

FILED
JUL 29 1987

WISCONSIN EMPLOYERS
RELATIONS COMMISSION

STATE OF WISCONSIN
ARBITRATION

IN THE MATTER OF MEDIATION/ARBITRATION
BETWEEN

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

and

MENOMONEE FALLS SCHOOL DISTRICT

CASE 52 No. 37457
MED/ARB-4021
AWARD
Decision No. 24142-A

Introduction

The Menomonee Falls School District Employees, Local 2765, AFSCME, AFL-CIO (hereafter Union) filed a petition with the Wisconsin Employment Relations Commission (hereafter WERC) requesting mediation/arbitration of its dispute over the terms of a new collective bargaining agreement with the Menomonee Falls School District (hereafter Employer or Board) pursuant to Section 111.70 (4) (cm) 6, Wis. Stat. After an investigation the WERC determined that a deadlock existed and ordered mediation/arbitration. The parties selected Arlen Christenson of Madison, Wisconsin to serve as mediator/arbitrator and a WERC order making such an appointment was issued on January 12, 1987. A meeting was held on April 7, 1987 and, after mediation was unsuccessful, an arbitration hearing was held on that same date. The parties had full opportunity to present evidence and argument in support of their respective final offers and at the close of the hearing agreed upon a briefing schedule. The proceedings were not reported and the record consists of the arbitrator's notes and the exhibits of the parties. Briefs were filed with the arbitrator by June 20, 1987.

Appearances

Gary M. Ruesch, Esq., Mulcahy & Wherry, S.C., Milwaukee, Wisconsin appeared on behalf of the District.

Richard W. Abelson, Representative, AFSCME, AFL-CIO, Waukesha, Wisconsin appeared on behalf of the Union.

Issue

The parties have agreed to all of the terms of a collective bargaining agreement with the exception of four issues still in dispute which may be summarized as follows:

1. Health Insurance.

Board Offer: Modify the terms of the collective bargaining agreement to require employees to contribute an amount toward the monthly premiums \$.28 a month or .3% of the cost of the premium for single coverage or \$.64 a month or .3% of the cost of family coverage.

Union Offer: Retain the present language requiring the District to pay 100% of the cost of premiums.

2. Dental Insurance.

Board Offer: Modify the terms of the collective bargaining agreement to require employees to contribute an amount toward the monthly premiums of \$.50 a month or 4.5% of the cost of single coverage or \$1.60 a month or 4.8% of the cost of family coverage.

Union Offer: Retain the present language requiring the District to pay 100% of the cost of premiums.

3. Health Insurance for Retirees.

Board Offer: Modify the terms of the collective bargaining agreement to change the number of years needed to qualify to 15.

Union Offer: Retain the current language establishing the number of years needed to qualify at 10.

4. Duration clause.

Board Offer: A two year agreement with a reopener after one year encompassing wages and health and dental insurance.

Union Offer: A two year agreement with a reopener after one year on wages only.

The parties have stipulated to a wage increase of 6% across the board for the 1986-87 school year.

Discussion

Section 111.70 (4) (cm)7, Wis. Stat. provides that an arbitrator shall give weight to eight listed factors. The parties, however, have presented evidence and argument relating to just four of those factors. Those factors, considered by the parties to be controlling, are:

- (1) Comparisons with other bargaining units of the employer.
- (2) The interests and welfare of the public.
- (3) Comparisons with other employees performing similar services.
- (4) Other factors normally considered in the determination of wages, hours and conditions of employment through voluntary collective bargaining.

Accordingly this discussion and analysis will focus primarily on these four factors keeping the other statutory criteria in mind as well.

None of the unresolved issues involve any significant immediate financial impact. The Board's proposal for an employee contribution to health and dental insurance premiums involves at most about two dollars a month per employee; the health insurance for retirees issue, cannot be priced accurately with the information available but cannot be very costly and the duration issue obviously has no direct cost impact. The items at issue clearly involve more a concern for and mutual predictions about their future impact than for their immediate consequences. Because of this it is necessary to engage in some degree of speculation about their impact; in some key instances without much evidence to support the speculation.

In the following discussion the issues will be discussed separately except for the health and dental insurance issues which will be discussed together.

Health and Dental Insurance.

The collective bargaining agreement of the parties has, for a number of years, provided that the Board pays 100% of the premiums for health and dental insurance. In recent years the Board has successfully negotiated with its other four bargaining units; teachers, clerical employees, food service workers and aides, for an employee contribution toward those premiums. The Board contends that, in the interest of uniformity and equity, the maintenance and custodial employees should also be required to contribute. Such a contribution, the Board argues, will also act as a cost control measure thus dealing with one of the most significant problems facing collective bargaining; that of medical costs. The controlling statutory criterion, in the Board's view, is that which requires consideration of the wages, hours and conditions of employment of other employees of the same employer. Such comparisons should be given more weight than those with employees in other comparable communities because the Union's data on external comparisons are "dangerously incomplete" and does not compare insurance programs of comparable coverage.

The Union argues that the Board is attempting to gain a change in the terms of the collective bargaining agreement which it was unable to obtain in collective bargaining or in previous interest arbitration proceedings. This the Union characterizes as the "shopping around theory" in which the Board seeks to find an arbitrator willing to accept its arguments. Moreover, the Union argues, the present language regarding health and dental insurance premiums was the product of the give and take of bargaining including a significant wage concession on the part of the Union to retain the 100% insurance premium payment. The Union points out that as an attempt at medical cost containment the stipulations of the parties, which will become a part of the new collective bargaining agreement, include a "pre-admission hospital certification program" which, it asserts, will result in a 5% reduction in premiums. The Union further contends that requiring employees to pay a portion of the insurance premium, because it will be the same for all employees regardless of wage level, is regressive in that lower paid employees will pay a higher percentage of their income. Finally the Union argues that the external comparisons favor its proposal as the majority of comparable employers pay 100% of insurance premiums.

The Union's contention that the Board must carry the burden of persuasion in support of its proposal to change the terms of the existing collective bargaining agreement is well taken and consistent with the virtually uniform view expressed in interest arbitration awards. When the parties have reached an agreement through collective bargaining an arbitrator is appropriately reluctant to impose a contrary "agreement." That is because the legislature has chosen to commit policy making regarding bargainable subjects to collective bargaining. When those policy choices are embodied in a collective bargaining agreement they should not ordinarily be disturbed unless and until the parties agree to do so. When the parties reach impasse on a collective bargaining agreement it is, of course, necessary to resolve that impasse. The means of resolution the legislature has chosen is arbitration. An arbitrator should be ever conscious, however, that the purpose of the entire exercise is to resolve issues by agreement and an award should attempt to achieve a result as close as possible to that which the parties would or should have reached through agreement. When an issue has been resolved by prior agreement the party seeking to change that resolution must carry the burden of establishing the need for change.

The Board seeks to sustain its burden of persuasion on this issue primarily by reliance on internal comparisons and upon the need to come up with cost containment measures to deal with the rapidly rising costs of medical and dental care.

Internal comparisons are critical, the Board contends, because the maintenance and custodial unit is the only unit with which it bargains that does not share in the cost of medical and dental premiums. In fairness and in pursuit of uniform treatment, the maintenance and custodial unit should as well. This argument,

however, proves too much because the other bargaining units are not treated equally or uniformly in this regard. Nor would the Board's final offer place the maintenance and custodial unit in a position of equality. The employees in each of the other units now contribute different amounts toward insurance premiums. For family health insurance coverage, for example, those amounts vary from the \$93.92 a month paid by teacher aides to the \$10.22 paid by teachers and \$5.00 a month by administrative employees. One of the reasons for the lower contribution by teachers and administrative employees is that they, unlike other employees, must pay a \$100/\$200 deductible before coverage begins. The Board's proposal is that the maintenance and custodial unit pay only \$.64 a month for family coverage. There are, no doubt, good and sufficient reasons for this different treatment. On its face, however, a regime which has the maintenance and custodial employees paying \$.64 a month differs little from the equality and uniformity standpoint from one in which they pay nothing. In either case each of the employee groups pays a significantly different amount both in dollar terms and in terms of percentage of the premium. Likewise each is treated differently in other respects such as the requirement for the payment of a deductible amount before coverage begins.

The Board contends nevertheless that the requirement that the employees in the maintenance and custodial unit pay part of the premiums is an important principle and leads to better cost containment. There is, however, no factual support in the record for this assertion. It is the same argument that was made in the 1983-1984 arbitration proceeding between the same parties which culminated in an award by arbitrator Weisberger which concludes that the contention is not adequately supported. As that award points out other cost containment measures may work as well or better. In this case, for example, the Union points out that it has agreed to a pre-admission certification program which promises some cost reduction. There may be value in exploring other measures such as an up front deductible as has been agreed to by some other employees, or other methods of co-payment. Indeed the exploration of different ways to approach cost containment may be the best reason for avoiding the uniformity the Board argues for. Experimentation, which uniformity prevents, might demonstrate the effectiveness of measures which could then be incorporated into other agreements.

I cannot accept the Union's contention that it is somehow improper for the Board to again insist to the point of impasse that the Union agree to a shared premium cost proposal. The failure to persuade an arbitrator at one time does not foreclose a later attempt with a different arbitrator. This is not necessarily just "shopping around". Conditions may have changed, new insights may have been developed or other reasons for change may exist. Nevertheless the Board's arguments on this issue are not persuasive. The current provision was agreed to by the parties and the Board must carry the burden of persuasion that under the statutory criteria a change is appropriate. That burden has not been sustained.

Health Insurance for Retirees.

The Board's final offer proposes to change the number of years necessary to qualify for paid health insurance upon retirement from 10 to 15. The current provision became a part of the collective bargaining agreement as a result of the arbitrator's selection of the Union's final offer in an arbitration between the Board and Union in 1985. In the course of his discussion of the issue, arbitrator Malamud expressed reservations about the 10 year provision and concluded that on that issue the Board had the better of the argument. Nevertheless, because he found the Union's final offer to be better overall, it was adopted and the 10 year provision became part of the collective bargaining agreement. The Board contends, in effect, that this is now an opportunity to correct this problem and incorporate a more reasonable 15 year eligibility requirement. This, the Board points out, is more consistent with both internal and external comparables.

The Union contends that because the provision has been in the agreement for just one year it is inappropriate for the Board to immediately seek a change through arbitration. The Union also points out that the impact of the provision is not a significant cost item since, for example, only two of the five employees who retired in the last year benefitted from it. The Union also argues that it is critical that neither of these employees will be entitled to insurance premium payment in their retirement if the clause is changed. To make this change after they have retired in reliance on their eligibility is unfair. Finally the Union argues that internal comparisons such as that with the teachers' contract are inappropriate since other retirement programs contain other provisions different from those applicable to maintenance and custodial employees. "To key on one unlike point in two different programs and allege that it must be the same, while failing to provide the plus-side benefits, is ridiculous", the Union contends.

The contract provision at issue, unlike the medical and dental premium provision discussed above, did not come into the collective bargaining agreement by agreement of the parties. It was imposed reluctantly by a previous arbitrator in accepting a Union final offer. The rationale advanced above for imposing a burden of persuasion on the party advocating a change in a previously agreed upon contract provision is, for that reason, inapplicable. Nevertheless the provision is a part of the agreement and the party proposing a change must, at least, provide some reason for choosing its proposal other than that the provision was imposed in the first instance.

On the face of it the Board's proposal is supported by both internal and external comparables. None of the internal comparables include an eligibility period as short as 10 years and, as best as can be determined, no more than one of the external comparables does so. If we were writing on a clean slate the Board's offer would clearly be preferable on this issue. The Union, however, raises an important point when it identifies the problem of the reliance of the recent

retirees on their entitlement to paid health insurance benefits. For those individuals this is a substantial financial consideration at the time of retirement. On the other hand, in light of the cost of the entire package of employee benefits, it is a considerably smaller cost item to the Board. The Board's final offer provides no assurance that this benefit will not be taken away after these employees have retired. For this reason alone the Union's final offer on this issue is preferable.

Duration.

The only difference between the final offers on the issue of duration is that the Board's offer would require negotiations in the second year on health and dental insurance in addition to wages and the Union's offer would limit the reopener to wages. The question is which of the offers will best serve the interests and welfare of the public. The Board contends that its broader reopener will enable the parties to consider the knotty issue of health and dental insurance premiums and other cost containment measures and will thus contribute to the stability of negotiations. The Union argues that the parties will negotiate over the total cost of a package in any event and the cost of health and dental insurance will inevitably be taken into account in the party's negotiations.

The Board's argument in this regard is the more persuasive. The Union's approach will bring the issue of health and dental insurance and cost containment into negotiations only indirectly despite the fact that it continues to be one of the most significant issues dividing the parties. The various approaches to cost containment should be discussed directly. A realistic discussion of solutions may be possible under the Union's proposal for a reopener on wages alone but it is less likely. For that reason the Board's proposal on the contract duration issue is preferable.

Conclusion.

Applying the statutory criteria the Union's final offer is the better of the two offers in respect to three of the four issues in dispute. On the whole the negative impacts of adopting the Board's offer outweigh the benefits that could arise from the broader discussions dealing directly with the medical costs issue in the next negotiations. At the same time the Board's concern with medical costs is amply justified. It is to be hoped that the parties will be able to address these matters as directly and as effectively as possible.

Award

Based upon the statutory criteria in Section 111.70 (4) (cm)7 and the evidence and argument presented by the parties and for the reasons stated above the final offer of the Union is selected and it, together with the stipulations of the parties, shall become a part of the collective bargaining agreement between the parties.

Dated at Madison Wisconsin this 10th day of July, 1987.



Arlen Christenson, Mediator/Arbitrator