BEFORE THE ARBITRATOR

ROSE MARIE BARON

In the Matter of the Arbitration of a Petition by

Greenwood Education Association

and

Greenwood School District

Case No. 16
No. 49008 INT/ARB-6846
Decision No. 28011-A

APPEARANCES

Mary Virginia Quarles, Executive Director, Central Wisconsin UniServ Council-West, appearing on behalf of the Greenwood Education Association.

Roger, E. Walsh, Esq., Davis & Kuelthau S.C., appearing on behalf of the Greenwood School District.

I. BACKGROUND

The District is a municipal employer (hereinafter referred to as the "District" or the "Employer"). The Greenwood Education Association (the "Association" or the "Union") is the exclusive bargaining representative of certain District employees, i.e., a unit consisting of all regular full-time and regular part-time certified teaching personnel including classroom teachers, special teachers, librarians and counselors. The District and the Association have been parties to a collective bargaining agreement which expired on June 30, 1993. On February 3, 1993, the parties exchanged their initial proposals; after two meetings no accord was reached and on March 26, 1993, the Association filed a petition requesting the Wisconsin Employment Relations Commission to initiate binding arbitration. Following an investigation and declaration of impasse, the Commission, on April 19, 1994, 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 May 23, 1994. Hearing in this matter was held on July 18, 1994 at the Greenwood School District offices in Greenwood, Wisconsin. No transcript of the proceedings was made. At the hearing the parties had the opportunity to

present documentary evidence and the sworn testimony of witness.

Briefs and reply briefs were submitted by the parties according to an agreed-upon schedule. The record was closed on September 19, 1994.

II. ISSUE AND FINAL OFFERS

The parties agreed that the provisions of the 1991-1993 Agreement were to be continued in a new two year Agreement, except as revised by the Tentative Agreements dated February 15, 1994. In addition, the Association proposed changes to the language of Article VIII - Staff Reduction, specifically Section 3 - Selection for Reduction, Steps 1 through 4; Section 5 - Recall; Section 7 - Definition of Qualified.

III. 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 final offer 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:
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> a. The lawful authority of the municipal employer.
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> b. Stipulations of the parties.
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> 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.
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> 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.
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> 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.

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 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.

IV. POSITION OF THE PARTIES

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

A. The Comparables

1. The Association proposes the school districts which comprise the Cloverbelt Athletic Conference:

Altoona	Cornell	Neillsville
Auburndale	Fall Creek	Osseo-Fairchild
Augusta	Gilman	Owen-Withee
Cadott	Loyal	Stanley-Boyd
Colby	Mosinee	Thorp

It argues that the District's exclusion of Mosinee and Altoona is

inappropriate, i.e., it is "selective surgery" in an attempt to remove from the comparables districts which would be harmful to its case. Arbitrator Zel Rice's decision in Cornell (MED/ARB-3328) rejected the District's attempt to "tailor what was found to be an appropriate comparable group in order to support the position of a party."

2. The District also relies upon the Cloverbelt Athletic Conference but excludes Altoona and Mosinee. The rationale for rejecting Mosinee is that it is too large and geographically distant. Its pupil population and full-time equivalency teachers are almost three times larger than Greenwood. It is an city while Greenwood is small and rural. Altoona is a large urban suburb of Eau Claire with approximately twice the number of students and teachers.

The District cites several arbitrators (Ziedler, Reynolds, Kessler, and Miller, citations omitted) who have excluded Altoona and Mosinee as comparables in interest arbitration proceedings involving other Cloverbelt Conference School Districts. In Gilman, Arbitrator Ziedler held that it was not the size of the two districts, but rather economic activity and geographic location which permitted exclusion of Altoona and Mosinee from the comparables. Arbitrator Reynolds held in Neillsville that they should be excluded because of differing demographic conditions; however, where there were only three districts which had settled in the case of Osseo-Fairchild, he determined that they should be considered as comparables. Arbitrator Kessler in the case of Colby felt that Altoona, as a suburban district which led the Conference in almost all comparisons, should be excluded because it "...can only inappropriately raise the average."

3. Discussion

While this arbitrator agrees that significant differences in demographics should be taken into consideration in determining comparables in interest arbitration, she cannot accept the premise that reliance on a total athletic conference should vary based upon whether a certain number of

settlements have been reached. To do so would be to remove the ability of the parties to have a stable base on which to rely when they fail to reach agreement in collective bargaining. It also opens the door to "forum shopping" when a party seeks to tip the balance in its favor.

It appears from the record that the District's objection to Altoona and Mosinee is based on two major factors, i.e., size and geographic distance (Brief, p. 9-10). The arbitrator is not convinced that the distance between Greenwood and Altoona to the west and Mosinee to the east is a compelling reason to exclude them. For whatever historic reason, they were considered appropriate for the athletic conference and the arbitrator will defer to that judgement.

The concern of Arbitrator Kessler that inclusion of Altoona would inappropriately raise the average can be resolved without excluding it from the list of comparables. Demographic differences between larger communities like Altoona and Mosinee and a smaller one like Greenwood, i.e., size of student body, number of teachers, cost per member, etc., can all be dealt with by utilizing the median rather than the mean in statistical analyses to determine averages. The median, a measure of centrality, gives a more accurate picture of the average than does the arithmetic mean which distorts the data when there are extremes at either end. In the Cloverbelt Athletic Conference, it will be the school district which falls in the exact center of the 15 districts which most accurately reflects the average. That figure can then be compared with Greenwood and will show Greenwood's standing in each of the variables being studied. For example, in Association Ex. 5, the 1992-93 pupil population shows a range from a low of 610 (Loyal is number 15) to a high of 1,832 (Mosinee is number one). The median, number 8, is Auburndale with 828 students. Greenwood with 625 students deviates from the median by 203 fewer students.

The arbitrator concludes that the Cloverbelt Athletic Conference composed of fifteen other school districts is the appropriate comparable group

to be utilized in the instant matter. While the issue before the arbitrator, i.e., contract language regarding staff reduction, does not permit a strict quantitative analysis as discussed above, it will be possible to take each of the Association's proposals for the Greenwood School District and compare them with language contained in the collective bargaining agreements of the fifteen school districts in the Cloverbelt Athletic Conference to determine if the Association's proposal meets the statutory criteria set forth in Sec. 111.70(4)(cm)d.

B. Staff Reduction Language

1. The Association

The Association's goal in proposing new language is to provide objective criteria for layoff decisions. The present point system which includes years of experience, training level, extra-curricular responsibilities, and administrative evaluations places too much weight on administrative evaluations. Evaluators with different philosophies make subjective judgements in evaluating teachers. No other district in the Conference uses a point system to determine layoffs.

It is noted that the District's system effectively substitutes layoff for non-renewal. Seniority is the accepted standard for layoffs while competency is the standard for non-renewal. A teacher who fails to meet the District's standards should be non-renewed, not placed on layoff.

The weight given in the point system for extra-curricular activities unfairly affects teachers who for reasons of health, family responsibilities, or lack of athletic skill cannot engage in these activities.

The Association argues that a seniority-based layoff system is universally accepted for its objective nature. All the comparables, with the exception of Owen-Withee, use seniority as the basis for layoff. In Owen-Withee evaluations are given weight only as an equal factor out of five.

The Association contends that the District's focus on minor components of its proposal clouds the main issue, i.e., that of seniority-based layoff.

Whether a teacher who has not taught a grade for five years is competent to do so can be determined by an evaluation procedure already in place. It is postulated that teachers are qualified to teach by virtue of their certification, not by how recently that grade has been taught.

It is contended that the Association's reliance on seniority in its final offer eliminates problems in the evaluation process on the part of the administration, on manipulation of extra-curricular points by a teacher, or inability to gain points because of a teacher's personal circumstances. Nor is it necessary for there to be actual layoffs before a seniority-based system is adopted, i.e., "the other shoe does not have to fall."

The Association cites Arbitrator Stern's holding in Maple Dale-Indian Hills (INT/ARB-6459) in support of its position that a quid pro quo is not required when the Association's proposal will bring the school district up to the pattern prevailing among the comparables.

2. The District

The District, in reviewing the history of bargaining for staff reduction, notes that the Association has previously attempted to revise this provision and has not been successful. The Association proposed these changes during the 1986-87 negotiations, however, these were dropped during bargaining and the parties ultimately came to a voluntary agreement on staff reductions which has continued to this date and which the District proposes to continue.

There have been no layoffs since the adoption of the 1986-87 agreement and the parties have had no experience with the revised staff reduction procedures. During the negotiations for the 1993-95 agreement, the Association did not propose any change to this article. The language in question was not included in the Preliminary final Offer and only arose during a mediation session between the parties and the WERC. The District rejected the Association's proposal and subsequently received the Association's Final Offer on Article VIII dated October 13, 1993 which is presently at issue. The District asserts that there was no discussion between the parties as to these

revisions either in person or by telephone.

In reviewing the layoff provisions contained in the schools of the Cloverbelt Athletic Conference (including Altoona and Mosinee), the district notes that none of these contain all of the provisions being proposed by the Association. If this offer was selected, Greenwood would have the most restrictive layoff provision in the Conference.

The District maintains that the Association's proposal was not one of its primary bargaining objectives but rather is an afterthought for the purpose of retaliation for the legislative cap on increases in salaries and other economic provisions. Had it really been concerned about the provisions of the staff reduction article, it would have included it in its initial proposal.

After an earlier grievance on the fairness of the administrative evaluation component of the layoff procedure, heard by the present arbitrator, the parties bargained a new point system for the regular evaluation of teachers which was included in the 1986-87 collective bargaining agreement. Since there has never been a layoff under that voluntarily agreed-upon language, the District contends that the Association has not demonstrated a need for modification.

The District further argues that where a change to the status quo is proposed by the Association, the burden of proof is on the Association to show that a problem exists and that its proposal would serve to reasonably correct that problem. In addition, the District contends that the Association has not provided a quid pro quo in exchange for its proposed change to the status quo. Arbitrator Fleishli's reasoning in Mequon-Thiensville School District, WERC Dec. No. 27947-A (1994) is cited for the proposition that a quid pro quo is more likely to be required where the proposed change is of benefit to the proponent and to the detriment of the other party. In that case the arbitrator ultimately rejected the hypothetical problems raised by the Mequon Education Association and furthermore gave no consideration to evidence of similar

contractual provisions in the comparable school districts.

The District concludes that the Association has not met its burden of showing a need for a change to the status quo. The present layoff language was voluntarily agreed to and there have been no layoffs since its adoption. None of the comparable school districts have the broad scope of provisions proposed by the Association. Finally, the Association has offered no quid pro quo for this major revision to the existing staff reduction provision. For these reasons, the District's final offer should be selected by the arbitrator.

3. Discussion

This is a case in which the Association is attempting to overcome a perceived inequity in how teachers are treated in the Greenwood School District when a layoff occurs. The only teacher layoff which has ever taken place in the district was during the 1985-86 school year when one art teacher position was eliminated and a less senior teacher was retained. It is undisputed that the 1985-86 collective bargaining agreement under which that dispute arose was subsequently renegotiated and that the parties voluntarily agreed to new layoff language which has been effect since the 1986-87 contract (Article VIII-Staff Reduction, Employer Ex. 11). Layoffs are based upon a combination of four criteria which are given points, i.e., seniority, training level, extra-curricular, and administrative evaluation. The teacher with the lowest number of points is to be laid off first. Recall is in inverse order of teacher reduction with the proviso that they are certified in and last taught in their elementary, secondary, or specialist designation within the last five years.

As discussed above, the Association wishes to eliminate what it characterizes as subjective factors in determining which teacher is laid off. It is contended that administrative evaluations receive too much weight and may be biased or manipulated and that reliance on extra-curricular activities adversely impact upon teachers whose family responsibilities or physical attributes do not permit their participation. The Association also questions

the "within five-year" teaching requirement for recall alleging that other means are available to determine teacher competence.

Although the Association argues that a seniority-based procedure is its ultimate goal, its proposal cannot be viewed so narrowly since included in it are several other components (attrition, voluntary layoff, bumping, recall. While these may be considered to be of secondary importance to the Association, the proposal as a whole must be considered by the arbitrator.

An analysis of the fifteen comparable school districts which comprise the Cloverbelt Athletic Conference shows that all rely to varying degrees on seniority when making layoff decisions. For example, in Owen-Withee seniority, experience, value of certification, extra-curricular activities, and performance evaluations are considered. In Osseo-Fairchild, the employer is permitted to remove the names of two teachers from layoff consideration despite their seniority. In Thorp, seniority, training, experience, and certification are determinative. Gilman and Loyal both consider qualifications and certification. The Association proposal provides that teachers be selected for layoff on the basis of shortest length of service in four groups, elementary K-6, secondary 7-12, Specialists K-12, and Special Education K-12. Only in Auburndale does one find a similar grouping of teachers. Others refer more broadly to teachers by grade level or departmental classification or certification in making selections for reduction.

Perhaps the most striking finding is that only one of the comparables utilizes a performance evaluation in determining who will be laid off, i.e., Owen-Withee, which relies on two most recent years performance evaluations along with length of service, overall teaching experience, value of certifications, and co-curricular assignments. Clearly, this is the issue that most troubles the Association in the instant case, that is, the concern that evaluations are more subjective than other criteria. If reliance on evaluations were the only matter in consideration, the Association would have the more compelling position since the preponderance of the comparables do not

include that factor. However, other portions of the proposal are not so clear-cut. For example, the use of attrition as a factor in layoffs is found in seven contracts while eight of the comparables are silent on this matter. The Association's position is not supported by such a finding. The Association's proposal to include language on voluntary layoff is not supported by the data; only in Auburndale and Stanley-Boyd is specific language found. Contract language permitting an employee to bump into a substantially equivalent position held by a less senior person for which the teacher is qualified is found in seven districts and not specified in eight--not persuasive support for the Association's position. There are several provisions for recall submitted by the Association. Specific language on recall in inverse order of layoff prevails in almost all the districts; the District's wish to continue the status quo of additionally requiring teaching within five years is unique in the Conference. The fact that none of the comparables require this teaching experience makes the Association's proposal preferable. The time for teachers to respond to a recall ranges in the Conference from 5 to 14 days (based on 11 districts) with a median of 10. Neither the Association's offer of 14 or the District's status quo of 7 deviates significantly from the median therefore this factor is not accorded any weight. Another Association proposal on recall is that full-time teachers may refuse part-time recall without prejudice. Only three districts, Loyal, Neillsville, and Owen-Withee provide this option. School Districts are denied making new or substitute assignments while qualified employees are on layoff in six of the comparables. Neither of these findings support the Association.

Finally, the definition of "qualified" section is found in only two of the comparables and is not persuasive for the Association's position.

Based upon an assessment of the totality of the Association's proposed changes to Article VIII, it is clear that comparisons with the fifteen districts which have been deemed to be comparable do not support the Association's position. The Association contends that the District seeks to

escalate "minor" components of the Association's offer and urges the arbitrator to focus on the major issue, that of a seniority-based layoff procedure. However, to do so would be beyond the arbitrator's mandate in Wisconsin in which we must select one party's offer in its totality. Had this issue been considered during the negotiation process, the parties might well have been able to agree on certain portions and then, if impasse had occurred, only a limited issue would be before the arbitrator. Since this did not happen, it is the arbitrator's opinion, and it is so held, that the entire final offers of the parties must be considered.

The District's final offer is to make no change to the language as it appears in the 1991-1993 contract. The District argues that where a change to the status quo is proposed by the Association, the burden of proof is on the Association to show that a problem exists and that its proposal would serve to reasonably correct that problem. Arbitrators have long held, and this arbitrator agrees, that basic changes in contract provisions should be negotiated voluntarily by the parties unless there is a compelling need to change the existing language. The Association has not demonstrated that a legitimate problem exists since the present language which has been in effect since 1986-87 has never been tested. While the goal of the Association appears to be to insure that any future layoffs will not be inequitable, there is no evidence that the evaluation portion of the layoff procedure will not be properly applied. Although the Association speaks of a strict seniority-based layoff procedure, it is a commonplace in labor agreements to make employment decisions based upon seniority plus an evaluation of the employee's ability to perform the job. If it is found that the application of these standards by the employer is arbitrary or capricious, the aggrieved has a vehicle for redress in the grievance procedure. Based upon the evidence of record, it is held that the Association has not borne the burden of proving that a problem exists requiring a change to the status quo. Further, since no problem has arisen, there is no way of knowing whether its proposal would or could serve as a remedy.

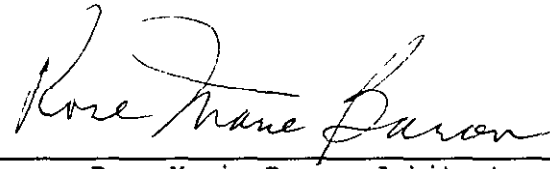
Since no bargaining on the staff reduction provision took place, no quid pro quo was offered or could have been offered for the changes to Article VIII proposed by the Association. This arbitrator has said: "It has long been held that when a party proposes a significant reformation of a fundamental aspect 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 (1991). Here the Association, by failing to confront this issue at the outset, had none of the give and take of bargaining and thus lost an opportunity for persuasion as to the preferability of its final offer.

The District has challenged the Association's timing of its proposal on changes to the reduction in staff language and appears to suspect that it was done in bad faith. The arbitrator does not believe that it is necessary to venture into such uncharted territory and declines to do so holding that her task is limited to consideration of the final offers which accompanied the Order of Appointment by the Wisconsin Employment Relations Commission.

VI. AWARD

Based upon the discussion above, the final offer of the Greenwood School District, along with the stipulations of the parties, shall be adopted and incorporated in the parties' Collective Bargaining Agreement for 1993-1995.

Dated this 22nd day of October, 1994 at Milwaukee, Wisconsin.



Rose Marie Baron, Arbitrator