STATE OF WISCONSIN
BEFORE THE INTEREST ARBITRATOR

In the Matter of The Petition of MEQUON-THEINSVILLE EDUCATION ASSOCIATION To Initiate Arbitration between said Petitioner and MEQUON-THEINSVILLE SCHOOL DISTRICT	Case 11 No. 49816 INT/ARB-7013 Decision No. 27947-A

APPEARANCES: PATRICK A. CONNOLLY, UniServ Director, appearing on behalf of the Association.

WARREN L. KREUNEN and JENNIFER S. WALTHER of von Briesen and Purtell, S.C., Attorneys at Law, appearing on behalf of the District.

OPINION AND AWARD

Mequon-Theinsville School District, hereinafter referred to as the District, and Mequon-Theinsville Education Association, hereinafter referred to as the Association, were parties to a collective bargaining agreement applicable to all certified full-time and regular part-time teachers, which expired by its terms on June 30, 1993. The parties were unsuccessful in their efforts to negotiate a successor agreement and the Association, on September 23, 1993, filed a Petition with the Wisconsin Employment Relations Commission (WERC), seeking to initiate interest arbitration pursuant to Section 111.70(4)(cm)6. of the Municipal Employment Relations Act (MERA). After an investigation conducted by Commissioner William K. Strycker, the WERC issued a decision, dated February 14, 1994, wherein it certified the existence of an impasse

and issued an order requiring interest arbitration. The parties selected the undersigned, from a panel of arbitrators submitted to them by the WERC and the WERC, on March 28, 1994, issued an Order appointing the undersigned to serve as arbitrator and issue a final and binding award, pursuant to Section 111.70(4)(cm)6. and 7. of the MERA. A hearing was held at the District's offices in Mequon, Wisconsin on May 19, 1994, at which time the parties presented their evidence. At the hearing, the District presented a written argument in support of its final offer. The Association filed its written argument, in support of its final offer, on July 15,1994. The District, which had reserved the right to file a response,did so on July 25, 1994. Full consideration has been given to the evidence and arguments presented in rendering the award herein.

THE ISSUES IN DISPUTE

At the conclusion of the investigation by the WERC, the District submitted a Qualified Economic Offer (QEO) covering the 1993-1994 and 1994-1995 school years, which was approved by the WERC. As a consequence, even though both final offers make reference to the economic provisions to be included in the new agreement, consistent with the District's QEO, the only issues in dispute in this proceeding are the two non-economic issues raised by the Association's final offer. They relate to proposed changes in the language of the agreement pertaining to the establishment of the school calendar and the submission of grievances to

arbitration.

School Calendar

The three prior agreements between the District and the Association (and its predecessor) all included a provision, in Article IV, C, describing the procedure to be followed in establishing the school calendar. It read as follows:

> "1. School calendar - Shall be agreed upon by the board and administration after consultation with the M-TEA. This includes 181 student days and 9 days for inservice, parent conferences, and holidays."

Pursuant to said provision, it has been the District's practice to meet and discuss the specific content of the school calendar for the ensuing school years, during negotiations and well in advance of their effective dates. In all cases, the calendars thus established have been accepted by the representatives of the Association (or its predecessor) and attached to the agreement.

During the negotiations which resulted in the agreement covering the 1991-1992 and 1992-1993 school years, the parties agreed to enter into a "letter agreement" to "memorialize certain positions of the parties" taken during the negotiations "which the parties expect to maintain throughout the life of the contract." It contained the following provision:

> "Attached are calendars for the 1991-92, 1992-93, and 1993-94 school years; these calendars will not be changed if the settlement agreement and this letter agreement are executed and ratified by both parties."

During the negotiations for the agreement here in dispute, the

Association made a request for a "change" in the school calendar to include two, one-half grading and conference preparation days at the end of the first and third quarters, to be counted as student contact days. Thereafter, the parties met to discuss the specific content of the calendars for the 1994-1995 and 1995-1996 school years. As a result of those discussions calendars were developed which were deemed acceptable to the representatives of the Association. They included two, one-half days "for grading" at the end of the first and third quarters. Thus, none of the bargainable aspects of either of the two school calendars which were discussed during the negotiations over the terms to be included in the 1993-1994 and 1994-1995 agreement is here in dispute. However, the Association has made a proposal as part of its final offer which would change the procedure for establishing school calendars in the future and states that they are part of the agreement. It reads as follows:

> "Article IV. C. Other, Section 1. School Calendar.
>
> Replace this section with the following: The school calendar shall be agreed upon by the Board and the M-TEA and shall be attached to and made part of this agreement. This includes 181 student days and 9 days for inservice, parent conferences, and holidays."

Arbitration

Under the terms of the agreement between the District and the Association's predecessor (Theinsville-Mequon United Educators) in effect for the 1985-1986 and 1986-1987 school years, the final (fourth) step of the grievance procedure called for a decision by

the Board of Education. The procedure specifically stated "the Association does not waive its legal rights to carry the grievance further." Thus, it was understood, that the Association retained the right to take further action, such as filing a prohibited practice complaint with the WERC, alleging a violation of the agreement, contrary to the provisions of Section 111.70(3)(a)5.

During the negotiations between the District and the Association's predecessor over the terms to be included in the agreement covering the 1987-1988, 1988-1989 and 1989-1990 school years, the Association's predecessor sought to include a provision in the agreement calling for binding arbitration of grievances which could not be resolved in the agreed to grievance procedure. The District resisted that proposal in negotiations, but ultimately agreed to include an arbitration provision, calling for arbitration by a "permanent umpire" who was mutually acceptable and a resident of the District.

After agreement in principle was reached at the table, an effort was made to find an individual willing to serve as permanent umpire who was acceptable to both parties and there were further negotiations over the exact wording of the language to be included in the agreement. According to correspondence in the record, the parties' attorneys served as spokespersons for this purpose.

A prominent Milwaukee attorney who lives in the District, Gerald P. Boyle, agreed to serve as permanent umpire and was deemed acceptable to both parties. After Boyle was selected to serve as

permanent umpire, the parties encountered some difficulty in agreeing to the language to be included in the agreement. In particular, they were unable to agree on the procedure to be followed in selecting a new permanent umpire, in the event that Boyle was no longer willing or able to serve in that capacity. The language which was ultimately agreed to excludes any reference to that potential problem. The language in question was carried forward into the three-year agreement which expired on June 30, 1993 and reads, in relevant part, as follows:

> "STEP 5. In the event the parties are unable to satisfactorily resolve the grievance through the aforementioned procedure, either party may submit the matter for resolution to the permanent umpire within thirty calendar days of the board's decision. The party submitting the matter shall notify the other party and the permanent umpire. Such notice must specify the express term(s) of the collective bargaining agreement between the Mequon-Thiensville School District and the M-TEA which have allegedly been violated.
>
> "The umpire shall have no authority to amend, modify, nullify, ignore, add to, or subtract from the provisions of the agreement. He shall only consider and make a decision with respect to the specific issues submitted to him by the parties. The decision of the permanent umpire shall be final and binding.
>
> "Failure to meet any of the timelines in the grievance procedure shall result in forfeiture of the right to appeal to the permanent umpire. The cost of the permanent umpire shall be borne equally by the parties, but each party will pay for its own witnesses and legal representatives, and the cost of any transcript will be paid by the party requesting it, unless both parties request a copy in which case the cost shall be split.
>
> "NOTE: No disciplinary action will be taken against parties with a grievance because of their presentation of the grievance."

As part of its final offer, the Association proposes to modify the above wording to read as follows:

> "In the event the parties are unable to satisfactorily resolve the grievance through the aforementioned procedure, either party may, within thirty calendar days of the Board's decision, submit the matter for resolution to the Wisconsin Employment Relations Commission for it to appoint a member of its staff as arbitrator for the grievance. The party submitting the matter shall notify the other party and the WERC. Such notice must specify the express term(s) of the collective bargaining agreement between the Mequon-Theinsville School District and the M-TEA which have allegedly been violated.
>
> "The Arbitrator shall have no authority to amend, modify,nullify, ignore, add to or subtract from the provisions of the agreement. He shall only consider and make a decision with respect to the specific issues submitted to him by the parties. The decision of the arbitrator shall be final and binding.
>
> "Failure to meet any of the timelines in the grievance procedure shall result in forfeiture of the right to appeal to arbitration. The cost of the arbitration shall be borne equally by the parties, but each party will pay for its own witnesses and legal representatives, and the cost of any transcript will be paid by the party requesting it, unless both parties request a copy in which case the cost shall be split.
>
> "NOTE: No disciplinary action will be taken against parties with a grievance because of their presentation of the grievance."

ASSOCIATION'S POSITION

It is the Association's position that its final offer should be selected as the more appropriate final offer under the statutory criteria for the following reasons:

1. The Association's proposal to modify the arbitration provision will correct a flaw inherent in the existing procedure. The current language does not resolve the question of how the

parties are to proceed in the event that the permanent umpire cannot serve. The Association's predecessor attempted to address that issue during the negotiations over the current language, but the District rejected its proposal and the Association's predecessor agreed to omit any reference to the problem. However, that agreement does not alter the fact that the existing procedure is flawed.

2. The flaw in the grievance procedure is a "ticking bomb" that could serve to prevent a grievance from being resolved expeditiously in a fair and impartial manner. Such an event would render the entire agreement meaningless.

3. In their basic text, *How Arbitration Works*,[1] the Elkouris note that the need to select an arbitrator after a dispute has arisen may involve as much difficulty as the dispute itself, resulting in delay while the dispute remains unsettled, causing additional damage to the parties' relationship.

4. By agreeing to the use of an umpire, the District has accepted the principle of resolving disputes through an impartial third party. Therefore, it cannot reasonably argue in favor of continuing this defect in the grievance procedure.

5. The Association's proposal better serves the interests and welfare of the public by avoiding additional disputes, delay and harm to the parties' relationship.

---

[1]BNA, Third Edition, page 70.

6. The Association's proposal is supported by the evidence concerning the provisions contained in agreements with comparable districts. The Association's evidence establishes that there are 13 comparable districts. They are the four other districts in Ozaukee County (Cedarburg, Grafton, Port Washington, and Northern Ozaukee), the remaining seven districts in the North Shore United Educators UniServ Unit (Brown Deer, White Fish Bay, Shorewood and the four Nicolet area districts) and the remaining two area districts (Germantown and West Bend). In 9 of the 13, unresolved grievances are referred to an outside agency for the appointment of arbitrators. In seven of those nine districts, that agency is the WERC. Two districts use the FMCS. While four districts do not have arbitration provisions in their agreements, three of the four rely upon the filing of prohibited practice complaints with the WERC to resolve disputes and have done so.

7. None of the agreements with the comparable districts contain the defect found in the agreement here. Further, none contain a provision calling for the use of a permanent umpire. Instead, a substantial majority call for the use of an arbitrator selected by an outside agency, in most cases the WERC.

8. The Association's calendar proposal is likewise supported by the provisions and practices among the comparable districts. Every district among the comparables negotiates the calendar with its teacher bargaining representative and every contract includes the calendar. By proposing to maintain the status quo, the

District seeks to preserve an outmoded anomaly.

9. The Association's proposal to negotiate the calendar and include it in the bargaining agreement is a reasonable proposal regarding working conditions, while the District's proposal to maintain the status quo is not. Teachers contract for their services and the agreement ought to specify when those services will be provided. Further, it is customary and usual for agreements to specify when employee services will be provided.

10. Under the current arrangement, the District could unilaterally change the calendar during the work year and the Association would be unable to grieve the matter. This represents an intolerable working condition.

11. The District's proposal to maintain the status quo is unreasonable because the District, in effect, is insisting that the Association give up its right to bargain the calendar in order to reach a voluntary settlement.

The Association makes the following points, in reply to District arguments:

1. The District's claim that the Association has offered no quid pro quo in exchange for its two proposals is without merit. The Association's arbitration proposal in intended to correct a defect and its calendar proposal would merely serve to bring the District's teachers "up to the pattern." As Arbitrator Stern held in Maple Dale-Indian Hills School District, Decision No. 27400A 2/93, absent other considerations, such a proposal does not require

a quid pro quo.

2. The District's claim that it has offered a quid pro quo is disingenuous. The Association has not accepted the District's QEO. By unilaterally implementing the QEO the District has shielded its economic proposal from arbitral review. Therefore, the question of whether its proposal is appropriate or justified, let alone the question of whether it contains a quid pro quo, cannot come before the arbitrator.

DISTRICT'S POSITION

It is the District's position that its final offer, which would preserve the status quo with regard to the two issues in dispute, is more reasonable under the statutory criteria for the following reasons:

1. The weight of arbitral authority is to the effect that the party proposing a change in existing contract language has the burden of justifying the proposed change. Arbitrators have employed a three-pronged test for purposes of evaluating proposals to change the status quo. The proponent must establish that there exists a need for the proposed change; a quid pro quo must be offered; and the existence of the need and quid pro quo must be established by clear and convincing evidence.

2. The published opinions of arbitrators reflect that they are very reluctant to require a change in the status quo, as established by past practice or negotiations and voluntary agreements. This is true even though such arrangements may not be

supported by evidence of comparability. This is especially true on matters unrelated to wages and benefits. In those areas, arbitrators hold, the parties should be free to address problems that confront them in a way that is acceptable, regardless of what other parties may agree to. To impose conditions to which the parties have not agreed to replace such voluntary arrangements requires a high order of proof regarding the need to do so and the existence of an appropriate quid pro quo. No quid pro quo is to be expected or required of the party seeking to maintain that which was voluntarily agreed to.

3. Arbitrators have rejected proposals to change provisions contained in grievance procedures which were voluntarily agreed to where no need was shown to justify the proposed change. Arbitrators have entered similar holdings with regard to other language provisions, such as those dealing with teacher evaluations. In this case, the Association has failed to show that any problem exists requiring a change in the arbitration provision.

4. The arbitrator in this proceeding accepted the school district's proposal with regard to the calendar in two cases (Mukwonago Area School District, Decision No. 24084-A (6/87) and Manitowoc School District, Decision No. 22915-A (4/86)) where the union failed to meet its burden of proof that its proposal to change the status quo was justified, even though the status quo was not supported by comparability data. Other arbitrators have reached the same conclusion.

5. The Association proposes to make two changes in the status quo, even though neither provision has been a source of problems. Only one grievance has been submitted to the permanent umpire, since that arrangement was voluntarily agreed to and all of the school calendars established under the existing provision, including the two which the Association would include in the agreement as part of its final offer, have been acceptable to the Association.

6. The Association offers no quid pro quo in exchange for either proposal in its final offer. In fact, if there exists any quid pro quo in this case, it is found in the District's final offer, which includes a QEO calling for wage increases which substantially exceed the minimum required by law. If the Association's proposal is accepted in this case it will set an unfortunate precedent allowing the Association to compel changes in contract language previously agreed upon in bargaining without furnishing a quid pro quo and discourage school districts from offering QEO's greater than the minimum required by law.

In reply to Association arguments, the District argues that the alleged flaw in the arbitration provision is hypothetical, since the permanent umpire was available to hear the only case that has been submitted to arbitration in the past; the Association has not previously attempted to negotiate language to remedy the perceived flaw; the Association's argument that the District could unilaterally change the calendar during the year is speculative,

since the evidence fails to establish that it has ever done so; the evidence does establish that calendars have been discussed and accepted by both parties and attached to the agreement; and the Association's reliance upon comparability data as a substitute for a quid pro quo is without merit, since it is recognized that the parties ought to be free to resolve issues and problems without regard to comparability, especially on matters unrelated to wages and benefits.

DISCUSSION

The District is correct when it argues that the burden of proof in this case rests upon the shoulders of the Association. By its proposals, the Association seeks to modify the status quo, with regard to working conditions established through negotiations and voluntary agreement.

When reviewing proposals that seek to modify the status quo as to such matters arbitrators generally agree that the proponent must show that a problem exists and that its proposal would serve to correct the problem in a way which is reasonable and otherwise justified. Some arbitrators go on to state that the proponent must also show that a sufficient quid pro quo has been offered in exchange. Others, such as the arbitrator cited by the Association in its arguments, hold that a quid pro quo is not required in all

cases.[2]

In the view of the undersigned, the question of the possible need for a quid pro quo depends upon a number of factors. If the proofs show that the agreed to arrangement is a source of problems to both parties and that the proposed change will correct those problems in a balanced and reasonable way, the question of whether there exists a separate quid pro quo would appear to be irrelevant. On the other hand, if the problem is one that only adversely affects the proponent of change or the proposed change is of benefit to the proponent and detriment to the other party, the imposition of such a requirement might be more appropriate. This question need not be reached in this case.

In the view of the undersigned, the Association's proposals fail because it has not met its burden of proof with regard to the first two requirements. In the case of its arbitration proposal, there is no showing that the existing provision has been a source of problems. Only one grievance has been taken to the arbitration step of the grievance procedure and the permanent umpire was available to her that case and did so.

In its arguments, the Association anticipates the possibility that a problem may arise in the future if the permanent umpire were unavailable to hear a particular grievance that required immediate

---

[2]The Association quotes Arbitrator Stern in his Maple Dale-Indian Hills case as holding "absent other considerations, bringing a group up to the pattern does not require a quid pro quo."

resolution. In addition to being anticipatory, that argument assumes that the parties would be unable to agree on a substitute umpire and that the courts/WERC would be unavailable to resolve the deadlock in a manner that was relatively prompt and consistent with the parties' underlying agreement to arbitrate such disputes. Thus, there has been no showing that the interests and welfare of the public require the change sought by the Association.

The Association's proofs with regard to this proposal suffer from another deficiency. The problem anticipated by the Association's arguments is that the permanent umpire might become unavailable to hear a case or cases at some point in the future. In order to deal with that anticipated problem, it is not necessary to totally abandon the concept of using a permanent umpire who is deemed mutually acceptable. A more limited proposal (similar to that made originally by the Association's predecessor) to use the staff or the ad hoc panel of the WERC in the event the parties could not agree on a replacement, would have been sufficient to deal with the anticipated problem.[3]

The Association's proposal with regard to the calendar provision suffers from some of these same deficiencies. The Association's proofs have failed to demonstrate that the existing provision has been a source of problems or that its proposal is

---

[3]It is interesting to note that several of the agreements with districts deemed comparable by the Association require that the parties first attempt to agree upon a mutually acceptable arbitrator.

necessary to deal with those problems.

As the District notes in its arguments, the Association raises a hypothetical problem, concerning what rights the Association would have in the event the District acted to change a calendar that had been previously found acceptable by both parties. Like the anticipatory problem raised in connection with the arbitration provision, this hypothetical problem also suffers from a failure to establish what would be the consequences. The Association assumes, without demonstrating by citing prior decisions, that it would have no remedy before the courts/WERC or an arbitrator.

In their arguments, both parties address the question of what weight, if any, should be given to the content of the QEO offered by the District in this case. In the view of the undesigned, this is a significant question, which has the potential to "cut both ways," but need not be addressed in this proceeding, since the question of the possible need for a quid pro quo has not been reached.

For the above and foregoing reasons, the undersigned concludes that the final offer of the District is more reasonable than the final offer of the Association and renders the following

AWARD

The final offer of the District, to make no change in the existing language dealing with the two non economic issues in dispute shall be included in the parties' collective bargaining agreement covering the 1993-1994 and 1994-1995 school years, along

with its QEO and changes agreed to during negotiations, mediation, and the investigation conducted by the WERC.

Dated at Madison, Wisconsin this 28th day of July, 1994.

George R. Fleischli
Arbitrator