BEFORE THE ARBITRATOR

ROSE MARIE BARON

In the Matter of the Petition of

Wisconsin Council 40, AFSCME, AFL-CIO

and

Merton Joint School District #9

Case No. 23
No. 47101 INT/ARB-6392
Decision No. 27568-A

APPEARANCES

Michael J. Wilson, Representative at Large, Council 40, AFSCME, AFL-CIO, appearing on behalf of the Merton School District Employees Union.

Robert W. Butler, Staff Counsel, Wisconsin Association of School Boards, appearing on behalf of Merton Joint School District #9.

I. BACKGROUND

The Merton Joint School District, a municipal employer (hereinafter referred to as the "District" or the "Board") and the Merton School District Employees Union (the "Union"), representing all regular full-time and regular part-time non-professional employees of the District, have not been parties to a collective bargaining agreement covering wages, hours and working conditions of these employees. On October 10, 1991, the parties exchanged their initial proposals; after three meetings no accord was reached and on March 2, 1992, the Union filed a petition requesting that the Wisconsin Employment Relations Commission initiate binding arbitration. Following an investigation and declaration of impasse, the Commission, on March 1, 1993, issued an order of arbitration. The undersigned was selected by the parties from a panel submitted by the Commission and received the order of appointment dated March 16, 1993. Hearing in this matter was held on May 19, 1993 at the Merton School District offices in Merton, Wisconsin. No transcript of the proceedings was made. At the hearing sworn testimony by District witnesses Bruce Connally and Audrey Sepe was received; both parties had opportunity to present documentary evidence. Briefs were submitted by the parties according to an agreed-upon

schedule. The record was closed on July 27, 1993.

II. STATUTORY CRITERIA

The parties have not established a procedure for resolving an impasse over terms of a collective bargaining agreement and have agreed to binding interest arbitration pursuant to Section 111.70, Wis. Stats. (May 7, 1986). In determining which of the parties' final offers to accept, the arbitrator is to consider the factors enumerated in Sec. 111.70(4)(cm)7:

> 7. Factors considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:
>
> a. The lawful 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.
>
> e. Comparison of the 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 generally in public employment in the same community and in comparable communities.
>
> f. Comparison of the 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 in private employment in the same community and in comparable communities.
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> g. The average consumer prices for goods and services, commonly known as the cost-of-living.
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> h. 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.
>
> i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

> j. 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.

III. POSITION OF THE PARTIES AND DISCUSSION

The following statement of the parties' positions on each of the unresolved issues in their final offers does not purport to be a complete representation of the arguments set forth in their extensive briefs and reply briefs which were carefully considered. What follows is a summary of these materials and the arbitrator's analysis of this material in light of the statutory factors noted above. Because the selection of appropriate communities for purposes of comparability will have a major impact on the selection of one of the parties' final offers, that matter will be addressed first.

A. The Comparables

The parties have proposed different external comparables. The Union has stated that it has selected only organized school districts. Some of these are affiliated with the Hartland Arrowhead High School (for which Merton is a K-8 feeder school), which are, in turn, affiliated with the Braveland Athletic Conference. It has also included neighboring school districts (within 25 miles of Merton), selecting only those which are union-organized. In its brief, the Union has noted that Hartland-Lakeside is a unionized district which also feeds into the Hartland Arrowhead High School and that it has patterned its proposal after the voluntary agreements reached by this bargaining unit (Union Ex. 28). Although the Union indicates that it believes Hartland-Lakeside is more of an internal comparison (Union Brief, p. 8), the arbitrator believes that for purposes of analysis under Sec.111.70(4)(cm)(7)(d), i.e., municipal employees performing similar work, it is appropriate to include it with the other external school districts selected by the Union.

With the exception of Hartland-Lakeside, which it has included, the District proposes a distinctly different set of comparables. These are other school districts operating only elementary schools in the Hartland-Arrowhead Union School Districts. The comparables are shown in the table below, followed by the positions of the parties and the arbitrator's discussion and finding.

TABLE 1

PROPOSED COMPARABLES

Union	District
Elmbrook	Erin No. 2
Germantown	Hartford Joint One
Hartford Union	Hartland-Lakeside
Hartland-Lakeside	Lake Country
Kettle Moraine	Lisbon Joint Two
Menomonee Falls	North Lake
Mukwonago	Richfield Joint Eleven
Muskego-Norway	Stone Bank
New Berlin	Swallow
Oconomowoc	
Pewaukee	
Slinger	
Sussex (Hamilton)	
Waukesha	

1. Position of the Union

a. External Comparables. The Union argues that only unionized school districts should be relied upon for purposes of comparison. In its brief and reply brief, the Union cites numerous arbitral awards in which well-respected and experienced arbitrators have held that only organized districts are appropriate for comparability (e.g., Kerkman, Vernon, Flagler, Kessler, Malamud, Rice, Johnson, Miller, Zeidler [citations omitted]). For example, Arbitrator Flagler found that when there are "language" items at impasse, no useful comparisons are possible with non-union school districts.

Arbitrator Zeidler said, " '...it is inequitable to compare collectively bargained conditions with those which have been unilaterally established by employers.' Although the districts offered by the Union are some distance from each other, yet this type of comparison between districts that have had collective bargaining agreements is more equitable than the comparisons

proposed by the District with some districts used for comparison purposes in which the employer alone sets the rates." (citation omitted).

b. The Private Sector. The Union does not believe that there is a sufficient record upon which to compare Merton Schools to the private sector, either in Wisconsin or nationally.

2. Position of the District

a. External comparables. The District asserts that its comparables meet the test of geographic proximity, similar economic conditions and similar size. The District's choice of comparables are geographically proximate to Merton and would be likely to compete for the same prospective employees. Arbitral precedent is cited for the proposition that for non-certified staff geographic proximity is one of the most important indicators of comparability (e.g., Zeidler, Briggs, R.J.Miller, Rice). While the Union has selected school districts in the athletic conference, it should be noted that Merton Joint Nine School District is not a member of the Braveland Conference. It is a school district operating only as an elementary school and does not have any affiliation to any of the comparables except Hartland-Lakeside. Thus it is inappropriate to apply the same standard of comparison, i.e., the athletic conference, to this bargaining unit as is done in teacher bargaining. Citing Arbitrator Weisberger, the District argues that comparable districts for teacher arbitration cases may be significantly different from appropriate comparables for non-certified school district employees.

Another factor to be considered when comparing school districts is similar size. Arbitrator Michelstetter, looking at a non-teacher unit in Janesville, held that "Size is an appropriate consideration because of the ability of larger districts to pay, their ability to use personnel more effectively and the often greater complexity of their work and structure." (citation omitted).

The District further contends that its comparables possess similar economic conditions to Merton (exemplified by similar equalized value; see

District Brief, table, p. 16), while the Union's comparables do not. All of the school districts proposed by the Union, with the exception of Hartland-Lakeside, have a significantly larger number of students and significantly larger equalized value, i.e., over eight times more equalized value than the Merton School District. In contrast, among the Board's comparables, Merton ranks fifth out of nine schools in terms of property value.

Further, Merton shares more in common with the Board's comparables because of the fact that these districts are elementary school districts.

The District argues against reliance on the unionized status of school districts and cites arbitral awards in support of this position. For example, in a 1985 decision by Arbitrator Grenig, he listed the rationale for his selection of comparables as "geographic proximity, size, tax rates, and per pupil costs" and included in his list of nine districts, two which were not unionized. In 1983, Arbitrator Briggs declined to use union status as a criterion for selecting comparables. The District cites the present arbitrator's 1988 decision in Benton in which both organized and unorganized school districts within a radius of 30 to 35 miles were held to comprise the appropriate labor market.

The arbitrator is urged to select the District's comparables based upon the similarity of the equalized value, the geographic proximity, similar size.

3. Discussion

For purposes of this discussion it is useful to replicate, with some modification, the tables presented by the parties in their briefs which set forth the variables generally considered in determining appropriate comparables. In computing the average, the arbitrator will utilize the median instead of the arithmetic mean. The median is a better measure of central tendency particularly where a few high or low numbers may inadvertently skew the results. Thus each set of numbers is ordered from lowest to highest in order to find the center. In the case of the Union where there are fourteen comparisons, the median falls between the seventh and the eighth; for the

District, with nine comparables, the median is the fifth in the range of numbers. As noted earlier, the Hartland-Lakeside district will be included in the external comparables. It is noted that in some of the exhibits and briefs the Hamilton School District is referred to as Sussex; for consistency, the arbitrator will refer to that district as Sussex in this discussion.

TABLE 2

UNION COMPARABLES (1991-92)

School District	Geographic Proximity	Size (Pupil)	Equalized Value	E.V. per pupil
Elmbrook	12 miles	5,907	$2,891,337,588	$ 489,476
Germantown	20	2,827	695,749,565	246,108
Hartford Union	10	1,330	749,300,178	563,383
Hartland/Lakeside	3	1,197	279,024,329	233,103
Kettle Moraine	12	3,666	731,027,816	199,407
Menomonee Falls	17	3,143	1,089,516,582	346,648
Mukwonago	20	4,701	730,040,910	155,294
Muskego-Norway	20	3,352	683,212,693	203,822
New Berlin	14	4,203	1,384,933,797	329,510
Oconomowoc	9	4,186	1,107,605,813	264,597
Pewaukee	8	1,510	447,767,122	296,534
Slinger	25	1,923	382,496,538	198,906
Sussex	10	2,636	612,531,870	232,371
Waukesha	13	12,269	2,945,071,407	240,041
Average (Median)	12.5	3,248	730,534,363	243,075
Merton		503	134,248,075	266,895
Deviation from Median (+/-)		- 2,745	- 606,286,288	+ 23,820

These data reveal a large difference in the number of pupils between Merton and its selected districts. Merton is by far the smallest school district and is, in fact, outside (below) the range which includes Hartland-Lakeside at the low end with 1,197 students and Waukesha at the top with 12,269. In terms of equalized value, Merton again is outside the range and far

below the median: Merton is at $134,248,075; the low is $279,024,329 in Hartland-Lakeside and the high is $2,945,071,407 in Waukesha. The picture changes in the equalized value per pupil category where we see that Merton exceeds the median by an amount which would place it sixth among the comparables which range from a low of $155,294 in Mukwonago to a high of $563,383 in Hartford Union. Thus, in spite of the fact that Merton lags behind its comparables in size and equalized value, when one considers the per pupil factor, Merton compares quite favorably.

TABLE 3

DISTRICT COMPARABLES (1991-92)

School District	Geographical Proximity	Size (Pupil)	Equalized Value	E.V. per pupil
Erin	10 miles	295	$ 83,223,355	$ 282,113
Hartland-Lakeside	3	1,197	279,024,329	233,103
Hartford #1	10	1,492	341,140,476	228,646
Lake Country	5	320	178,497,750	557,805
Lisbon #2	3	228	58,246,746	255,468
North Lake	3	225	99,508,026	442,258
Richfield #11	8	197	72,908,393	370,093
Stone Bank	4	240	140,358,615	584,828
Swallow	3	247	118,708,486	480,601
Average (Median)	5	247	118,708,486	370,073
Merton		503	134,248,075	266,895
Deviation from Median (+/-)		+ 256	+ 15,539,589	- 103,178

This table shows that in terms of number of pupils, Merton exceeds the average by 256; it is the third largest among the comparable K-8 districts. The equalized value ranges from a low of $58,246,746 in Lisbon #2 to a high in Hartford #1 of $341,140,476; Merton exceeds the average, placing at fifth from the top. In the equalized value per pupil category, the range is from a low of $228,646 in Hartford #1 to a high of $584,828 in Stone Bank. Merton falls below the median by over $100,000, placing it at seventh from the top. These

figures reveal that while Merton is one of the largest districts and in the very center of the comparables as to equalized value, its per pupil value is significantly lower.

The Union proposes that the equalized value per pupil is a more meaningful concept in that it represents the amount of community resources supporting each student. The arbitrator agrees that this factor is entitled to weight in a determination of appropriate comparables.

Each of the parties has set forth many reasons as to why its comparables are the appropriate ones. Four of the variables are presented in the tables above: geographical proximity, size (pupil count), equalized value, and equalized value per pupil. Also to be considered is the validity of selecting only K-8 schools for comparison. The question of whether the organized status of a district is determinative has received much attention. The Union has selected only organized districts; the District has selected only K-8 schools with only one of these, Hartland-Lakeside, being organized.

At the outset it should be stated that the arbitrator agrees with the Union's position that limiting comparison of this bargaining unit (maintenance, cleaners, clerk-typists, instruction assistants, and food servers) to similar employees in K-8 schools only, i.e., the feeder districts, would not be appropriate. The kind of work that Merton employees perform will not differ in a significant fashion if it is performed in an elementary school or a high school. Perhaps the size, age, and appetite of elementary school children creates a different ambiance in a school cafeteria than would a group of teenagers in a high school; nonetheless, it has not been shown by direct evidence that the duties of food servers, for example, require differing levels of skill, effort and responsibility based upon the grade level of the school.

There is no question that the Union's comparables are larger in size as measured by pupil count than those proposed by the District. If size alone were considered, the District's comparables would provide a better fit.

However, one must not apply comparability standards in a mechanical way. It would require ignoring the realities of the labor market to dismiss the fact that Merton is not an isolated rural community with limited employment opportunities, but rather is on the doorstep of the greater Waukesha and Milwaukee employment markets.

While it is true that many of the Union's proposed districts are much larger communities than Merton, and their economic base differs considerably, a more important factor is that their geographic proximity makes them a part of the relevant labor market. Contrary to the emphasis by the Employer on the fact that its comparables are no more than ten miles from Merton, the Union's point there is nothing unusual about workers commuting twenty to twenty-five miles to a job is well-taken. In an award by Arbitrator Michelstetter quoted by the District for another purpose (Brief, p. 14), he addressed the labor market in Janesville:

> ...The undisputed testimony in this case is that unit employees are hired almost exclusively from the Janesville area and well within thirty miles of the city. Under these facts, the thirty miles area does constitute a labor market from which employees are selected and comparisons to the districts of Madison, Sun Prairie and Waukesha are not warranted.

This arbitrator held in Benton School District, Decision No. 24812-A (1988) that comparable communities within a radius of 30 to 35 miles comprised an appropriate labor market. The Union's argument on the matter of proximity is the more persuasive.

Perhaps the major issue to be decided at this juncture is whether the organized status of comparables shall be afforded the greatest weight in arriving at a decision. Both parties have argued forcefully for their disparate positions and have provided numerous arbitral precedents in their support. Among the cases cited by the District is this arbitrator's decision in Benton, cited above. In that case, the arbitrator declined to adopt in toto the proposals of either side for comparables. The Union's proposed comparables were all organized units, however, some were too distant from Benton to meet

the geographic proximity test. The District's nine comparables included three unionized units which were also among the Union's comparables, and they were adopted. Two of the unrepresented units in the athletic conference, Belmont and Schullsburg, were adopted because of their very close proximity to Benton. Since the majority of units in the final selection of comparables by the arbitrator were organized units, i.e., five to two, the utilization of unorganized units had minimal impact upon the outcomes, thus leading to the acceptance of both organized and unorganized districts for purposes of comparison. The present factual record differs significantly from that of Benton. Here the District's proposed districts are all unorganized; there is no agreement on the inclusion of any organized units as there was in Benton. Furthermore, the large number of Union comparables, all within the relevant labor market, provide a much larger base for analysis than did the seven units noted in Benton.

Finally, the arbitrator is persuaded by the cogent arbitral precedents cited by the Union regarding the choice of organized units only, particularly where contractual language issues are addressed. This is a first contract and the newly represented employees in the bargaining unit are starting from ground zero. There is a need for a structure upon which to build for the future, that is, a statement of the rights and responsibilities of both management and labor to ensure viable labor relations for years to come. Of particular relevance here is Arbitrator Flagler's reasoning in a 1992 case, Cochrane-Fountain City School District, Decision No. 27234A, regarding "language" issues (Union brief, p. 8). He stated:

> ...While comparisons with nonunion support staffs may provide some limited guidance on the economic package, in the absence of collective bargaining agreements no useful comparisons are possible with non-union school districts as to contract language issues.

The logic of this assertion is particularly applicable in the instant case where some of the most hotly contested issues, i.e., job awards, qualifications, layoff and recall, and bumping, involves the application of

seniority, the sine qua non of unionism.

In addition to language issues, the economics of wages and hours are better analyzed in light of what has happened at the bargaining tables of organized school districts than with conditions of employment which have been unilaterally imposed by an employer.

The District argues and cites precedent for the position that union status is not as important as other factors in deciding the comparability group. What distinguishes this case from, for example, Arbitrator Haferbecker's 1983 decision in Bruce School District (Support Staff, is that here there are fourteen geographically proximate school districts contrasted to his three unionized comparables, a factor which he held "would be too limited a comparison."

This arbitrator is of the opinion that a consideration of union status is necessary to reach a reasoned decision. While the statute is silent as to the role and weight union status is to play in the arbitrator's decision, it seems that this factor may be examined under Section 111.70(4)(cm)7.j.:

> j. 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.

There is no question that the decision on comparables will have a major influence on which of the parties will prevail in this matter. This decision, as well as a determination regarding the individual issues in contention, is not a matter which has been easily resolved. There are several proposals by both parties which the arbitrator find to be excessive or to create future interpretation problems. Some of the Union's language proposals, for example, are not models of clarity and may result in future disagreement as to applicability. The District's desire to determine employee qualifications in hiring from posted positions, trial periods, layoffs, etc. with little attention to seniority is problematic. If the arbitrator had the authority to

select the more reasonable proposal on an item by item basis, some of these difficulties could be avoided, however, under Wisconsin law this is not permitted. Thus, the arbitrator, albeit reluctantly, must select one final offer, flaws and all.

Based upon the greater weight of the evidence, the arbitrator concludes that the Union's proposed comparables are the more reasonable and they will therefore form the basis for the following examination of each of the impasse items.

Because there has been little evidence or argument regarding private employment or other public employment settlements, neither will be considered in a final determination of which of the parties' final offers is the more reasonable.

B. Issues in dispute

There are ten substantive issues in dispute:

Article 9 - Job Postings

Article 10 - Layoff and Recall

Article 11 - Hours of Work

Article 12 - Overtime

Article 14 - Insurance (14.03 Dental)

Article 15 - Retirement

Article 16 - Holidays

Article 25 - Emergency School Closings

Article 26 - Employee Evaluations

Appendices - Classification and Wage Schedule by year

The parties in their presentations at hearing emphasized the importance of certain of these matters. The three issues which seem to be of paramount importance are wages, retirement, and overtime. Based upon the written arguments of the parties, great weight will be given to these issues and the choice of a final offer will be determined by which party's offer on these matters prevails.

Before venturing into these matters, it is necessary to address a contention raised by the District, i.e., that the Union has the burden of providing a quid pro quo for each of the additional benefits it demands. These include holidays, time and one-half for work which is below 40 hours per week and currently being paid at straight time and time and one-half for Saturdays, an increase in the long-term disability benefit, and the requirement that the Board pay the entire share of the Wisconsin Retirement System costs. (District Brief, p. 3).

The Union argues that such a contention is not applicable since this is an initial contract and "There is nothing in place from which to offer a quid pro quo." (Union Reply Brief, p. 13).

The question of whether a party must offer a quid pro quo arises when that party wishes to change the status quo, that is, when a change to an existing collective bargaining agreement is proposed. Arbitral standards which are applied under these circumstances place the burden on the party seeking to make a change to demonstrate a need for the change by showing that a legitimate problems exists and that a quid pro quo has been provided for the change. "It has long been held that when a party proposes a significant reformation of a fundamental aspect of the collective bargaining agreement, some concession or trade-off, i.e., a quid pro quo, is offered which would persuade the other party to accept the offer." Stanley-Boyd School District, Dec. 26887-A (Baron, 1991). It is clear from this context that the concept of a trade-off applies only when there is a contract is existence.

Similarly, in both Benton and Peshtigo School District, Dec.27288-A) (1993), I held that in negotiating a first contract the Union did not bear the burden of showing need each time it sought to add or improve benefits or conditions of employment, since that was the goal of all unions in collective bargaining. Applying this rationale to the instant case, there will be no application of a status quo standard. Each of the proposed benefits, economic and non-economic, will be compared with the level of benefits received by

similar employees in the selected comparable communities.

1. Wage Schedules and Total Compensation

Of significant importance in the negotiation of a first contract is the placement of employees on a wage schedule, the wage rate, wage related costs (including wages, FICA, retirement), and fringe benefits (health, dental, life, and long-term disability insurance). The following tables summarize the costing of the parties' final offers. Percentage increases for the first year, 1991-92, reflect the increase from the non-contractual base year of 1990-91. All data are derived from Board Ex. 3 and Ex. 4 (corrected).

COSTING OF FINAL OFFERS

TABLE 4

TOTAL WAGES

	UNION	BOARD
1991-92	9.96 %	5.54 %
1992-93	13.69	5.01
1993-94	7.45	4.99
3-year total	31.10	15.54

TABLE 5

TOTAL WAGE RELATED COSTS
(Wages, FICA, Retirement)

	UNION	BOARD
1991-92	9.96 %	6.92 %
1992-93	13.69	6.55
1993-94	13.54	6.50
3-year total	37.19	19.97

TABLE 6

TOTAL COMPENSATION
(Wage related costs; health, dental and life insurance; LTD)

	UNION	BOARD
1991-92	11.50 %	8.78 %
1992-93	13.50	6.97
1993-94	13.41	6.99
3-year total	38.41	22.74

The tables show that the cost of the Union's offer is significantly higher than that of the District. It is the Union's position that the employees organized for the purpose of "catch-up"; their benefits have historically been limited and wage levels were poor compared to other school districts. The Board contends that its offer is generous and reasonable in light of its selected comparables, the cost of living, as well as other public and private sector employees. These matters will be addressed below.

In considering the arguments of the parties, it is the arbitrator's opinion that a focus on the wage offers for first year of the contract is appropriate since it is here that significant changes in the custodial and instructional aide categories are being contemplated. The Union exhibits specify Day Custodian and Night Custodian while the District categorizes these positions as Maintenance and Cleaners. The Union has provided specific data comparing one of the job classifications in the bargaining, i.e., the night custodians, with the comparables selected by the arbitrator (see Union Brief, pp. 41-42). The data in the table below is for the latter category (the positions filled by Klug and Barron, neither of whom is at the top of the seven-step range). The arbitrator has determined for the purposes of this analysis to utilize only the lower-level custodial category. To include the Day Custodian/Maintenance position would only skew the distribution even higher and would serve to inflate the disparity, i.e., the Board's and the Union's have made a similar offer of $11.63.

TABLE 7

COMPARISON OF CUSTODIAL RATES
1991
Top Rate for Job

Elmbrook	12.50
Germantown	10.86
Hartford Union	10.76
Hartland-Lakeside	10.17
Kettle Moraine	11.90
Menomonee Falls	13.32
Mukwonago	11.83
Muskego-Norway	11.30
New Berlin	n/a
Oconomowoc	11.30
Pewaukee	11.55
Slinger	9.96
Sussex (Hamilton)	13.88
Waukesha	13.81
Median	11.55
Union Offer	9.17
District Offer	7.46

Inspection of this data shows that Merton falls far below the average of the comparables in remuneration of its custodial staff. The Union's offer for 1991 more closely approximates the median and is, therefore, deemed to be the more reasonable.

The parties disagree on the classification of instructional assistants. The Union proposes one category, i.e., instructional assistant, while the District has distinguished between certified and non-certified instructional assistants, with the pay for the non-certified employees at a lower rate. For 1991 the offers at the maximum level/rate for the job are:

Union:	Instructional Assistant	$ 8.91
District:	Instructional Assistant (Certified)	8.91
	Instructional Assistant (Non-Certified)	7.14

Inspection of the comparable collective bargaining agreements reveals that only two districts differentiate between certified and non-certified aides in terms of wages: Mukwanago and Elmbrook have pay differentials based on certification status.

It is the position of the Union that a two-tier wage schedule for teacher aides is inequitable. The present proposals represent the minimum for the classification; if certification is to be recognized in the future, it should be rewarded with additional pay.

The record does not reveal the motivation of the Board in proposing two categories of instructional assistants, nor has any argument been made which might convince the arbitrator of the wisdom of such a plan. Since the 1991 top wage rate of $8.91 is not in dispute, the arbitrator finds that the Union's position on the classification of instructional assistants is the more reasonable. There is no dispute regarding top pay for food server and clerk/typist which is the same in both parties' offers.

The costing of the final wage offers, shown in table form above, shows that for the three years of the contract, the Union's wage offer is approximately twice that of the District. This results primarily from the increase in the night custodial pay schedule where the greatest changes are proposed by the Union (e.g., the top rate increases from $9.17 to $10.88 to $11.21 over the life of the contract). Such a large increment would, under ordinary circumstances, cause an arbitrator great concern. However, the present situation is unique in that it represents a first bargain between a newly organized work force and its employer. In a first contract it is not unusual for workers to make demands which seem extravagant on their face. Under Wisconsin law these public employees' proposals are put to the test of reasonableness by comparing them with the wages, hours, and conditions of employment enjoyed by similar employees. As noted above, the wages of comparable custodial employees are considerably greater than even the Union's final offer. The Merton employees' goal, i.e., to catch-up to their counterparts in wages, is supported by the evidence. In totality, therefore, the final offer of the Union on wages is held to be the more reasonable under the circumstances.

2. Retirement Benefit

The Board has proposed that all employees will receive a retirement benefit through the Principal Mutual Life Insurance Company (PMLIC) effective July 1, 1991. This plan will provide a benefit of 1.6% of the employee's monthly salary multiplied by length of service. Board Ex. 20 shows that under its plan a retiree with ten years of experience will receive a greater benefit than that proposed by the Union.

The Union proposes that the Wisconsin Retirement System (WRS) be selected and that the Employer pay the employee's share of the contribution. It is noted that all of the Union's comparables, except for Oconomowoc, provide retirement benefits to its custodial staff through the WRS. In addition, four of the school districts proposed by the Board, i.e., Hartland-Lakeside, Hartford Joint 1, Stone Bank, and Richfield have voluntarily enrolled their employees in the WRS. Merton teachers, as well as counties, vocational, technical and adult education districts, and other public employees participate in the WRS. More than half of active public employees in the plan were non-teachers (Union Brief, pp. 26-27). The Union points out that the Board has not produced any evidence that any other public employer or employee is covered by the Board's proposed retirement plan. The Union admits that the cost of the WRS is greater than that of PMLIC but stresses the quality of retirement and disability benefits.

Board Ex. 21 contains a list of some of PMLIC's retirement plan customers. Except for the Nebraska Department of Labor, there are no discernible public employers, and in particular, no school districts listed as participants in this plan.

Of particular importance is the voluntary acceptance of the WRS by the Hartland-Lakeside Board of Education in their 1990 contract. This is the one school district which was on both parties' list of comparables and on that basis is deserving of considerable weight in reaching a decision.

It cannot be denied that the cost of the WRS is greater than that of the

PMLIC. Nonetheless, the Union's belief that its members will be better served by a retirement system which serves not only its comparables, but over one thousand municipal employers, is deemed to be more persuasive. If one applies the standard of the "interest of the public," to the issue of retirement benefits, the security which derives from participation in a tried and true state system long serving public employees outweighs an untested private insurer. Further, in addition to retirement benefits, the fact that employees may, for example, transfer retirement credits among public employers enrolled in WRS is an advantage not to be ignored.

Based upon the greater weight of the evidence, the offer of the Union on retirement is deemed the more reasonable.

3. Overtime

There are several aspects to the issue of overtime which remain unresolved: time and one-half (per day or week); Saturday work; Sunday work; Holidays. The offers for overtime for at least two hours work at the overtime rate appear to be the same except for a Union proviso that employees be allowed to work until their normal quitting time. Since the difference in offers is minimal, no specific finding shall be made and the selection will depend upon the outcome of the other sub-issues. A summary of the major items and the offers of the parties are summarized below.

a. Time and one-half: The Union proposes to pay overtime at the rate of time and one-half over eight hours in one day or 40 hours in one week while the Board offers only time and one-half after 40 hours. The Board argues that its proposal conforms with the requirements of the Fair Labor Standards Act. The Union points to the custodial and maintenance category within its comparables to support its position. With two exceptions, the comparables pay time and one-half for work over eight hours in a day (Hartford: in special situations and with approval of the district administrator; Pewaukee does not). Even among the districts cited as comparables by the Board, three provided this benefit. One must conclude from the evidence that mere

conformance with the minimum requirement of the FLSA is not a sufficient rationale to support the Board's position and that based upon a comparison with the selected comparables, the Union's position is the more reasonable.

b. Overtime for Saturday work: The Union's position is that time and one-half shall be paid to any employee who works on a Saturday. The Board agrees to the same payment, but qualifies its offer to apply only to those employees who are not normally scheduled to work, i.e., those on a Monday through Friday work schedule. However, the Employer does not wish to include employees who are hired to work on a Tuesday through Saturday schedule in the payment of overtime for Saturdays. Because the Merton school facilities are used by a number of community organizations, the building is often in use on Saturdays and Sundays.

The record on this issue was rather sparse, therefore, each of the contracts submitted by the Union was reviewed by the arbitrator to determine first, whether under work week a "normal work week" was defined as Monday through Friday, whether any districts had a Tuesday through Saturday week, and if a specific reference was made in the overtime section as to Saturday overtime payment. Of the thirteen custodial units surveyed, seven defined the work week as Monday through Friday (as has the Union in its final offer). Mukwanago has a normal Monday-Friday week, however, an employee may be assigned a Tuesday-Saturday week for no more than four weeks. In Menomonee Falls, the normal week is Monday-Friday, however, a Tuesday-Saturday position may be created to be filled by a volunteer, or if there are none, the least senior employee. No overtime is paid in either of these districts under this schedule. Specific reference to overtime for work on Saturday was included in five contracts; the others referred more generally to overtime pay for work over forty hours in a week (or eight hours in a day). What is to be gleaned from this information which does not give significant support to either parties' offer? First, it appears to the arbitrator that the Board's wish to meet the needs of the community by engaging a custodian to work regularly on

Saturdays is well within its prerogatives as management. The Board is not expressing a desire to shirk its legal responsibility to pay overtime for work which is above and beyond the 40-hour work week; it merely wishes to be able to designate a position to cover what it well knows is an on-going need for Saturday custodial service. The Union's offer would either obviate the possibility of a Tuesday-Saturday schedule position or require the services of a Monday-Friday scheduled employee who would be called in to work on Saturdays at the overtime rate. For these reasons, the Employer's offer on this particular issue is preferable.

c. Overtime for Sunday work: The Union asks for double time while the Board offers time and one-half for Sunday work. Of the thirteen comparables, eight pay double time for work on Sunday for custodial employees with an exception in Elmbrook for snow removal which is paid at time and one-half. Based upon this data, the Union's offer more closely matches the practice of the comparables and is therefore deemed to be preferable.

d. Holidays: The Union asks for double time (plus holiday pay) for holidays while the Board offers time and one-half (plus holiday pay). Nine of the comparable school districts provide double pay for maintenance and custodial workers, except for snow removal in Elmbrook. The Union's offer more closely approximates the comparables and is deemed to be preferable.

Based upon the discussion of the four sub-topics regarding overtime, the Union has prevailed in three, the Board in one. The arbitrator is well aware of the wish of the Employer to match its staffing to the needs of the district and the community in general as noted above, however, under the law there is no way to make an award which would respond to this need as only a total final offer may be selected. It is apparent from the data submitted that the greater weight of the evidence regarding overtime supports Union's offer.

C. The Cost of Living

The Board has argued forcefully that its offer is the more reasonable when measured against the objective and measurable cost-of-living criterion of

the statute. Extensive documentation from the U.S. Department of Labor has been submitted showing, inter alia, a three percent average annual increase in the Consumer Price Index. Both parties' wage offers, as well as total compensation, exceed the CPI; the Union's offer is three times greater than the cost of living in the first year of the contract and over four times greater in 1992-93. The Board also contends that the Union is ignoring changes in the present economic and political realities facing municipal governments.

The Union asserts that the Board's argument is not relevant to the proceeding. The Merton support staff should not be made to make financial sacrifices or to continue to live on less than the going rate in the labor market, as exemplified by the comparables.

The arbitrator recognizes the statutory mandate to consider the cost of living in determining which of the parties' final offers is the more reasonable. As is usual, there are awards which support placing great weight on the national index and others which hold that a better standard of the effects of inflation on municipal employees is to adhere to the pattern of settlements in the local area (see, e.g., Kickapoo Area School District, Decision No. 27470-A, Baron, 1993). In the instant case there are a large number of comparable communities which have reached settlement which this arbitrator finds more compelling than a national standard.

The Union contends that in the past the Board made all decisions regarding wages and benefits and now must bear the consequences of "catch-up." The arbitrator agrees that bargaining for a first contract involves a wish by the employees for equity with the comparables. If the Union's offer is to be selected it will necessarily call for a greater outlay on the part of management than might be the case in bargaining successor agreements. In the instant case it is clear that employees, particularly in the custodial area, lag significantly with the relevant labor market. Even by selecting the Union's wage offer, for example, inspection of Table 7 will show that the custodial wage rate will still be less than the median wage by more than $2.00

per hour.

Applying the pattern of settlements standard, the Union's final offer more closely approximates that of the comparable school districts and, therefore deemed the more reasonable of the two on the cost-of-living factor.

D. The interest and welfare of the public

The District argues that the economic and political environment favors its offer and details Wisconsin tax data to show the increasing burden on taxpayers and the need for relief. Several arbitral decisions are cited in support of its position that general and local economic conditions be considered in measuring the reasonableness of a final offer. Also noted is the political climate in Wisconsin and the changes in the state arbitration law.

It should be noted that several of the awards cited by the Employer regarding economic conditions were issued in 1983 (Board Brief, pp. 53-54). Arbitrator Vernon, in his Depere decision, alluded to concessionary bargaining or no-wage increases during this time. However, we are at a point ten years later where the economic climate has changed and Unions have begun to reject further sacrifices in wages and benefits. But even in this decision, as emphasized by the Board, the arbitrator stated: "...the general economic data must be considered and must be given weight particularly where there are so few settlements. If there were more settlements, perhaps less weight would be given to the general economic conditions." (emphasis added by this arbitrator).

There are fourteen comparable school districts who have reached settlements in this case. The Merton School District does not argue that it is unable to pay the additional costs of the Union's offer. It seems to the arbitrator that while taxpayers have a profound interest in keeping their taxes from escalating, it is also in the public interest in to attract and retain competent employees in their school district. The expenses connected with replacing long-term, experienced personnel who may be tempted to move on to better paying jobs in surrounding districts must also be considered when

viewing the public interest.

It is held, therefore, that the interest and welfare of the public will not be ill-served by the adoption of the Association's final offer on wages and benefits.

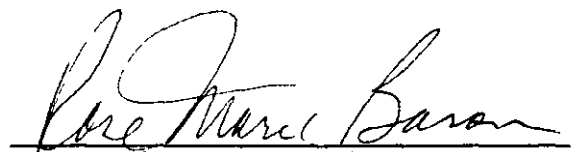
IV. SUMMARY

As noted earlier, the parties have indicated that the major issues which will determine the selection of one of the final offers are wages, retirement, and overtime. In each of these, the arbitrator has found that the Union's offer is the more reasonable based upon comparison with the school districts which form the relevant labor market. It would serve no purpose, therefore, to make specific findings on the remaining issues which would, in any case, be considered less compelling than the three major issues.

V. Award

Based upon the discussion above, the final offer of the Union shall be adopted, and along with the stipulations of the parties, incorporated into the parties' written collective bargaining agreement for 1991-92, 1992-93, and 1993-94.

Dated this 30th day of August, 1993 at Milwaukee, Wisconsin.



Rose Marie Baron, Arbitrator