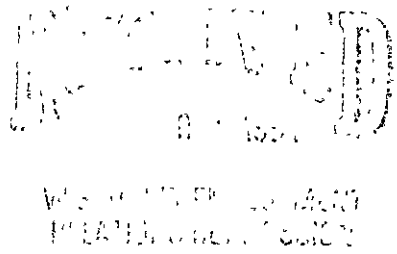
ARBITRATION OPINION AND AWARD



In the Matter of Arbitration

Between

FOREST COUNTY, WISCONSIN

And

FOREST COUNTY COURTHOUSE EMPLOYEES ASSOCIATION

WERC Case 67
No. 48432
INT/ARB-6701

Decision No. 27811-A

Impartial Arbitrator

William W. Petrie
217 South Seventh Street #5
Post Office Box 320
Waterford, WI 53185-0320

Hearing Held

Crandon, Wisconsin
January 13, 1994

Appearances

For the Employer

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For the Association

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BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between Forest County, Wisconsin and the Forest County Courthouse Employees Association, with the matter in dispute the wages to be paid to bargaining unit employees during the two year renewal labor agreement following the expiration of the prior agreement on December 31, 1992.

After their preliminary negotiations had failed to result in a complete agreement, the Association on December 8, 1992 filed a petition with the Wisconsin Employment Relations Commission seeking final and binding interest arbitration pursuant to Section 111.70 of the Municipal Employment Relations Act. After preliminary investigation by members of its staff, the Commission on September 21, 1993 issued certain findings of fact, conclusion of law, certification of the results of investigation and order requiring arbitration, and on October 12, 1993 it appointed the undersigned to hear and decide the matter as arbitrator.

A hearing took place before the undersigned in Crandon, Wisconsin on January 13, 1994, at which time both parties received full opportunities to present evidence and argument in support of their respective positions. Each party thereafter closed with the submission of a post hearing brief, after which the record was closed by the Arbitrator effective February 25, 1994.

THE FINAL OFFERS OF THE PARTIES

That the final offers of the parties, hereby incorporated by reference in this decision, differ only with respect to the wage increases to be applicable during each of the two years in the renewal agreement.

(1) The Association proposes wage increases as follows: a $.20 across-the-board increase effective January 1, 1993, a $.15 across-the-board increase effective July 12, 1993, and a 4.0% across-the-board increase effective January 1, 1994.

(2) The County proposes wage increases as follows: a $.24 across-the-board increase effective January 1, 1993, and a 3.0% across-the-board increase effective January 1, 1994.

THE STATUTORY CRITERIA

Section 111.70(4)(cm)(7) of the Wisconsin Statutes directs the undersigned to give weight to the following arbitral criteria:

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 employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.

e. Comparisons of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.

f. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.

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

h. The overall compensation presently received by the municipal employees, 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.

POSITION OF THE ASSOCIATION

In support of the contention that its final offer is the more appropriate of the two before the Arbitrator, the Association cited various of the specific arbitral criteria referenced in Section 111.70(4)(cm)(7) and it argued principally as follows.

(1) That it is within the *lawful authority* of the County to accept and abide by the terms of the Association's final offer. That this criterion was never discussed during the course of negotiations or at the arbitral hearing and, accordingly, it is not in dispute between the parties.

(2) That consideration of the *stipulations of the parties* indicate that the 1993-1994 agreement will place only a nominal financial burden upon the County.

(a) That the parties have already reached tentative agreement on two language changes in the renewal agreement, which changes would have a nominal financial impact upon the County.

(b) That the first agreement is merely a clarification of how personal holidays are handled in the first year of employment and/or when an employee retires or resigns; that this may result in a nominal increase but only for a new employee or someone who is resigning or retiring.

(c) That the second agreement reduces the hourly rate set forth in the appendix from three to two digits; that this rounding-off process is designed for administrative purposes and it carries the potential for only a nominal cost increase.

In conclusion, that the tentative agreements reached by the parties during their recent negotiations, create virtually no increased costs to the Employer.

(3) That the County has *the financial ability to meet* the costs of the Association's final offer, and that this criterion should have no bearing upon the outcome of these proceedings.

(a) That the County has never claimed an inability to pay during the parties' negotiations, mediation or arbitration proceeding.

(b) That lack of ability to pay is an objectively provable fact, the party alleging such condition has the burden of coming forward with evidence in support of such claim, and the Employer has offered no evidence of any inability to pay.

(4) That the counties constituting the *primary external comparables* for Forest County, have already been established in prior proceedings.

(a) That the parties are in agreement that the group should include Florence, Langlade, Marinette, Oconto, Oneida and Vilas Counties; that the Association feels that Marinette County should continue to be included in the group, but the Employer disagrees.

(b) That inclusion of Marinette County was addressed for the parties by Arbitrator Kerkman in his 1989 decision and award, at which time he determined it was one of the primary external comparables.[1]

(5) That consideration of *the primary external comparables* favors the selection of the final wage offer of the Association, rather than that of the County.

(a) That none of the six comparable counties is at or near the County's 3.0% wage increase offer for 1994.

(b) That the average 1994 wage increase for the primary external comparables was 3.8%, as compared to the County's 3.0% and the Association's 4.0% offers. (Association Exhibit #14)

(c) That the employees of the comparable counties have had the benefit of receiving their increases at the beginnings of the years, rather than one and one-half years after the expiration of the prior agreement.

(d) That while the County has emphasized *economic conditions* in support of its final offer, the employees are living in this same economic environment on their 1992 wages; indeed, that the Employer has recouped a significant part of the cost of the wages by virtue of the interim interest earned by it on the money due the employees.

(e) That the Association is not seeking an unreasonable wage increase, is not seeking the highest wages among the comparables, and is not asking for an increase sufficient to bring them up to average; rather, they are merely seeking to keep pace with the courthouse employees in the comparable counties.

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[1] The decision of Arbitrator Jos. B. Kerkman, in Forest County (Courthouse), Case 53, No. 41401, INT/ARB 5094, May 24, 1990, appears as Association Exhibit #5.

(f) That the Arbitrator is really being asked how much wider the wage disparity between the counties should be allowed to grow through the application of percentage increases?

(g) That the present wage inequity is compounded by the fact that the comparable communities receive substantially better overall benefits packages.

(h) That the Arbitrator should also consider the fact that Forest County employees work fewer hours than those in many of the comparable communities, which means that their lower hourly earnings are applied to fewer hours worked per year, further reducing annual earnings; in this connection that comparable employees in Oconto, Oneida and Vilas counties normally work 1950 hours per year as opposed to the 1820 hours per year worked in Forest, Marinette, Langlade and Florence counties. (Association Exhibit #27)

(i) That when hourly earnings are projected over the number of hours normally worked in 1992, the following comparisons are meaningful: the *Deputy Register of Deeds* classification in Forest County earned $15,179, which ranged from $419 to $3,213 below the comparables; the *Clerk Steno* classification in Forest County earned $14,469, which ranged from $873 to $4,251 below the comparables; the *Register in Probate* classification in Forest County earned $15,179, which ranged from $2,254 to $11,985 per year below the comparables; and the *Economic Support Specialist* classification in Forest County earned $14,669, which ranged from $1,029 to $5,904 below the comparables.

(j) That the Association attempted to lessen the referenced annual earning disparities by proposing a longer working day, which proposal was rejected by the County.

(6) That *the overall compensation* presently received by those in the bargaining unit is lower than among the primary external comparables.

(a) That unit employees receive a maximum annual *longevity benefit* of $240 after twenty years of service, the lowest among the five comparable counties which offer this benefit: that Oneida County pays its employees $600 per year after twenty years; that Vilas County pays $372 after twenty and $432 after twenty-five years; that Langlade County pays $360 per year after twenty years; that Marinette County pays $300 per year after twenty years, with an additional $15.00 for each year thereafter; and that Oconto County pays 3% of monthly salary after twenty years, multiplied by total years of service. (Association Exhibit #28)

(b) That the Employer will pay a maximum of 6.1% in *retirement contributions*, and is the only county among the primary comparables requiring employees to contribute; that all other comparables pay the full employee share. (Association Exhibit #29)

(c) That the Employer pays 66.5 *hours of holiday pay per year*, versus an average of 70.7 hours per year for the comparables; that the only comparable with fewer hours of paid holiday pay per year is Langlade County at 65 hours per year. (Association Exhibit #30)

(d) That bargaining unit *sick leave benefits* are below the comparables, in terms of maximum accumulation and the payout for unused sick leave at retirement. (Association Exhibit #31)

(e) That Forest County, with a maximum of 20 days of *annual paid vacations*, is not competitive: that Florence County also has a 20 day maximum but its employees get to the maximum benefit two years earlier; that Langlade, Oconto and Vilas counties have 25 day maximums; that Marinette and Oneida counties have 30 day maximums; and that Forest County employees move to higher levels of vacation benefits at a slower rate than among the comparables. (Association Exhibit #33)

(f) That Forest County provides good *health insurance* at reasonable rates, made possible with cooperation and careful use of the benefits by its employees. (Association Exhibit #23)

(g) Pursuant to the above, it is clear that Forest County does not make up for its woefully low wages with an above average benefits package; to the contrary, that Forest County employees are consistently at or near the bottom in virtually all areas of compensation.

In conclusion, that the final offer of the Association is the more appropriate of the two final offers and should be selected by the Arbitrator in accordance with Section 111.70(4)(cm)(7) of the Wisconsin Statutes, for the following summarized reasons: *first*, it is within the lawful authority of the County; *second*, its selection places only a nominal financial burden upon the Employer; *third*, the Association is not trying to empty the County's coffers by making unreasonable wage demands; *fourth*, the County is saving $146,000 per year in health insurance costs, and it has the ability to meet the costs of the Association's final offer; *fifth*, the Association's final wage offer compares favorably with the wage increases in comparable counties; and, *sixth*, that the overall benefits package for those in the bargaining unit is below average and cannot make up for the low wage offer provided by the County.

POSITION OF THE EMPLOYER

In support of the contention that its final offer is the more appropriate of the two before the Arbitrator in these proceedings, the Employer argued principally as follows.

(1) That Forest County is the most impoverished county of the comparables, which is a factor that must be weighed heavily by the Arbitrator.

(a) That the County's final offer in this matter was fashioned with serious consideration of the general economic conditions in the County; while surrounding counties have experienced more positive economic conditions for varying reasons, Forest County has, in the past, and continues to, experience poor economic conditions.

(b) That many Wisconsin interest arbitrators have given considerable weight to the general state of the economy when determining which final offer is the most feasible.

(c) That one important indicator of the state of the local economy is *per capita income*, and Forest County has the lowest adjusted gross income per capita, as compared to any of the comparables. (Employer Exhibit #13)

(d) That Forest County has the *lowest median family income*, the *lowest median household income*, and the *highest percentage of families in poverty* of the various intraindustry comparables. (Employer Exhibit #17)

(e) According to the Wisconsin Taxpayers Alliance, that Forest County has the *second lowest median income within the State of Wisconsin*, the *highest percentage of dependent population among the comparables*, *the second lowest high school graduation rate in the State*, and the *third lowest number of college graduates in the State*. (Employer Exhibit #15)

(f) That Forest County also has the *highest percentage of transportation and moving employees* and *laborers* among the intraindustry comparables, which are limited education, limited skill and low paying jobs; conversely, that the percentages of higher paying and more traditional jobs such as executive, sales and clerical positions are low in the county.

(g) That Forest County has 84 percent of the its property in forest land (versus a 44 percent Wisconsin average), that eighteen percent of its employed residents work in factories predominantly involved in forestry and wood products, and the timber industry is the largest employer in the County. (Employer Exhibit #23)

(h) That 76% of the County land is non-taxable land, including the forest land owned by the U.S. Forest Service, the State of Wisconsin, and the County, Town and School Districts.

(i) In the manufacturing sector, that the average weekly wage in the County is $238.95 per week or $12,325.40 per year, which is less than one-half of the State averages of $524.55 per week and $27,276.60 per year. (Employer Exhibit #27)

(j) That in the non-manufacturing area, the government sector provides the majority of the County's jobs.

(h) That in the ten year period between 1980 and 1990, the County's population declined by 3% and its population mix changed significantly; nearly one-half of its housing is seasonal, the median rent is a mere $183, and the median value per owner-occupied housing is $38,400. That these figures clearly indicate a County that lacks affluence.

(i) That in 1992 and 1993, the County generally experienced higher unemployment than the average for the intraindustry comparables. (Employer Exhibit #19)

(j) That the County has, by a wide margin, the largest percentage of persons per thousand who are receiving Aid for Families with Dependent Children, among the intraindustry comparison group. (Employer Exhibit #18)

(k) That the County has an excessive portion of its acreage in public or set-aside lands for which it receives no tax dollars, and has only approximately 24% of its land in taxable acreage. (Employer Exhibit #31)

(l) That with the introduction and passage of Senate Bill 44, the County must be more fiscally responsible than ever; that this budget bill places limitations on county tax levy

increases and forces counties to go to the voters to assess levies above and beyond that allowed in the law.

(m) In light of the bleak overall economic conditions summarized above, that its final offer is fair and reasonable; that it acknowledges that its employees deserve an increase in compensation but it also believes that the economic climate in the County must dictate that such increases be matched to what is affordable.

(2) That the Courthouse Employees are compensated fairly, when compared to various other of their public and private sector counterparts.

(a) For a variety of reasons, that Marinette County should not be utilized as a comparable in these proceedings.

(b) That an examination of wages paid for Clerk Stenos, Clericals, Certified Aides, Janitors, Receptionists, Secretaries, Terminal Operators, and Tellers, among seven private sector employers in the County indicates that those in the bargaining unit are well paid. (Employer Exhibit #39)

(c) That the Wisconsin Department of Industry, Labor and Human Relations conducted a survey of private sector wages 1992, which included the wages paid to clerical and maintenance employees in two delivery areas encompassing Forest County and its comparables. A comparison of the wages paid these employees indicated that the County wages are substantially higher. (Employer Exhibit #40)

(d) That when compared to wages paid in the City of Crandon, the wages paid those in the bargaining unit are more than competitive. (Employer Exhibit #42)

(e) That the very low employment turnover in the courthouse unit indicates that wage levels are not a problem; in this connection, that 24% of the employees were hired prior to 1980 and an additional 52% prior to 1990. (Union Exhibit #13)

(3) That Courthouse employees receive more general employee benefits that other public sector and private sector employees.

(a) By way of example, that Forest County pays all of the health insurance premiums, which is not typical of the practice in comparable counties; in this respect, that only Langlade County also pays 100%, while Oneida pays 95%, Vilas pays 92%, and Florence and Oconto pay 90%.

(b) That Forest County also has no co-pay feature, which feature is typical of the other comparable counties.

(c) That when deductibles, co-pay features and premium contributions are considered, Forest County has the second lowest maximum out of pocket costs of the comparable counties. (Employer Exhibit #29)

(d) That the Employer survey of seven private sector employers in the area shows that only two pay 100% of employee group insurance costs, with the others requiring their employees to pay from half to ten percent of their premium costs. (Employer Exhibit #41)

(e) That Forest County has sought to give a fair wage increase to its Courthouse Employees, in light of the compensation now received by these employees compared to everyone else in the county; that while it would like to pay its employees the same wages paid in the comparable counties, it simply does not have the resources to do so.

(4) That the Employer's final offer exceeds the increases in the CPI, and is reasonable considering the poor state of the economy in Forest County.

(a) That the County's offer of 24 cents in 1993 (an average of 3%) and an additional 3% in 1994 is more in line with the CPI than the Association's offer of 3.5% for 1993 (a lift of 4.3%), and 4% in 1994.

(b) In the above connection that through September of 1993, the average CPI increase for non-metropolitan areas was 2.8%; accordingly, that the County's final offer is closer to this figure than the Union's, and its offer is favored by arbitral consideration of the cost of living criterion.

(c) In addition, that the general economic climate in Forest County must be considered by the Arbitrator; that similar consideration has been accorded economic circumstances by other Wisconsin interest arbitrators.

(d) That the County's final offer reflects the general economic climate of Forest County, the arbitrator must take this into consideration when comparing the two offers, and the County simply cannot grant the same salary increases to its employees as granted by other counties, when it does not enjoy the same economic health and prosperity. In this connection, that its 3% increases for 1993 and for 1994 are reasonable, they maintain stability for the County employees, and they reflect the economic climate and the well being of the County.

In summary and conclusion that the final offer of the County is favored by arbitral consideration of the poor economic conditions in the county, the fact that Courthouse employees are fairly compensated compared to other public and private sector employees, their low turnover, their more generous benefits than other public and private sector employees, and the fact that the County's final offer is fair and equitable when market conditions are considered.

FINDINGS AND CONCLUSIONS

This case is highly unusual in that the parties are in disagreement only with respect to wages during the term of the renewal agreement, and that the two principal considerations emphasized and relied upon by them are the *comparison criterion* emphasized by the Association, versus the *ability to pay* criterion emphasized by the Employer.

The legislature has not prioritized in terms of relative importance, the various statutory criteria contained in Section 111.70(4)(cm)(7) of the Wisconsin Statutes and, accordingly, it has left to the parties and to arbitrators the responsibility for determining the relative weight to be applied to these criteria when they come into apparent conflict with one another. While such determinations must be made on case-by-case bases, it is reasonable to infer that the legislature intended the arbitral criteria to be prioritized and applied on the same bases normally governing their utilization

in wage determination in general.[2] Accordingly, the undersigned will first address the normal application of the comparison criteria and the so-called ability to pay criterion, prior to applying them to the evidence and arguments of the parties and selecting the more appropriate of the two final offers in these proceedings.

The Comparison Criteria Under Sections 111.70(4)(cm)(7)(d), (e) and (f) of the Wisconsin Statutes

In the referenced sections of the Wisconsin Statutes, the undersigned is directed to consider three types of comparisons between those employees involved in the dispute and other employees: *first*, versus other *employees performing similar services; second*, versus other *general public sector employees in the same and comparable communities;* and, *third*, versus other *private sector employees in the same and comparable communities.*

It is widely accepted in the interest arbitration process that *the comparison criteria*, in general, are the most important and persuasive of the various arbitral criteria, and that the so-called *intraindustry comparison criterion*, is the most important and persuasive of the various possible comparisons.[3] Merely stating this principle, however, does not address the myriad of potential problems inherent in the application of the intraindustry comparison criterion, including three which were considered by the parties to the dispute at hand: *first*, the makeup of the primary intraindustry comparison group which should be utilized in making such comparisons; *second*, the significance of historic wage differentials within the primary intraindustry comparison group; and, *third*, the significance of the Union proposed *split increase*, which would provide *greater wage lift* during the life of the renewal agreement, at *somewhat lower total wage costs* than otherwise would be the case. The normal arbitral treatment of these considerations of wage determination are rather well described in the following excerpts from Bernstein's venerable but still authoritative book:

> "Comparisons are preeminent in wage determination because all parties at interest derive benefit from them. To the worker they permit a decision on the adequacy of his income. He feels no discrimination if he stays abreast of other workers in his industry, his locality, his neighborhood. They are vital to the union because they provide guidance to its officials upon what must be insisted upon and a yardstick for measuring their bargaining skill.... Arbitrators benefit no less from comparisons. They have 'the appeal of precedent and ... awards based thereon are apt to satisfy the normal expectations of the parties and to appear just to the public.
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[2] This is the same principle embraced by the Wisconsin Legislature in Section 111.70(4)(cm)(7)(j) of the Wisconsin Statutes, wherein it provided that arbitrators should consider "such other factors ... 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."

[3] This so-called *intraindustry comparison* within the public sector falls generally within Section 111.70(4)(cm)(7)(d), and it normally consists of those employees performing similar services within a primary external comparison group. The wages, hours and conditions of employment for teachers, for example, would be compared against those for teachers in comparable school districts, those for police officers and firemen would be compared against those for police officers and firemen in comparable cities, etc; in the case at hand, the wages, hours and conditions of employment for the courthouse employees in the bargaining unit would be compared against those for courthouse employees in comparable counties.

a. Intraindustry comparisons. The intraindustry comparison is more commonly cited than any other form of comparison, or, for that matter, any other criterion. More important, the weight it receives is clearly preeminent; it leads by a wide margin in the first rankings of arbitrators. Hence, there is no risk in concluding that it is of paramount importance among the wage-determining standards.

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A corollary of the preeminence of the intraindustry comparison is the superior weight it wins when found in conflict with another standard of wage determination. The balancing of opposing factors, of course, is central in the arbitration function, and most commonly arises ... over an employer argument of financial adversity.

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The last of the factors related to the worker is wage history. Judged by the behavior of arbitrators, it is the most significant consideration in administering the intraindustry comparison, since the past wage relationship is commonly used to test the validity of other qualifications. The logic of this position is clear: the ultimate purpose of the arbitrator is to fix wages, not to define the industry, change the method of wage payment, and so on. If he discovers that the parties have historically based wage changes on just this kind of comparison, there is virtually nothing to dissuade him from doing so again. By the same token, if they have not had a wage relationship over time, he is likely to refuse to create one.

A wage history is measurable on two planes: amount and time. Its weight is a direct function of the closeness with which both approach identity. If firms *a* and *b* have made exactly the same cents-per-hour adjustments on exactly the same dates for a number of years, that fact is more impressive than any dilution on either count. Variations, however, are often deceptive, suggesting the advisability of looking beneath the surface. For example, the cost to an employer of a particular rate increase granted by others in the industry may be, in part, converted into an additional holiday. Or, in an industry dominated by a large firm, small employers may delay before putting the same wage change into effect. It is probable that deviations in time are more common than those in amount.

This discussion of wage history suggests a final problem in administering the intraindustry comparison, namely, the historic differential. That is, how do arbitrators behave when an established disparity in rates conflicts with the principle of wage parity within the industry? Here the force of the intraindustry comparison is clearly paramount. In the *Pacific Gas & Electric* case, for example, the Utility Workers argued that the company's 'traditional leadership' should be maintained. Kerr replied:

> The doctrine of historical relationships runs directly counter to that of standardization. Standardization cannot be achieved by bringing the lower paid up to the higher paid, if the higher paid insist always upon being higher paid. If the lower paid were constantly to insist on standardization and the higher paid on historical differentials, the effect would be that of the dog chasing his tail. While standardization seldom occurs at one jump, it seems to be the more widely recognized and constantly effective of the two doctrines. Consequently, the argument that

> Pacific Gas and Electric rates should permanently be maintained a given amount above other rates is not accepted as valid.[4]

In preliminarily applying the above described principles to the dispute at hand, it is apparent that the Arbitrator will be required to address in detail the following considerations.

(1) The extremely important and normally preeminent *intraindustry comparison criterion* generally takes precedent when it comes into conflict with other arbitral criteria, including employer arguments of *financial adversity*.

(2) When faced with questions relating to the composition of a *primary intraindustry comparison group*, arbitrators normally place great weight upon the parties' *bargaining history*, and they rarely disturb the makeup of a primary intraindustry comparison group which has historically been utilized by the parties.

(3) When faced with *historic wage differentials* within a primary intraindustry comparison group, arbitrators normally recognize the relatively greater importance of moving toward *wage standardization*, rather than crediting offers and arguments of the parties which would tend to perpetuate or expand such historic differentials.

(4) *Wage standardization* in the face of historic wage differentials is rarely achieved in *one jump*; in addressing historic wage differentials on the twin bases of *amounts* versus *time*, arbitrators are normally more tolerant toward different implementation dates of standard wage rates than toward continuation of different wage rates, per se.

In first addressing the composition of the primary intraindustry comparison group in these proceedings, the undersigned is faced with the dispute of the parties relative to the inclusion of Marinette County. In this connection, it is first emphasized that interest arbitrators do not normally distinguish between a comparison group historically established and utilized by parties in their past negotiated settlements, versus one established in prior interest arbitration proceedings; accordingly, the group historically utilized by the parties is defined in the May 24, 1990 decision and award of Arbitrator Kerkman, in which he determined that the primary intraindustry comparison group should consist of Forest, Florence, Langlade, Marinette, Oconto, Oneida and Vilas counties.[5] While the Employer argued that Marinette County should be excluded from the comparison group, principally due to its recently completed job reclassification study and resulting changes in compensation, these are not considerations which would justify its removal from the historical comparison group. Indeed, these changes will undoubtedly be considered by all of the members of the group in their future negotiations.

In the absence of the requisite extremely persuasive evidence and argument to the contrary by the Employer, therefore, the undersigned has preliminarily concluded that the same counties previously utilized by the parties and recognized by Arbitrator Kerkman, should continue to comprise the primary intraindustry comparison group in these proceedings.

In next comparing the wages paid to comparable jobs within the above defined intraindustry comparison group, the undersigned notes that those in

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[4] Bernstein, Irving, The Arbitration of Wages, University of California Press - 1954, pages 54, 56, 57, 66-67. (Footnotes omitted except for Pacific Gas & Electric Company, 7 LA 532)

[5] Association Exhibit #5.

the bargaining unit rank at the bottom of the six comparable counties in terms of both *hourly wage rates* and *yearly earnings* for the various classifications contained within the bargaining unit, and even if the maximum hourly rates for the various classifications are compared on the bases most favorable to the Employer (i.e. based solely on hourly working rates, utilizing the higher, year-end figures when faced with split rates, and using its selected classifications for comparison), adoption of the Employer's final offer would entail *significant further deterioration* of the previous earnings disparity between those in the bargaining unit versus the hourly wages of those employed in comparable classifications within the primary *intraindustry comparison group*. In these connections the following data extracted from Employer Exhibits #33, #34, #35 and #36 are quite instructive:

CLASSIFICATIONS	1992 MAX	1993 MAX	1994 MAX
(1) Clerk Steno	Avg $8.25	$8.50	$8.95
	Forest $7.94 (-.31)	(C)$8.18 (-.32)	(C)$8.43 (-.52)
		(A)$8.29 (-.21)	(A)$8.62 (-.33)
(2) Deputy Clerk of Courts	Avg $9.17	$9.81	$10.29
	Forest $8.34 (-.83)	(C)$8.58 (-1.23)	(C)$ 8.84 (-1.36)
		(A)$8.69 (-1.12)	(A)$ 9.04 (-1.17)
(3) Home Health Aide	Avg $8.05	$8.95	$9.33
	Forest $7.36 (-.69)	(C)$7.74 (-1.21)	(C)$7.97 (-1.36)
		(A)$7.85 (-1.10)	(A)$8.16 (-1.17)
(4) Custodian	Avg $8.70	$9.43	$9.90
	Forest $8.74 (+.04)	(C)$8.98 (-.45)	(C)$9.25 (-.65)
		(A)$9.09 (-.34)	(A)$9.45 (-.40)

As is apparent from the above, therefore, there would be further relative erosion in wages for the referenced classifications with the adoption of either of the two final offers: the maximum hourly rate for the Clerk Steno Classification will go from 31 cents below average in 1992, to either 52 cents below average or 33 cents below average in 1994; the Deputy Clerk of Courts will go from 83 cents below average in 1992, to 1.36 or $1.17 below average in 1994; the Home Health Aide will go from 69 cents below average in 1992 to $1.36 or $1.17 below average in 1994; and the Custodian will go from four cents above average in 1992, to 65 cents below or 40 cents below average in 1994. If the comparisons were made on the basis of *yearly* rather than *hourly* earnings, and the relatively shorter work day and work year for bargaining unit employees factored in, the earnings disparities would be even larger than those shown above. Similarly, if the Employer had computed its averages for the various comparables on the basis of the year end maximums for the various classifications in Employee Exhibits #33 through #36, thus minimizing the impact of the split increases, the wage disparities would generally have been more significant. If the comparisons emphasized by the Union at pages 10-11 of its post hearing brief were utilized for comparison purposes, the disparities would be significantly higher.

On the basis of all the above, therefore, and even when viewed on the comparisons most favorable to the Employer, the undersigned has preliminarily concluded that arbitral consideration of the *intraindustry comparison criterion* clearly and strongly favors the selection of the final offer of the Association in these proceedings.

While the Employer has introduced into the record and argued the significance of certain other general private and public sector comparisons, the Arbitrator has concluded that they cannot be assigned significant weight in the final offer selection process in these proceedings for the following principal reasons: there is no indication in the record as to how the seven

referenced employers were selected for comparison purposes, and/or why they should be considered as representative of comparable private and public sector employers; the pay comparisons of diverse jobs, apparently on the basis of inferences drawn from their job titles, also generates obvious and serious questions relative to the validity of the comparisons [6]; general public and private sector comparisons are, at best, entitled to significantly less weight than are *intraindustry comparisons*.

For the reasons referenced above, the undersigned has preliminarily concluded that the secondary comparables cited by the Employer cannot be assigned significant weight in the final offer selection process in these proceedings.

The Interests and Welfare of the Public and the Ability to Pay Criteria Under Section 111.70(4)(cm)(7)(c) of the Wisconsin Statutes

Questions frequently arise wherein parties will argue relative to the amounts of *absolute weight* and/or *relative weight* that should be placed upon so-called *ability to pay* considerations in the final offer selection process. In this connection it will first be noted that the popular characterization of this arbitral criterion as *ability to pay* is, itself, something of a misnomer. The following additional excerpts from Bernstein's book more appropriately define and describe the application of this arbitral criterion.

"4. *Financial Condition of the Employer*

This unorthodox and rather heavy-handed title constitutes an attempt to devise a meaningful phrase to describe what the parties and arbitrators actually deal with in wage cases. The conventional slogan - ability to pay - is deficient on several counts. For one, the employer's typical plea is negative, *in*ability to pay. For the purpose of precision in this discussion this concept is confined to the comparatively rare contention that a wage increase or failure to cut rates would imperil the marginal firm. A second inadequacy of 'ability to pay' is that the usual argument is less extreme than this language suggests on its face. Normally the employer contends that a prospective wage action would be a secondary financial embarrassment. He may note, for example, that stiffening price competition necessitates cost retrenchment without suggesting that failure to cut wages will knock the firm out of business. The terms 'financial condition of the employer,' then shall include these three relatively distinct notions: affirmative ability to pay as justification for an increase, inability to pay in the face of a threat to survival, and, most commonly, moderation in wage policy reflecting less than satisfactory business conditions.

* * * * *

In the face of these management and labor attitudes toward the financial-capability criterion, arbitrators have three alternatives: first, to give it decisive weight; second, to ignore it; and, finally, to accord it some but not controlling influence. The problem almost invariably arises in negative form: the employer argues that he cannot pay the proposed increase (or must have a wage cut) and the union counters that his plea should be disregarded. Hence the three options revolve about the matter so framed.

The great majority of arbitrators refuse to grant the employer's impaired financial standing decisive weight...

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[6] At pages 18 and 19 of its brief, the County is comparing jobs identified as *Clerk Steno, Clerical, Certified Aide, Janitor, Receptionist, Secretary, Terminal Operator, and Teller,* with the *Clerk Steno* and the *Custodian* classifications in the bargaining unit.

The much more common ruling is that the financial standard is not controlling...

The second alternative, entirely ignoring this criterion, receives a similar response from arbitrators. The great majority are unwilling to take this extreme position; a small minority dissent...

* * * * *

Most arbitrators incline to give more influence to the intraindustry comparison than to financial hardship provided that both are of roughly equivalent validity. That is, a tight comparison tends to carry greater weight than a clear showing of distress. If one is not substantiated, of course, the other gains relatively in force."[7]

The inherent difficulty in directly applying certain of Bernstein's observations and conclusions relating to the financial condition of employers, to a statutory interest arbitration dispute in Wisconsin, is generated by the fact that his examples are generally drawn from the *private sector* rather than the *public sector*. The application of the so-called *ability to pay* criterion in interest arbitration at the local government level was perceptively addressed in part as follows by Arbitrator Howard S. Block, in a section of his treatise entitled *Ability to Pay: The Problem of Priorities:*

The source of most local government revenue, as any homeowner will irately confirm, is the property tax. In urban areas, the political thrust of municipal government is to ease somewhat the utterly disproportionate tax levied on homeowners and to turn more insistently to state and federal sources for funds...

Thus, the unique aspect of applying interest criteria to local government negotiations become clear. When an employer in private industry argues inability to pay, he implies that if his labor costs are forced above a tolerable level, he will liquidate his holdings and reinvest his capital in another enterprise affording him a more acceptable rate of return. In short, he will go out of business. We have witnessed the same economic forces at work in the past - where federal and state minimum wages were enacted and subsequently raised, large numbers of marginal enterprises closed their doors.

One other example will illustrate why ability to pay is seldom controlling in the private sector. Some 20 years ago there were 175 retail bakeries in Long Beach, Calif., and its environs. Gradually, their number dwindled as these bakeries were forced to the wall by competition from frozen pastries and ready mixed type of powders sold in the supermarkets. Each year or two survivors met with the Bakers' Union to renegotiate wages and other cost items. The union's demands were modest, but firm. They remained impervious to the depressed conditions of the industry. As the local union president put it, 'What would be the point of forgoing a wage increase? Next year they won't be any better off, or the year after. We can't keep them in business. They've got to solve that themselves. In the meantime, for as long as the jobs last, we're going to maintain a decent wage.' It is only necessary to add that arbitral findings in the private sector disclose a substantial concurrence with the reasoning expounded by this representative. In the relatively few instances in which inability to pay has been given significant weight, it has usually been relied upon to justify some postponement of wage adjustments called for by the labor market but not to deny them permanently.

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[7] The Arbitration of Wages, pages 77-78, 80, 81, 83. (footnotes omitted)

Unlike private management, an assertion by government of inability to pay will rarely be a prelude to closing its doors. For government to go out of business is not a very realistic alternative. Even curtailment or elimination of government services because of a budgetary squeeze is often more than offset by the necessity of providing additional benefits to meet growing social problems, ... The point is, operating decisions of the private sector are economic in nature, rooted in the profit motive. Identical decisions in a public enterprise are political; that is economic factors are often dominated by political considerations. Harvard Professors Dunlop and Bok have perceptively contrasted the impact of economic constraints in the public and private sector in their recent book from which the following extract is highly pertinent to this discussion:

> 'In the private sector, union demands are usually checked by the forces of competition and other market pressures. Negotiators are typically limited by such restraints as the entry of nonunion competitors, the impact of foreign goods, the substitution of capital for higher-priced labor, the shift of operations to lower-cost areas, the contracting out of high-cost operations to other enterprises, the shut down of unprofitable plants and operations, the redesign of products to meet higher costs, and finally the managerial option to go out of business entirely. Similar limitations are either nonexistent or very much weaker in the public sector. While budgets and corresponding tax levies operate in a general way to check increases in compensation, the connection is remote and scarcely applicable to particular units or groups of strategically located public employees. Unhampered by such market restraints, a union that can exert heavy pressure through a strike may be able to obtain excessive wages and benefits.'

At any rate, whatever the complexities presented by the ability-to-pay argument on state and federal levels, it is on the local level that the problem is most resistant to a solution... How does an arbitration panel respond to a municipal government that says, 'We just don't have the money'?

Pioneering decisions of interest neutrals have assigned no greater weight to such an assertion than they have to an inability to pay position by private management. An arbitration panel constituted under Michigan's Public Act 312 rejected an argument by the City of Detroit which would have precluded the panel from awarding money because of an asserted inability to pay. What would be the point of an arbitration, the panel asks in effect, if its function were simply to rubber stamp the city's position that it had no money for salary increases? What employer could resist a claim of inability to pay if such claim would become, as a matter of course, the basis of a binding arbitration award that would relieve it of the grinding pressures of arduous negotiations? While the panel considered the city's arguments on this point, it was not a controlling consideration.

Inability to pay may often be the result of an unwillingness to bell the cat by raising local taxes or reassessing property to make more funds available...

* * * * *

Also, an inability to pay declaration, or at least a restricted ability to pay stance, has another useful purpose: that of enabling public management to maintain a bargaining position...

* * * * *

> A parting comment on the matter of priorities. Although I have tended to dwell on inability to pay as a form of conflict over priorities in spending, I would not want to leave the impression that a local or statement government cannot, in a very real and practical sense, be dead broke. To cite a highly pertinent analogy, even an enterprise that goes bankrupt - produces a conflict among creditors over priorities in the disbursement of the remaining assets."[8]

On the basis of the considerations referenced and described above, the undersigned joins the majority of Wisconsin interest arbitrators in applying the so called *ability to pay* criterion under Section 111.70(4)(cm)(7)(c), in a manner consistent with the following principles:

(1) In the event that a Wisconsin public employer establishes that it is bereft of funds and has reached the limit of its taxing power to raise additional monies, this absolute *inability to pay* must take precedent over all other arbitral criteria, including the *intraindustry comparison* criterion.

(2) When a Wisconsin public employer alleges *financial hardship short of an absolute inability to pay*, this criterion normally carries relatively less weight in the final offer selection process than does, for example, *intraindustry comparisons*.

(3) When faced with a claim of *financial hardship* in support of proposed maintenance of wages or benefits that are *substantially below the average of intraindustry comparables*, arbitrators are more tolerant toward deviations in *time* rather than deviations in *amounts*.

In applying these principles to the dispute at hand, the Impartial Arbitrator has preliminarily concluded that the Employer's very real and very well documented claims of *financial adversity* and *impaired ability to pay*, cannot be assigned determinative weight in the final offer selection process, over the very real disparity in wages paid, as between the Employer and the intraindustry comparables. While Wisconsin interest arbitrators might flexibly apply the intraindustry comparison criterion in a manner conducive to an employer proposed gradual movement toward wage parity over a period of time, the record simply does not support the Employer's proposed *increase in bargaining unit wage differentials*. In this connection it is noted that the Association is really seeking maintenance of the status quo ante in wage comparisons among the comparable counties, rather than any significant movement toward standardization of wages.

The Cost of Living Criterion Under Section 111.70(4)(cm)(7)(g) of the Wisconsin Statutes

In this connection the Employer emphasizes the recent stability in the CPI, and it urged that recent and anticipated movement in the index during the two year contract period was closer to the approximate 3% annual wage increases proposed by the Employer, than to the higher increases proposed by the Association. Without unnecessary elaboration, it is clear to the undersigned that cost of living considerations favor the position of the Employer in these proceedings, but the weight to be placed upon this criterion must be determined.

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[8] Block Howard S., Criteria in Public Sector Interest Disputes, University of California, Los Angeles, California, Institute of Industrial Relations, Reprint No. 230, pages 169-171, 172, 178. (Included quotation from Derek C. Bok and John T. Dunlop, Collective Bargaining and the Public Sector, in *Labor and the American Community*, Simon and Shuster - 1970, pages 334-335; remaining footnotes omitted)

The relative importance in the final offer selection process of the cost of living criterion, varies with the state of the national and the Wisconsin economies. During periods of rapid movement in prices, this criterion may be one of, if not the most important of the various arbitral criteria, but during periods of relative price stability it declines significantly in its relative importance.

An examination of the settlement costs within the primary intraindustry comparison group indicates that the comparables have not placed determinative weight upon cost of living considerations in their negotiations and, due to the recent stability in prices, the cost of living criterion is entitled to relatively little weight in the final offer selection process in these proceedings.

The Overall Compensation Criterion under Section 111.70(4)(cm)(7)(h) of the Wisconsin Statutes

This arbitral criterion recognizes the principle that impasse items should not be viewed in isolation. Hypothetically, if parties had characteristically negotiated low benefits in favor of higher than normal wages, this factor could be considered by an interest arbitrator in selecting a higher final wage offer; similarly, if parties had negotiated a higher than normal benefits package, this might justify arbitral selection of an offer containing comparatively lower wages than might otherwise have been appropriate.

The Employer is entirely correct in emphasizing that it apparently provides better *medical and hospitalization insurance coverage* than the intraindustry comparables, when measured in terms of its payment of 100% of the premium costs and the lack of a co-pay feature in the coverage. This factor does not, however, translate into a superior level of benefits across the board, as is emphasized by the Union in its apparently accurate and valid arguments relating to superior benefits provided by the comparables in the areas of *longevity pay, employer retirement contributions, holiday pay, sick leave benefits*, and *paid vacations*.

Pursuant to the above, the Impartial Arbitrator has preliminarily concluded that no unusual weight should be placed upon the *overall compensation criterion* in the final offer selection process in these proceedings.

Summary of Preliminary Conclusions

As addressed in more significant detail above, the Impartial Arbitrator has reached the following summarized, principal preliminary conclusions:

(1) That the case is highly unusual in that the parties are in disagreement only with respect to wages during the term of the renewal agreement, and that the two principal considerations emphasized and relied upon by the parties are the comparison criteria and the ability to pay criterion.

(2) It is widely recognized in Wisconsin and elsewhere that the comparison criteria are normally the most important of the various arbitral criteria, and that the so-called intraindustry comparison criterion is normally the most important and persuasive of the various arbitral criteria.

(a) The intraindustry comparison criterion generally takes precedence when it comes into conflict with other criteria, including employer arguments of financial adversity.

(b) When faced with questions relating to the composition of a primary intraindustry comparison group, arbitrators normally

place great weight upon the parties bargaining history, and they rarely disturb the makeup of a primary intraindustry comparison group which has historically been utilized by the parties.

(c) When faced with historic wage differentials within a primary intraindustry comparison group, arbitrators normally recognize the relatively greater importance of moving toward wage standardization, rather than crediting offers and arguments of parties which would tend to perpetuate or expand such historic differentials.

(d) Wage standardization in the face of historic wage differentials is rarely achieved in one jump; in addressing historic wage differentials on the twin bases of amounts versus time, arbitrators are normally more tolerant toward different implementation dates of standard wage rates than toward continuation of different wage rates, per se.

(3) In the absence of the requisite extremely persuasive evidence and argument to the contrary, the same counties previously utilized by the parties and recognized by Arbitrator Kerkman, should continue to comprise the primary intraindustry comparison group in these proceedings.

(4) Even when viewed on the basis of comparisons most favorable to the Employer, arbitral consideration of the intraindustry comparison criterion clearly and strongly favors the selection of the final offer of the Association in these proceedings.

(5) The secondary comparables cited by the Employer cannot be assigned significant weight in the final offer selection process in these proceedings.

(6) That the Employer's very real and very well documented claims of financial adversity and impaired ability to pay, cannot be assigned determinative weight in the final offer selection process, over the very real disparity in wages paid, as between the Employer and the intraindustry comparables. While Wisconsin interest arbitrators might very well flexibly apply the intraindustry comparison criterion in a manner conducive to gradual movement to wage parity over a period of time, the record simply does not support the Employer's proposed increase in bargaining unit wage differentials.

(7) The cost of living criterion favors the position of the Employer, but it is entitled to relatively little weight in the final offer selection process in these proceedings.

(8) The overall compensation criterion is entitled to no unusual weight in the final offer selection process in these proceedings.

(9) None of the remaining statutory arbitral criteria were significantly argued or can be assigned significant weight in the final offer selection process in these proceedings.

Selection of Final Offer

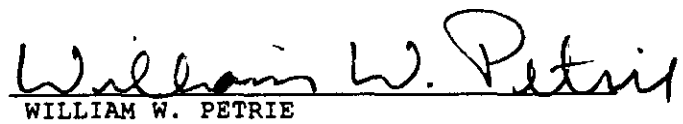
After a careful review of the entire record in these proceedings, including arbitral consideration of all of the statutory criteria contained in Section 111.70(4)(cm)(7) of the Wisconsin Statutes, the Impartial Arbitrator has preliminary concluded, for the various reasons described above, that the final offer of the Association is the more appropriate of the two final offers.

AWARD

Based upon a careful consideration of all of the evidence and argument, and after a review of all of the various arbitral criteria contained in Section 111.70(4)(cm)(7) of the Wisconsin Statutes, it is the decision of the Impartial Arbitrator that:

(1) The final offer of the Association is the more appropriate of the two final offers before the Arbitrator.

(2) Accordingly, the Association's final offer, hereby incorporated by reference into this award, is ordered implemented by the parties.



WILLIAM W. PETRIE
Impartial Arbitrator

April 26, 1994