STATE OF WISCONSIN

BEFORE THE ARBITRATOR

In the Matter of the Petition of WEST CENTRAL EDUCATION ASSOCIATION To Initiate Arbitration Between said Petitioner and PLUM CITY SCHOOL DISTRICT	Case 18 No. 44582 INT/ARB-5778 Decision No. 26824-A

Appearances:

Mr. James H. Begalke, Executive Director, West Central Education Association, appearing on behalf of the Association.
Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by Mr. Stephen L. Weld, appearing on behalf of the Employer.

ARBITRATION AWARD:

On April 1, 1991, the Wisconsin Employment Relations Commission appointed the undersigned Arbitrator, pursuant to 111.70 (4) (cm) 6. and 7. of the Wisconsin Municipal Employment Relations Act, to resolve an impasse existing between West Central Education Association, referred to herein as the Association, and Plum City School District, referred to herein as the District or the Employer, with respect to the issues specified below. The proceedings were conducted pursuant to Wis. Stats. 111.70 (4)(cm). Hearing was held at Plum City, Wisconsin, on June 12, 1991, at which time the parties were present and given full opportunity to present oral and written evidence and to make relevant argument. The proceedings were not transcribed, however, briefs and reply briefs were filed in the matter. Reply briefs were exchanged by the Arbitrator on August 5, 1991. In a footnote at page 2 of the Employer's brief, the Employer made an offer of settlement to the

Association. On August 5, 1991, the Arbitrator requested the Association to notify the Arbitrator and the Employer Counsel whether the Employer offer was acceptable to the Association. The undersigned held all matters in abeyance until he received word from the Association with respect to the acceptance of the Employer proposal for settlement. In a letter dated August 13, 1991, the Executive Director of the Association advised the Arbitrator that the Employer's proposal for settlement was unacceptable. The Association response was received by the Arbitrator on August 15, 1991, at which time the record was completed and closed.

THE ISSUES:

The issues in dispute between the parties include the District's proposal to amend the Management Rights clause of the Agreement so as to include a limited subcontracting provision in that clause; the parties' proposals for the amount of premium participation by the Employer for health insurance benefits; and the parties' proposals for the general increases for extracurricular assignments and for the salary schedule.

The provisions of the final offers are as follows:

1. Management Rights

   Association

   The Association proposes no change to the provisions of the Management Rights clause.

   Employer

   The Employer proposes to add the following paragraph to the Management Rights clause:

   "As in the past, the District continues to have the right to contract out for goods and services. Prior examples of past contracting out for professional services include contracts with CESA 11, nearby school districts, Chippewa Valley Technical College, the University of Wisconsin, other technical schools, and other universities/colleges.

"'The right to contract out for goods and services specifically includes the right to implement satellite/distance learning programs provided those programs are administered consistent with DPI regulations."

2. Insurance Benefits

Association

A. Medical Insurance. Change the first sentence to read: The Plum City schools will pay dollar amount equal to a 93% contribution of health insurance premiums by the Employer in 1990-91 and 1991-92' (for 1990-91 the dollar amount of the Board contribution will be $299.65 a month for family coverage and $116.47 per month for single) for the premiums of the individual teacher for hospitalization and major medical insurance with pre-admission review.

Employer

Article 10. Revise paragraph A to read as follows:

"The District will pay up to $299.65 for family coverage and up to $116.47 for single coverage for the premiums of the individual teacher for hospitalization and major medical insurance with pre-admission review in the 1990-91 school year. In the 1991-92 school year, the School District will pay up to 5% of the new premiums costs. This will be added to the 1990-91 dollar contribution. In addition, any increase in the premium costs which exceed 5% will be split on a 50-50 basis. Instances in which there may be a question of double coverage in the family, the family will be required to show proof that double coverage is not being provided. The School Board will not provide double coverage of this insurance."

3. Salary Adjustments

Association

Salaries listed in Article 16 and Article 22 will be adjusted by 5% in 1990-91 and 5% in 1991-92.

Employer

Article 16. All rates will be increased by 5% in 1990-91 and 4.75% in 1991-92.

Article 22. All rates will be increased by 5% in 1990-91 and 4.75% in 1991-92.

Appendix A - Wages. Increase each cell of the grid by 5% in the 1990-91 school year and add an MA+16 column. Increase each cell of the 1990-91 grid by 4.75% in the 1991-92 school year."[1]

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[1]While the Association final offer does not refer to the addition of the MA+16 column in its final offer, it does, however, reference an attached salary schedule which shows that they have proposed the MA+16 column as it is contained in the Employer's final offer.

DISCUSSION:

Wis. Stats. 111.70 (4)(cm) 7. directs the Arbitrator to give weight to the factors found in subsections a. thru j. when making decisions under the arbitration procedures authorized in that paragraph. The undersigned, therefore, will review the evidence adduced at hearing, and consider the arguments of the parties in light of that statutory criteria.

As set forth in the preceding section of this award, there are three issues that are disputed between the parties: the Employer premium contribution for health insurance, the amount of salary increase, and the Employer proposal with respect to a modified subcontracting provision in the Management Rights clause. A review of the evidence satisfies the undersigned that the dispute with respect to the economics which relate to the Employer contribution for health insurance premiums and for the general salary increases are so narrow that the outcome of this dispute cannot be determined by those issues. The Association correctly points out at page 51 of its initial brief:

> "At the arbitration hearing the parties agreed that the crucial issue in the instant matter was the Board proposal to add language to Article 3."

Moreover, the record evidence establishes that the economics are identical for the first year of the agreement (1990-91). With respect to 1991-92, the Association proposes a 5% wage increase compared to the 4.5% wage increase proposal of the Employer. Thus, the Association proposal carries with it a slightly higher salary schedule and extracurricular schedule increases. (.25%) In looking at the total package costs for 1991-92, we find from

Employer revised Exhibits 5 and 6 that the average dollar increase for returning teacher when considering salary increases and fringe benefits increases inclusive of health insurance premiums establish a higher dollar per returning teacher pursuant to the Employer offer than that generated by the Associa-tion offer. The Employer revised Exhibits 5 and 6 establish that the Employer offer generates an average dollar per returning teacher (package) of $2,651.00 compared to $2,641.00 generated by the Association offer. Thus, the Employer offer results in a $10.00 per teacher higher increase for the year 1991-92 than does that of the Association when considering salaries and fringe benefits. While the Employer offer generates more money than the Association offer, the $10.00 differential can hardly establish a preference for one offer or the other and it follows therefrom that the evidence fails to support a preference for either party's final offer when considering these economic issues. The outcome, therefore, must necessarily turn on which party's position is selected in the limited subcontracting dispute.

DETERMINATION OF THE COMPARABLES:

The parties adduced a considerable volume of evidence and devoted a considerable number of pages of their briefs arguing which set of comparables are the most appropriate. The Employer proposes the Athletic Conference (Dunn-St. Croix Conference) as the appropriate set of comparables. The Conference consists of Arkansaw, Boyceville, Colfax, Elk Mound, Elmwood, Glenwood City, Pepin, Plum City, Prescott, Spring Valley, St. Croix Central. The Association also proposes that the Athletic Conference be used as

comparables, but also includes the School District of Somerset in addition to the school districts contained within the Athletic Conference. In support of its position the Association points to a determination by Arbitrator Rice who determined in an interest arbitration between these same parties in 1985 that Somerset should be included. The Association argues that the comparables once established should be left intact in order to encourage the predictability of the bargaining process.

The Employer argues against the inclusion of Somerset pointing out the differential in the demographics and also relies on the dicta contained within the Somerset School District Interest Arbitration Award wherein Arbitrator Vernon rejected the Dunn-St. Croix Conference as a comparable pool to Somerset because the Dunn-St. Croix Conference was too widespread.

The undersigned has considered the arguments of the parties and for the purposes of this interest arbitration proceeding will rely on the set of comparables proposed by the Association. The Employer proposal with respect to comparables might have more appeal if the outcome of this dispute were to be determined by the economic issues rather than the subcontracting issue. Because Somerset has been included in prior arbitration awards in this School District; and because the limited right to subcontract proposed by the Employer has a more universal application common to school districts outside of the Athletic Conference. the comparables determined in prior arbitrations will remain undisturbed and the Somerset School District will be included in making comparisons with respect to the key issue.

THE SUBCONTRACTING ISSUE:

The undersigned has reviewed the statutory factors which he is directed to consider in making his decision. There has been no evidence adduced or argument directed with respect to this issue as it relates to criteria A, the lawful authority of the municipal employer; criteria E, comparison of conditions of employment with other employees generally in the public employment in the same community and in comparable communities; criteria F, comparison of conditions of employment with other employees in private employment in the same community and in comparable communities; criteria G, the consumer prices for goods and services; criteria H, over-all compensation; criteria I, changes in circumstances during the pendency of the proceedings. The remaining factors of stipulations of the parties, interest and welfare of the public, comparisons of conditions of employment among employees performing similar services, and other factors normally or traditionally taken into consideration will be discussed serially.

THE STIPULATIONS OF THE PARTIES:

The parties have agreed to add an MA+16 lane to the salary schedule. While this has not been one of the formal stipulations of the parties, it is a common provision in the final offer of both parties which might be construed to be the equivalent of a stipulation. Additionally, the stipulations show that a ministerial change was made to Article 18 paragraph B by deleting the second sentence; that liquidated damages amounts were increased by $50.00; that an agreement was made to enter into a side letter for a subcommittee review of extracurricular salaries; that the

calendar issues were resolved; and that the summer school rate for teaching and curriculum was set for $15.00 an hour. A review of all of the stipulations satisfies the undersigned that there is nothing contained therein which would create a preference for the final offer of the Employer or the Association with respect to this issue. It follows that the criteria of stipulation of the parties is inapposite.

CRITERIA C, THE INTEREST AND WELFARE OF THE PUBLIC:

The evidence establishes that the Employer has customarily entered into subcontracting arrangements for certain services. The evidence establishes that the Employer contracts for or has contracted for the following services:

1. Speech therapy and services for the visually handicapped and hearing impaired from CESA 11.
2. Early childhood, special education, EMR and ED services through a 66.30 agreement with Durrand, Arkansaw, Pepin, Alma and Plum City. (Durrand acts as the physical agent)
3. Program for at-risk students at Red Wing Technical School.
4. Services of Chippewa Valley Technical College.
5. Hiring of a psychologist through a 66.30 agreement.
6. Discussions with University of Wisconsin-Stout regarding algebra for a gifted/talented seventh grade student.

These practices conform to the first part of the District proposal which reads:

> "As in the past, the District continues to have the right to contract out for goods and services. Prior examples of past contracting out for professional services includes contracts with CESA 11, nearby school districts, Chippewa Valley Technical College, the University of Wisconsin, other technical schools, and other universities and colleges."

The evidence establishes that the Association has not opposed these types of contracting relationships. What the Association opposes in the District's offer is the District's proposal to include the right to implement satellite/distance learning

programs. The question presented as it relates to the criteria of interest and welfare of the public is whether the contracting out for goods and services for the purposes of implementing satellite/distance learning programs are in the interest and welfare of the public.

Satellite/distance learning programs provide two-way interactive television, both audio and visual, broadcasting to receiving schools and back to the remote teacher via cameras in the classroom. Teachers and students can interact with one another despite being geographically separated. The purpose of distance learning is to make available to the students the courses which cannot economically be offered where only one or several students express an interest in the course because the Employer cannot justify the costs of a teacher for one or several students. Among the subjects which might be considered for the satellite/distance learning programs are: third and fourth year Spanish and advanced mathematics and sciences. A review of the course offerings and the economic difficulties presented to the District in employing one teacher to provide a course to only one or several students satisfies the Arbitrator that it is indeed in the interest and welfare of the public to provide a more diversified curriculum to members of the student body.

In addition to the foregoing, there is also the pending study upon which the District is about to embark at a cost of $40,000.00 which would explore the possibilities of making the installation of the hardware necessary to implement the distance learning programs, the Employer persuasively argues that the expenditure of

the estimated $40,000.00 cost for this study would be against the interest and welfare of the public if the matter of its right to implement the satellite/distance learning program is uncertain or impermissible. The undersigned agrees that expenditure of the money to make the study would not be in the interest of the public unless Employer's right to implement the program was clearly established.

From the foregoing discussion it follows that the interest and welfare of the public is served if the Employer has the ability to implement the satellite/distance learning program.

COMPARISONS OF CONDITIONS OF EMPLOYMENT:

Employer Exhibit 59 establishes which school districts in the Athletic Conference have contracting out provisions in the collective bargaining agreements with their teachers. Additionally, there is in evidence Association Exhibit 129 which is the collective bargaining agreement in force between the Association and the Somerset School District for the years 1990-92. From Employer Exhibit 59 and Association Exhibit 129 we have learned that Somerset, Spring Valley, Elk Mound and Arkansaw have provisions in their collective bargaining agreement which specifies the right of the employer to contract out for goods and services. Boyceville, Colfax, Elmwood, Glenwood City, Pepin, Plum City, Prescott and St. Croix Central have no expressed provision specifying the employer's right to contract out for goods and services. Thus, four of the remaining twelve comparable districts have an expressed all-inclusive right to contract out. That right is unlimited in contrast with the limited right to contract out

for services as proposed by the Employer.

The evidence, however, establishes that the majority of the districts have no provision expressly specifying the right of the employer to contract out for goods and services. It follows that when looking to the comparables, the Employer's proposal is not supported by the majority of the districts. While the Employer's proposal is more limited than the four districts who have an expressed unqualified right to contract out for goods and services, nevertheless, the majority of the districts do not have that expressed right in their collective bargaining agreements. Because the majority of the comparables do not specify that right, it is concluded that the comparisons of conditions of employment of other employees performing similar services favors the status quo as proposed by the Association, i.e., that the contract between these parties remain silent with respect to that right.

OTHER FACTORS:

The Association argues that:

1. Changes in the status quo should be bargained, not arbitrated.

2. The Employer final offer proposes to add language without demonstrating a need for the change.

3. The Employer final offer does not offer a quid pro quo in its attempt to legislate a change in the agreement versus its duty to bargain such changes.

4. The Employer did not provide any clear and convincing evidence that Article 3 will remedy any problem.

The Employer argues that it needs the certainty of its right to contract out for satellite/distance learning purposes before it can commit to the $40,000.00 study to develop the feasibility of

that program. The Employer further argues that the proposal is not a change in the status quo because its right to contract out for these purposes merely codifies the understandings between the parties which have existed since the year 1978.

The undersigned has considered the status quo argument of the Union both as it relates to arbitral authority it cites that changes in status quo should be bargained and not arbitrated and that there has been no quid pro quo offered in return for these specified language. The Arbitrator is unpersuaded by these arguments. The undersigned has considered the authorities cited by the Association in support of its position that changes in the status quo should be bargained and not arbitrated. The undersigned agrees that it is preferable that such changes be made via the voluntary agreement route rather than it being imposed by arbitration. To refuse to consider a proposed change in the status merely because it should be bargained and not arbitrated defeats the purposes of these proceedings, because if no change in the status quo can be made via the arbitration route, an impasse will always be resolved in favor of no change even though a compelling case for change might be supported by the evidence. While there is the line of arbitral authority cited by the Association which stands for the proposition that the status quo should not be altered, there is also extensive arbitral authority to support the proposition that the status quo may be changed if the proponent of the change establishes a compelling need for the change which it proposes. This Arbitrator subscribes to the latter view and, therefore, will not decide this dispute on the

basis that changes in the status quo should be bargained and not arbitrated. Rather, the undersigned will review the evidence to determine whether the Employer has met its burden of proof to establish that the change in the language for subcontracting is supported by the evidence.

Similarly, the undersigned is unpersuaded that the quid pro quo argument is applicable to the instant dispute. The Association at page 10 of its Reply Brief states, "The Board offers no economic quid pro quo for its proposal." From the foregoing it is clear to the undersigned that the quid pro quo which the Association feels appropriate is a monetary consideration. In the view of this Arbitrator, a monetary quid pro quo is not appropriate. The impact of the subcontracting proposal of the Employer does not bear directly on an economic issue in that it has no direct relationship to salary structure or the fringe benefit programs of the Employer. Consequently, the Association argument that no economic quid pro quo has been offered by the Employer for its proposal is unpersuasive.

The evidence supports the Employer argument that its proposal with respect to all of the rights it specifies for subcontracting purposes have already been exercised by the Employer without objection from the Association except for the satellite/distance learning program. The question presented is whether the satellite/distance learning program is so significantly different than the other services which the Employer has already contracted for without objection from the Association so as to make the codification of the exercise of the rights the Employer has used

over the years unacceptable. The enumeration of the types of contracting out for services that the Employer has engaged in over the years are set forth in a prior section of this award. The Arbitrator will not re-enumerate those services here. Suffice to say that there seems to be little, if any, distinction between contracting with a CESA district for speech therapy and services for the visually handicapped and hearing impaired and providing instruction electronically. The distinctions appear to be in the method of delivery of the service where CESA teachers actually physically are present and where satellite/distance learning teachers communicate with their students electronically. Thus, the basic nature of the disputed service of satellite/distance learning falls into the same category as the other services for which the district already contracts. The undersigned is persuaded that the right which the district seeks has been exercised with the consent of the parties as demonstrated by their practice over the years dating back to 1978.

The Association in its Reply Brief at page 7 argues as follows:

> "If there was no one to teach Spanish III, WCEA would have no objection to satellite/distance learning since there would be no full or partial lay-off."

The foregoing quotation from its Brief exemplifies the position taken throughout the Brief that the Association would have no opposition to the Employer exercising an option to establish satellite/distance learning programs provided there would be no full or partial lay-offs. That position seems to square with the practice of the parties as it relates to other contracted services

which have been previously enumerated since there is nothing in the record to establish that lay-offs have resulted from the other contracted services. Furthermore, the testimony of the District Administrator is that he anticipates no lay-offs as a result of implementing the satellite/distance learning programs. In view of the testimony of the District Administrator in this school district that no lay-offs are contemplated, and in view of the practice which existed which the Employer now seeks to codify which establishes that no lay-offs have ensued as a result of their contracting out services in the past; the undersigned concludes that the Association expressed concerns regarding the lack of a commitment not to lay off as a result of implementing the satellite/distance learning programs may be well-founded. The failure of the commitment not to lay off because services are contracted presents a new ingredient to the practice which heretofore existed. The Association did not oppose the prior practice because there were no full or partial lay-offs as a result of the Employer's decision to contract out for those services. In the view of this Arbitrator the fact that the language fails to codify the practice insofar as protection from full or partial lay-offs as a result of the exercise of the Employer right to contract out, flaws the Employer proposal.

It follows from all of the foregoing discussion that when considering the criteria of other factors which are normally or traditionally taken into consideration in the determination of conditions of employment, the Association proposal that the status quo be maintained is preferred.

SUMMARY AND CONCLUSIONS:

The Arbitrator has determined that the stipulations of the parties are inapposite; that the interest and welfare of the public support the Employer's proposal; that the comparables support the Association proposal; and that other factors normally taken into consideration support the Association proposal to maintain the status quo. It follows from the foregoing that the status quo should be maintained which will result in the adoption of the Association final offer.

In arriving at the conclusion that the status quo should be maintained, the undersigned has considered the status quo as it exists pursuant to the evidence and as described in the Association's Brief. The evidence establishes that by custom and practice the Employer has exercised a right to contract out for goods and services. The Association argues in its Brief that it has no opposition to such contracting out and further argues that it does not oppose the Employer's establishing satellite/distance learning programs so long as it does not result in the full or partial lay-off of members of the bargaining unit. The undersigned views all of the foregoing to be the equivalent of bargaining history which explains the practice of the parties relating to contracting out. Therefore, in the view of this Arbitrator, the maintenance of the status quo without specific language dealing with the right to subcontract means that the Employer shall continue to have the right to pursue contracting out of goods and services for the purposes enumerated in its final offer so long as that contracting out does not result in the full

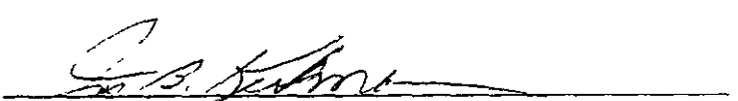
or partial lay-off of a member of the bargaining unit. That is the status quo which the Association wishes to maintain and this award is made in recognition that the practice as it presently exists permits the contracting for services, including satellite/distance learning so long as said contracts do not result in full or partial lay-offs.

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

AWARD

The final offer of the Association, along with the stipulations of the parties as certified to the Wisconsin Employment Relations Commission, and those provisions in the predecessor collective bargaining agreement which remained unchanged throughout the bargaining process, are to be incorporated into the parties' collective bargaining agreement for the years 1990-91 and 1991-92.

Dated at Fond du Lac, Wisconsin, this 17th day of October, 1991.



Jos. B. Kerkman, Arbitrator

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