have made their comparisons on the basis of benchmark analysis showing increases by dollar and per centage amounts at each of the traditional benchmarks. The following is the comparison to the schools which have settled for both dollar and per centage figures:

Increases for 1985-6 school year

District	BA	BA+6	BA MAX	MA	MA+9	MA MAX	SD MAX
Boscobel	950.	1,202.	1,352.	950.	1,352.	1,521.	1,521.
Viroqua	1,161.	1,440.	1,797.	1,252.	1,712.	2,050.	n/a
Fennimore	690.	1,350.	1,680.	690.	870.	930.	560.
	5	4	2	5	6	6	
av	933.	1,330.	1,609.	964.	1,311.	1,500.	
av w/o F.	1,055.	1,321.	1,574.	1,101.	1,532.	1,785.	:
compared to average without Fennimore							
Er.	900.	1,114.	1,152.	1,008.	1,371.	1,451.	1,529.
Er. Diff.	-155.	-207.	-422.	-93.	-161.	-334.	
Ass'n.	1,100.	1,364.	1,408.	1,380.	1,878.	1,988.	2,323.
Ass'n.Diff.	45.	43.	-166.	279.	346.	203.	

District	BA	BA+6	BA MAX	MA	MA+9	MA MAX	SD MAX
Boscobel	7.0	7.0	7.0	6.5	6.5	6.5	6.5
Viroqua	8.0	8.0	8.0	8.0	8.0	8.0	n/a
Fennimore	5.1	8.4	9.6	4.7	4.3	4.2	2.4
	5	4	2	5	6	6	
av w/o F.	7.50	7.50	7.50	7.25	7.25	7.25	:
av	6.70	7.80	8.20	6.40	6.27	6.23	:
Er.	6.5	6.5	6.5	6.5	6.5	6.5	6.5
Ass'n.	7.9	7.9	7.9	8.9	8.9	8.9	9.8

All of these settlements are the second year of two year agreements. Settlements occurring in a later year of a two year agreement may be the result of compromises for a multi-year agreement or merely reflect the best judgment of the parties at the time settlement occurred as to future years. While these settlements still reflect the local wage rates for teachers, they may or may not be indicative of what an appropriate general increase is in their second year. In this case, the secondary comparable group, except for Platteville, have all settled in 1985-6. The evidence of these settlements indicates that, but for the settlement in Fennimore, the other settlements are within the range of settlements occurring in 1985-6 for 1985-6. By benchmark analysis2/, Fennimore's settlement would have been, at best, the second lowest among the five districts offered by the Association, except at the BA 6 step. The settlement of the lowest among that group tended to preserve the number one position of that specific school district. I, therefore, have given the settlement in Fennimore

The following comparisons indicate that for 1985-6 the general increase offered by the Association is closer to the general increase offered by the average of its offered comparables, the Southwest Athletic Conference settlements without Fennimore and the CESA 3 settlements occurring in 1985-6:

Southern Eight 1985-6 settlements

	BA	BA+7	BA MAX	MA	MA+10	MA MAX	SCHED MAX
av.	1,010.	1,266.	1,443.	1,091.	1,575.	1,776.	1,903.
Er.	900.	1,114.	1,152.	1,008.	1,371.	1,451.	1,529.
Ass'n.	1,100.	1,364.	1,408.	1,380.	1,878.	1,988.	2,323.
Er. diff	-110.00	-152.00	-291.00	-83.00	-204.00	-325.00	-374.00
Ass'n. diff	90.00	98.00	-35.00	289.00	303.00	212.00	420.00
av.	7.5	7.6	7.7	7.5	8.0	8.1	8.0
Er.	6.5	6.5	6.5	6.5	6.5	6.5	6.5

2/ It appears that the settlement in Fennimore granted significantly larger increases at particular areas of its schedule, BA 6 and BA maximum (a benchmark not given weight in this dispute.) Depending upon the distribution of teachers in Fennimore, the general increase resulting might well have exceeded that which is implied by the method of analysis used herein.

Southern Eight 1985-6 settlements

	BA	BA+7	BA MAX	MA	MA+10	MA MAX	SCHED MAX
Ass'n.	7.9	7.9	7.9	8.9	8.9	8.9	9.8
Er. diff.	-1.00	-1.10	-1.20	-1.00	-1.50	-1.60	-1.50
Ass'n. diff.	.40	.30	.20	1.40	.90	.80	1.80

CESA 3 comparison 1985-86 increase							
average	1,012.	1,297.	1,417.	1,167.	1,619.	1,740.	1,811.
av.	7.5	7.9	7.7	7.9	8.3	8.1	8.0

Under the facts of this case the offer of either party is appropriate. However, on the basis of the foregoing, the offer of the Association with respect to adjustment in the schedule is not supported, but overall for 1985-6 is closest to appropriate, weighted in accordance with the distribution at the benchmarks considered herein.

Neither party produced evidence with respect to the 1986-7 aspect of the Employer's proposal. In the absence of any evidence, I conclude that circumstances in 1986-7 would be the same and whatever would be appropriate in 1985-6 would be appropriate in 1986-7. Accordingly, the offer of the Employer is slightly less than appropriate for 1986-7. However, the second year of the Employer's proposal is not given independent weight in determining this case.

Health and Dental Premiums

Positions of the Parties

As to health and dental, the Association takes the position that in the negotiations leading to the 1984-5 agreement, the Employer agreed to pay "full" health in exchange for the Association to agree to a change of carriers to one with lower total premiums. Up to that point, the Employer paid only 85%. Additionally, the Association takes the position that the Employer should be required to specify "full" payment when the practice has been full payment and the sepcification is necessary to maintain full payment in a two year agreement when the premium for the second year is unknown.

With respect to the health insurance premium issues, the Employer takes the position that there is no justification for changing premium amounts from contracually specifying a dollar amount equal to the full amount of the premium paid in "full" in the various provisions. It argues that the Association has failed to show any need to change the current practice. It also argues that five of the six other schools it deems primarily comparable similarly specify their premiums in dollar amounts rather than "full".

In reply, the Association denied that the district knew what the dollar amounts of premium costs were going to be at the time it filed its final offer. Further, it notes the Employer has not refuted the Association's argument with respect to internal comparability.

Discussion

The 1984-85 collective bargaining agreement, specified the maximum dollar amounts of premium which the Employer would pay. Association Exhibit 12 demonstrates that the parties, in concluding the agreement, agreed that the Employer would pay the full amount of the premium, expressed as above. It is not now disputed by the Employer that it wishes to pay the full amount of the premium for the term of the current collective bargaining agreement. It is unclear at this time whether the amounts expressed in the Employer's final offer are going to be the full amount of the monthly premium in the second year of its offer. Among the Southwestern Wisconsin Conference schools, one specifies "full" payment, two others specify percentages which are less than full and three specify dollar amounts which may, or may not, be equal to full. I note that Employer Exhibit 102 and

3/ Viroqua has no language with respect to dental premiums.

Association Exhibit 11 disagree as to Richland Center, with the Association Exhibit showing the language apparently recently adopted by the parties in Richland Center. Accordingly, weight is given to the Association Exhibit.3/ The schools relied upon by the Association specify essentially dollar amounts, although one pays half of the excess. Given the parties mutual goal of insuring that the Employer actually pay the full amount of the premium, I conclude that the offer of the Association is closer to the goal of insuring that the Employer is obligated to pay the full amount of the premium during the term of the parties collective bargaining agreement. Otherwise, the Employer's position is favored.

Long Term Disability

Positions of the Parties

The Association proposed creation of a long term disability plan because during the recent school year a teacher fully exhausted all benefits while suffering a major illness. It notes that this problem has occurred twice in the past. It cites six of the fourteen school districts in its comparability group have a long term disability benefit. It notes that other plans provide for long term disability benefits at a lower level because they were then not taxable. They are now taxable. Finally, it notes that there is little or no cost on this item since the policy can only be prospective.

The Employer denies that there is any significant comparability for creating a long term disability policy. It notes that of the six other schools it deems primarily comparable, only one has such a policy. In its view, the Association has shown no need to establish this new benefit.

Discussion

Background

Testimony in this case indicates that on at least one occasion a Riverdale teacher exhausted available sick leave and suffered a long term illness without pay. Although this is a risk common to all sick leave based systems, only one of the Southwestern Conference schools has this benefit. Four of the six other schools relied upon by the Association have any benefit; however, two appear to have very limited provisions. Upon the basis of the foregoing, the position of the Employer is favored.

Retirement Contribution

Positions of the Parties

The Association believes its proposal for the Employer to pay the "full" cost of the employees' share of retirement contribution is to be preferred over the Employer proposal to pay merely 6% which is the current full employee contribution. The Employer has consistently paid the full amount and has specified that it will pay the full amount of administrator's contribution. Ten of its thirteen comparable districts specify the full amount.

The Employer argues that it has always specified its payment of the employee's share of retirement as a percentage, which percentage has, in fact, been equal to the full amount of the employee's retirement contribution. It takes the position that four of the six other schools it deems comparable similary specify their retirement payments and do not use the term "full."

Discussion

Among the Southwestern Wisconsin Confernce schools, one, possibly two, of the six other schools specify "full", the remainder specify percentages. Among the six other comparable schools offered by the Association, half specify full. The Association's comparison to administrators is not well taken. Absent the benefits of collective bargaining and the limitations of an individual contract for specific term, the Employer is free

to modify benefits established by board policy at any time. On the basis of the foregoing, the position of the Employer is to be preferred.

Voluntary Early Retirement

Positions of the Parties

The position of the Association is that its total offer on all issues is to be preferred because the Employer's proposal with respect to voluntary early retirement presents a serious risk of being unlawful. It takes exception to two primary aspects of the Employer's proposal. First, it concludes that the Employer's proposal to provide a bonus for early retirement to those between the ages of 57 and 62, but not those over 62, but less than 65 constitutes unlawful age discrimination prohibited by the federal Age Discrimination in Employment Act, 29 U.S.C. 621, et seq.4/, and by the Wisconsin Fair Employment Practices Act, Section 111.33, Wis. Stats. Similarly, it contends the Employer's proposal providing for the termination of retiree's health insurance benefits upon, inter alia, the commencement of medicare coverage or reaching age 65 is unlawfully discriminatory. With respect to the first issue, the Association, in essence, contends that permanently retired individuals constitute employees protected by the act, and that the proposal of the Employer unjustifiably discriminates on the basis of age. In its view, the Employer's proposal for supplemental payments does not

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4/ The act states in relevant part: Sec. 623 (a) It shall be unlawful for an employer--(1) to fail or refuse to ... otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; ... (c) It shall be unlawful for a labor organization- ... (3) to cause or attempt to cause an employer to dicriminate against an individual in violation of this section. ... (f) It shall not be unlawful for a employer, ... or labor organization - (1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular businesss, or where the differention is based on reasonable factors other than age ... (2) ... to observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subtrefuge to evade the purpose of this act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified in section 12(a) of this Act because of the age of such individual. ... (g)(1) For purposes of this section, any employer must provide that any employee aged 65 or older and any employee's spouse aged 65 or older shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee under age 65. (2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of the Internal Revenue code of 1954. [Section 4(g) was added by Section 116 of Public Law 97-248, effective January 1, 1983, and was amended by Section 2301(b) of Public Law 98-369 effective January 1, 1984, and by Section 9201(b) of Public Law 99-272, effective May 1, 1986. The most recent amendment removed an age-69 upper limit for health care coverage of employees and their spouses, effective May 1, 1986.] (i)(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan. (9) For purposes of this subsection--(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002).

consititute a bona fide retirement plan within the meaning of the law exempting it from age discrimination regulation in that it is neither "bona fide" nor a "plan". Further, if it qualifies as such a "plan" it argues the plan has the effect of coercing employees to involuntarily retire in violation of the act and/or the plan is a "subtrefuge to evade the purpose of the Act" prohibited by the Act. Finally, even if exempt, it argues the plan fails to provide equal benefits without regard to age as required by law. With respect to health insurance, it argues that the provision excluding coverage for those over 65 discrminates between retirees on the basis of age and, therefore, is discriminatory. It argues that the contractual provisions for health insurance have benefits which exceed medicare and that a medicare carve out would have been preferable.

The Employer takes the position that neither offer has support among the comparable districts. It takes the position that its proposal more nearly achieves the goals of the parties. These goals are:

1. reward employees for continuous service, thereby encouraging employees to remain with the district until retirement.

2. induce employees to retire at an earlier age, thus, giving the employer the opportunity to replace higher paid employees with lower salaried employees. In this regard, it argues that the Association's proposal is only concerned with the benefit of the employee. Thus, it argues that, for example, the Association's health insurance proposal permits a retiree to receive benefits from two sources (possibly duplicating benefits) and, for another example, that the Association's proposal permits "retirement" at anytime after fifteen years of service.

Discussion

In this case both parties have proposed to create an early retirement program for the district. The Employer correctly asserts that the parties have a mutual self interest in creating this program in that it:

1. Rewards employees for long service

2. encourages younger employees to remain with the district until retirement.

3. encourages teachers to retire at an earlier age, creating opportunities for the employer to hire new teachers at a lower pay range in the salary schedule.

The main differences between the parties' proposals are as follows:

1. The Association provides benefits for those who "retire" after fifteen years of service; whereas the Employer adds the requirements the employee must be at least 57, but not more than 62 years old.

2. The Association provides for five years of health care benefits; whereas, the Employer terminates benefits when the one of the following occurrs; the employee reaches 65, obtains federal health benefits and/or becomes eligible for medicare.

3. The Employer provides a separability provision which prevents the provision from having prospective effect if found unlawful. The Association does not have a separate separability provision, but relies upon the current agreement's savings clause, Article XIV, which provides that if a provision would be held invalid, the remaining provisions would not be affected thereby and the parties would enter into negotiations for a successor. (in any event the Employer is not challenging the lawfulness of the Association proposal.) The main dispute framed by the parties over this issue is which proposal more nearly effects these goals without unduly generating undesireable side effects.

1. Construction

The Employer correctly points to ambiguity in the Association's proposal in that it does not define the term "retirement." The Employer alleged in its brief that this would entitle an employee to "retire" at any age after fifteen years service, thus, imposing substantial cost on the Employer.5/ Although the Association filed a reply brief it did not deny this possible construction. the term "retirment" is not defined in the Association's proposal. Ordinarily, the term would be given its normal meaning in arbitration which definition would probably preclude most abuses. On the otherhand, the definition accorded the word could be construed to adopt the definition provided in the Wisconsin Retirement System, Sec. 40.02, Wis. Stats. and former Sec. 42.245, Wis. Stats., because the Association's proposal appears to coordinate therewith. If the latter is the case, it appears unlikely that there could be any substantial abuse. Thus, for non disability retirements, it appears likely that the earliest would be age 55. Similarly the Employer's argument that there might be duplication of health insurance payments is unlikely, in that in the undersigned's experience most such policies provide at least for accomodating benefits to the extent that duplicate payments do not occur.

2. Comparability

Of the fourteen schools offered by the Association as comparable, only Boscobel, Lancaster, Mineral Point, Platteville, and River Valley have voluntary early retirment programs. The following is a comparison of those plans:

	earliest	latest	min yrs.	health benefit
Boscobel	50	65	15	3 years (no termination at 65)
Lancaster	62	70	20	3 yrs, but not past 65
Mineral Pt	62	65	15	3 yrs, but not past 65
Platteville	62	statutory	15	50% ending at age 65
Riv. Val.	55	70	18	50% ending when elig. for medicare

On the basis of the foregoing, it is clear that neither of the eligibility standards of the parties is comparable, however, that of the Employer is closest to the time frame used in the area. It is clear that the eligibility concept of the Association being available to those who retire in the period 62 to 65 years of age is more comparable. As to health insurance, the proposal of the Employer is clearly comparable.

Lawful Authority of the Employer

The Association has challenged the Employer's proposal on the basis that it presents a substantial risk of unlawfulness and, therefore, should not be adopted. It is important to note that the Association did not allege or attempt to show any unlawful motivation by the Employer. Further, there was, in fact, no evidence or other conduct by the Employer during the course of these proceedings indicating even the slightest hint of unlawful motivation. The Association is correct in its position that the Employer's proposal for a 57 to 62 year old benefit could subject the instant contract to litigation. The position of the Association raises legitimate issues under the Age Discrimination in Employment Act and, presumably to a lesser extent under Wisconsin law.

It appears the position of the Association is based upon the position of the EEOC in interpreting the Age Discrimination in

5/ Employer brief page 48; however, this issue was not fully developed.

Employment Act, contained in Field Note 35, question 20 6/ However, it does not appear that the courts have endorsed the view exposed by the Association herein. In two recent cases, the position taken by the Association has been rejected by the courts: Patterson v. Independent School District 35 FEP Cases 1236 (C.A. 8, 1984); Cipriano v. Bd. of Education of North Tonawanda 40 FEP Cases 355 (C.A. 2, 1986). These cases both hold that a plan similar to the proposal of the Employer is a bona fide retirment plan subject to the exception in the act. As to this element it is likely that the Seventh Court of Appeals which is responsible for this area is in accord, EEOC v. Fox Point School District 38 FEP 1774 (C.A. 7, 1985). While these cases are not entirely dispositive of the issues raised, it is not highly likely such actions would prevail.

Ordinarily, a decision to adopt a collective bargaining agreement provision which deliberately adopts a litigation position ought to be voluntarily bargained. A party proposing such a position should be required to show that either the matter is of minor consequence or that the adoption of such a position is substantially justified. Evaluation of an argument of substantial justification involves the following factors:

1. importance of the objectives;

2. the availability of other reasonable alternatives which do not require litigation;

3. the nature and degree of the liability involved;

4. the position of the opposing party and the impact upon it, including the costs of defending the action and liabilities involved. Included in this aspect is the evaluation of whether the opposing party has made efforts to avoid the situation.

For the reasons discussed below, it is my conclusion that the objectives to be sought by the 57 to 62 year old provision are not sufficiently worthwhile to merit adopting a litigation position.

3. other consideration

Among the other factors often considered in collective bargaining is the impact a given proposal will have on the work force. The parties both seek to create a voluntary early retirement proposal which rewards employees of long service by making it easier for them to retire. In turn, the Employer benefits from the opportunity to hire lower paid employees and the ability to retain existing employees to retirement. The fundamental difference between the employer 57 to 62 window and the Association's fifteen year minimum requirement is that the Association's proposal supplements the current retirement system to permit the employee to voluntarily retire early at any time the employee chooses to retire early. In this respect it is more of a positive incentive. If the employee chooses not to take advantage, he or she is not deprived of the opportunity. The Employer proposal on the otherhand similarly provides a supplemental benefit which eases the burden into retirement. However, if the employee does not take advantage by age 62 or(in the case of one unit employee) is 62 at the time of adoption of the proposal the employee is penalized and must wait until full retirement benefits are available. This tends to be more coercive. The law discussed above is indicative of the nature of the resentments built by coercive tactics. Under the facts of this case the more positive, less coercive approach is to be preferred.7/

6/ Question and answer 20 state: "Q. Under what circumstances should retirement incentives be considered a potential violation of the ADEA?

7/ This benefit does not appear coordinated with the statutory age 62 early retirement benefit.

M-Team Pay 8/

Positions of the Parties

The Association takes the view that its proposal with respect to M-team meetings is necessary and reasonable. Its main position is that teachers should be compensated at a reasonable hourly rate for all M-team work beyond the normal 4:00 p.m. ending time. It argues that management has abused the one-hour grace period allowed for meetings scheduled to start before 4:00 p.m., by consistently scheduling meetings at 3:30 p.m. Thus, there have been 166 M-team meetings in the past two years, of which 106 were scheduled in this way. As a result it notes that in 112 of these meetings teachers have not received pay for hours after 4:00 p.m. Further, it argues the existing provision creates substantial inequity for teachers in that; 1. some are paid nothing or less than other teachers for the same amount of time spent after 4:00 p.m. in M-team meetings, 2. lack of compensation creates a disparate impact on the 8 to 11 teachers who must regularly attend M-team meetings. Finally, it sees its proposal as a low cost item.

The Employer takes the position that the existing language provides adequate compensation for M-team meetings. It believes there is little justification for increasing the pay from $12 to $15 per meeting when no other schools in the conference even pay for M-team meetings.

Discussion

1. external comparability

Association Exhibit 26 demonstrates that virtually all area employers consider meetings such as M-team meetings as compensated by the annual salary. A few limit the number of meetings and some provide additional compensation if the number of meetings is excessive. There is no evidence as to how many employers actually frequently require M-team meetings after the end of the day. For this reason, external comparability is of little value as to this issue.

2. public interest and other considerations

A considerable portion of this dispute involves the classical struggle between the Employer and the Association as to whether work should be compensated as being in addition to that specified in the salary schedule. The public interest in all such disputes is clear, but its application requires the use of experienced judgment. The public has an interest in obtaining the best education available for its means at the lowest practical cost. In order to efficiently meet this goal, it is necessary to hire, encourage and retain well qualified professional staff. Simply phrased the public interest always is in adequately compensating employees for their work. While reasonable minds can, and do, disagree as to what adequate compensation is, there can be no disagreement that there is no public interest in obtaining work from employees without compensation.

The contract provision in this case can be read as being intended to provide additional pay for the duty of attending M-team meetings as the Association has alleged or it can be read as delineating the difference between the level of extra work which falls outside the scope of the salaried teaching contract. An additional purpose of this provision may be to discourage late or long M-team meetings. Because of these latter contructions, the fact that the Employer has routinely scheduled these meetings at 3:00 p.m. does not appear to be any kind of abuse, but merely obeying a perceived intention of the contract. It does appear, however, that the provision parallels Article XVI, Section A. That provision also provides that a small amount of meeting time after school is included in the teaching contract. That provision specifically limits the amount of meetings which can be

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8/ Travel pay is given no independent weight in this case.

held. In this case, the evidence is clear that a small number of teachers regularly attend M-team meetings. Because these meetings are frequently at 3:30 p.m. and end before 5:00 p.m., these teachers often do not receive any additional pay M-team meetings. Employer witness Melby did testify without contradiction that M-team members did receive additional prepartion time and time for needed testing. He did not testify that they receive any other compensation when they attended a large number of meetings scheduled within the parameters of the existing M-team provision. The weight of the testimony in this case is that unit employees who frequently attend M-team meetings are not compensated fully for the additional work outside the school day. Accordingly, the Association position is preferred on this issue.

TEACHING HOURS AND CLASS LOADS

Positions of the Parties

The Employer believes its proposal as to teaching hours and class loads is more justified. It does not take issue with the change in number of class periods proposed by the Association, but instead takes issue with the proposals creating a minimum 225 minutes per week of preparation time and making substitute teaching voluntary. As to the former, it primarily objects to the specification of an amount of preparation time and the increase in pay for lost preparation time from the current $8.00 per period to one-half the teacher's regular hourly pay. In its view, its offer to increase the $8.00 payment ot $9.00 is more appropriate. It notes that only one of the six other schools it deems primarily comparable, River Valley, has any provision relating to elementary preparation time. It strongly objects to the Association's proposal to make substituting voluntary with the teacher. It argues that this proposal may leave it in the situation that it would be unable to deliver services even though there is a qualified teacher physically available to deliver them. It indicates it has proposed to eliminate the split/combination class pay because it no longer plans such classes.

The Association states that it proposes to equalize the number of periods and number of periods in which teachers must have duty of the junior high school with that of the senior high school on the basis of equity among teachers. It sees no reason why teachers who work harder should be paid the same as other teachers. It notes that, currently, junior high school teachers teach seven periods of 42.5 minutes each, (297.5 minutes), plus a twenty minute home room period, whereas senior high teachers teach six forty-five minute periods (270 minutes). It takes the position that it needs a tightened preparation time provision to eliminate the Employer's encroachment on preparation time with minor clerical and ministerial duties which could be performed by non professional personnel. The Association opposes the deletion of split/combination class pay. It notes the Employer has offered no rationale for deletion and affirmatively argues that it bargained hard for the benefit in 1984-5.

Discussion

background circumstances

It is undisputed that the existing preparation system has operated in the same fashion for at least 13 years. Elementary teachers receive the least amount of preparation time. They have ususally received 160 minutes of preparation time taken when students are at recess or in special subjects. The basic concern underlying this proposal is that unit teachers have been required to do lunch counts, work which is admittedly non professional. It is unclear whether this has increased in the last years. The teachers believe the Employer is unresponsive to their request to eliminate this petty work and the Employer takes the position that it is not possible to do it any other way. There was no testimony underlying the Association's request with respect to making substitute work voluntary. It should be noted that one of the Association's witnesses asserted that a reason for the need for the guaranteed minimum preparation time was that she lost

preparation time when students were off for snow or holidays.

comparability

The following is the evidence of comparability with respect to the issues involved herein:

Southwestern Conference school	class sch.	elementary extra assignment pay	elementary preparation time
Boscobel	normal class load 25 periods per week, all grade levels	$10 (elementary)	no guarentee at elementary level, one prep. period other levels
Fennimore	no language	none	no language
Prairie du Chien	none	none	amount unspecified all teachers have scheduled preparation periods High and junior get min. 1 sched prep. period per day
Richland Center (tent. agreement)	norm. is 25.5 hrs. instruction per week in middle school	none, but limited teacher use	300 minutes/week 15 minute blocks
Viroqua	normal teaching load is defined by building use agreement,	limited use	30 minutes preparation per day minimum
River Valley	maximum 5 teaching periods in jr. and sr. high schools	$10	weekly prep. during specials

Comparisons offered by the Association are not significantly different. Four of the six other comparables offered by the Employer have language relating to how much contact time a teacher must have. Three of the four appear to rely on past practice and there has been no evidence as to how other districts have arrived at their class schedules. Given that structure, it appears unlikely those employers would retain unilateral control over the number and length of periods. The best that can be said on the existing record is that the majority of comparables do regulate contact in a context which suggests agreement on the premises of approximate length and number of periods. No further inference in support of either party's proposals for length of day and amount of contact can be drawn. The available evidence of comparisons tends to support the Employer's proposal for pay for short term loss of preparation time, since most other schools do not have any other provision for pay. Viroqua and Richland Center, limit the amount of time a teacher may be used during their preparation time; Viroqua by banning it, supports the Association herein, Richland Center, by allowing it twice without pay, supports the Employer herein. With respect to guaranteed preparation time, 5 of 6 regulate preparation time. Of the six, two follow a scheme closer to the Association's level of defining and requiring preparation time than they are to the Employer's. It would appear that at Boscobel and River Valley, past practice might govern at the elementary level in order to make substitute pay work. Based upon the record, Richland Center and Viroqua are the only comparables limiting substitute time. In Richland Center, the Employer may use a teacher no more than twice per month, and it appears in Viroqua that the Employer may not use a teacher to substitute during the guaranteed preparation time.

other factors

Arbitrators generally require the party making a proposal to show a need for a change and that its proposal reasonably accomplishes what is needed. It should also be noted that where a party is proposing to prohibit the Employer from requiring

unit employees to do work which has traditionally been work performed by the unit (in this case, making substitution voluntary), but not necessarily exclusively performed by unit employees, the party making such a proposal must show that the Employer will have sufficient means to have the work performed. Assuming for the purposes of argument that lunch count problems justify some change, the facts in this case do not warrant the sweeping improvements and limitations sought by the Association with respect to this issue.

VACANCIES, TRANSFERS AND REASSIGNMENTS

Positions of the Parties

The Association takes the position that its proposal is necessary to correct deficencies in current contract language. Specifically, it notes employees must apply for vacancies before school lets out for the summer, even though most vacancies first occur in the summer. It notes that recently the district reorganized and, in the process, transferred teachers without regard to their personal preferences. It believes this language is necessary to protect the interests of teachers. It notes teachers have, at the same time, been denied transfers which they requested or have been involuntarily transferred away from positions which took them a long time to obtain.

The Employer takes the position that its proposal for change in the current vacancy language is needed to guarantee to teachers and itself that teachers will only be assigned to areas in which they are certified to teach or certifiable. On the otherhand, it takes the position that the Association has shown no need to completely change the language of the current vacancy provisions of the agreement. It notes that the Association's position is not supported by any comparisons.

Discussion

background

The evidence indicates that Riverdale is a district with a large geographical area similar to that of other conference schools. The undisputed testimony in this case is that the district has recently reorganized and, in accordance with its current policy, made involuntary transfers of teachers based soley upon its assessment of teacher skills. It is also undisputed that this caused some teachers to lose assignments which they had worked hard to get. Similarly, it is clear that the current posting provision does not give teachers an adequate notice of existing vacancies or give teachers an adequate opportunity to seek specific positions.

comparisons

The following is a comparison to schools in the Southwest Wisconsin Conference as to the existence of posting provisions and limitations on the employer right to transfer. It should be noted that the additional comparisons offered by the Association do not vary the result

School	Posting	Transfer limitation
Boscobel	posting	employer discretion
Fennimore	none	none
Prairie du Chien	posting	none
Richland Center	none	none
River Valley	posting	employer discretion
Viroqua	no posting	senior qualified teacher

other considerations

The current posting provision has proved unworkable. The Association has credibly demonstrated that employee desires have not been given sufficient consideration in transfer determinations. Some modification is warranted. Clearly, adequate notice of existing vacancies is a pre-requisite to giving adequate consideration to employee interests. The Association has

not demonstrated that a strict seniority system is necessary for this unit at this time; however, the Association proposal is closer to that which is appropriate. Accordingly, the Association's position is favored as to this issue.

Weight

As stated above, the mediator-arbitrator must select the final offer which is closest to appropriate. The mediator-arbitrator is not permitted to modify the final offers. The weight to be assigned to a specific statutory critereon and issue is left to the mediator-arbitrator. Under this system, the party who wins "carries along" the less desireable parts of its offer. The purpose of this is to encourage the parties to narrow their final offers to look as good as possible. In this case, the issues with the most significant weight are wages, voluntary early retirement, hours, and vacancies. Extra assignments and other issues are given no weight or less than determinative weight. In general, the Association's proposal is preferable. However, it is necessary to note that the Association's proposal with respect to hours is without substantial foundation. Had that issue been the sole issue in this case, it would not have been adopted. The proposal of the Association on that subject appears to have the potential to have such far reaching unjustied consequences that it nearly outweighs the positive aspects to the Association's entire proposal. I note that the agreement relating to this award will have expired by the time the award was rendered and that the parties will be immediately negotiating a successor.

AWARD

That the final offer of the Association for the 1985-6 year be adopted.

Dated at Milwaukee, Wisconsin, this 12 day of February, 1987.

Stanley H. Michelstetter II,
Mediator-Arbitrator