STATE OF WISCONSIN

Before the Interest Arbitrator

In the Matter of the Petition of Merton School District Employees AFSCME Local 3833 For Final and Binding Arbitration Involving Education Personnel in the Employ of Merton School District	Case 26 No. 51266 INT/ARB-7356 Decision No. 28228-A

APPEARANCES

For the Union:

Sam Froiland, Staff Representative

For the Board:

Robert W. Butler, Staff Counsel

PROCEEDINGS

On DEcember 5, 1994 the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission pursuant to Section 111.70 (4)(cm)6 & 7 of the Municipal Employment Relations Act, to resolve an impasse existing between Merton School District Employees, hereinafter referred to as the Union, and the

District Employees, hereinafter referred to as the Union, and the Merton School Board, hereinafter referred to as the Employer.

The hearing was held on February 17, 1995 in Merton, Wisconsin. The Parties did not request mediation services. At this hearing the Parties were afforded an opportunity to present oral and written evidence, to examine and cross-examine witnesses and to make such arguments as were deemed pertinent. The Parties stipulated that all provisions of the applicable statutes had been complied with and that the matter was properly before the Arbitrator. Briefs were filed in this case and the record was closed on April 20, 1995 subsequent to receiving the final reply briefs.

ISSUES

Except for the tentative agreements of the Parties and all other provisions of the Contract as currently constituted, the following issues are in dispute in this matter:

Union Proposal

Across-the-Board increases: 3 1/2% Effective July 1, 1994
3 1/2% Effective July 1, 1995

District's Final Offer

Across-the-Board increases: 3 1/2% Effective July 1, 1994
3 1/2% Effective July 1, 1995

The District also proposed to remove the limitations on sub-contracting contained in Part K of Article II and add language that would protect bargaining unit employees from layoff or reduction of hours as a result of such sub-contracting. The District also proposes to remove Article XXVIII, Section 4, which provides for the purging of employees' disciplinary records after one year provided the employee has not been subsequently disciplined for just cause.

UNION POSITION

The following represents the arguments and contentions made on behalf of the Union:

The comparables were identified by Arbitrator Baron in her 1993 award involving this bargaining unit. Wage increases of 3 1/2% closely approximate the wage pattern among externally comparable groups. None of the comparability pool has received less than a 3% annual wage increase and both the average and

median increases among these groups are in the range of 3 1/2 - 4 1/2% annually.

The District has characterized the wage offers throughout its exhibits in terms of package costs. Package costs are not used in the evaluation of cost of living. Such methodology is misleading. Previous arbitrators have addressed this issue and affirm that wage increases and not package costs should be compared to the cost of living. The Union provided citations to this effect. Additionally, incremental step increases for support staff are not considered by arbitrators to be rate increases. Again, the Union cited a number of arbitral citations in support of that position. Since step increments should not be included in the costing methodology, it is clear the Union's 3 1/2% figures for wage increases must be recognized and the Board's figures which reflect wage increases for each year in excess of 5% must be rejected. The Board has offered and the Union is asking no more than the wage pattern which has been established by comparables.

The Board utilized state imposed spending limits in defending its wage offer. Spending limits coupled with its inability to increase the levy rate create a significant budgetary problem for them in attempting to fund the increases sought. This is particularly troublesome given the District's failure to act to increase the levy when it was within its rights

in earlier budget years. The District refused to alter the levy rate in order to fund the previous interest arbitration award despite the Board's legal authority to do so. Therefore, the Board's argument that the current freeze has put it in an awkward financial position is diminished as it refused to take measures to escape that condition in past years. Again, appropriate citations were supplied.

Increases to other support staff employees may be relevant but teachers are not the most comparable employees. Patterns of settlement in non-teaching units have generally been held not to be persuasive in determining the appropriate wages for teachers. Again, a number of citations were sought. Internal comparisons between teacher/professionals and support staff are not persuasive evidence in interest arbitrations.

Likewise, no weight should be accorded data which quantifies administrative wage and benefit increases. Arbitrators have found no basis for comparison of administration to bargaining unit personnel. The fact that administrative employees who do not have the right to bargain received a wage increase which is not as large as the wage increase proposed for the support staff has very little meaning since these employees had no option other than to accept the offer of the Board. In addition, administrative employees are not municipal employees according to the statutory definition.

The Union's status quo position is preferable to the District's proposed changes in the language of Article II, Management Rights, and Article XXVIII, Discipline. The District has not demonstrated a clear and convincing need for the language changes sought. The Arbitrator in this case is faced with the District's proposal to make changes in the status quo in two specific language areas. This is taken very seriously by interest arbitrators. Arbitrators are reluctant to accept changes in the status quo. Arbitrators generally adopt the final offer which preserves that which has been previously agreed to by the Parties absent special and compelling circumstances. Arbitrator Malmood in the Everest Area School District opined a three prong test: has the Party proposing the change demonstrated a need for the change, if there has been no demonstration of need has the Party proposing the change provided a quid pro quo and finally, is there clear and convincing evidence to establish that 1 and 2 have been met.

Both of the language items which the District seeks to change are items which the Parties jointly agreed to during negotiations which led to the initial Collective Bargaining Agreement between the Parties. Approximately 18 months later, with very little experience in administering the terms of the agreement, the District seeks to alter language which it had no reservations about under the previous agreement. With respect to

Article XXVIII, no written disciplinary action has taken place with any of the bargaining unit employees since the contract was settled. The only documentation is a brief memorandum from the District's insurance carrier stating that investigation of employees might be hampered in the event that files are expunged. This information was provided to the District less than an hour prior to the hearing. The Union argued that there is no evidence of a need for the suggested change in the language of Section 28.04. Therefore, the status quo is the appropriate outcome.

The District also has not made a compelling argument for the need to change Article II as it relates to the provision addressing sub-contracting. Particularly on a language item which has such a vital connection to the survival of this bargaining unit in the long term, the Arbitrator must recognize the status of the tentative agreement reached between the Parties in negotiations over the initial Collective Bargaining Agreement which went into effect less than two years ago. The change in the District's position has not come about as a result of any real inability to pay argument. There was no establishment that any particular group of employees in this bargaining unit is paid beyond the range of other municipal employees performing similar services, nor are there any budgetary concerns that are more of a problem in the Merton District than they are throughout the state. The District's current levy rate is a product of its

own decision making and its unwillingness to fund at a level which would more adequately address wage levels in the range of similar municipal employees.

Finally, the District has not offered a quid pro quo in exchange for the changes in the language items it is seeking. Many arbitrators have ruled that too much is made in regard to the matter of a need for quid pro quo; however, it should be said that the initial Collective Bargaining Agreement and the tentative agreements which were reached therein were products of give and take between the Parties. For the District to attempt to achieve concessions through arbitration on those issues now would show that quid pro quo cannot be completely discounted. This is particularly true in light of the Union's very reasonable wage proposal and its relationship to the external comparables. Therefore, the Union asked that its final offer be the one found by the Arbitrator to be the most reasonable and made part of the final agreement.

The Union also responded to the Employer's brief in this matter. The Union will not argue that Arrowhead Union High School should not be included as a comparable for this group, however, it noted that the District has eliminated some of the more well established bargaining units from the primary comparison group - districts such as Elmbrook, Menominee Falls and Mukwanago. In addition, the District has eliminated the most

consistent wage leader among the comparison group, Waukesha, from its analysis altogether with no explanation. The flaws in the District's analysis combined with the attempt to cherry-pick in selecting the primary and secondary groups cannot be overlooked and should not be determinative in this case.

The District continues to misrepresent and inflate the value of the wage increases requested by the Union. The methodologies of the total package costing and the step increases being included in the costing have been rejected by most arbitrators in the case of support staff bargaining units. Without the inclusion of other data for each comparable school district such as seniority lists, turnover and new hire information, comparison of step increases is speculative and has limited practical value. The Union's wage request is quite conservative and well within the established pattern. Therefore, any existence of a quid pro quo must be rejected out of hand.

The Union admits that the current language regarding the sub-contracting item provides employees with protection which is stronger than in comparable contracts. The District has referenced its need for flexibility and cost efficiency as justification for the change in the status quo language. While these goals are honorable on their face, without specific demonstrations that these goals will be reached by virtue of the change in language, no evidence of the language change

relationship to these goals exists. The District has failed to demonstrate that the current language impedes flexibility. In fact, it has been pointed out that the Union has allowed it to continue contracting with outside contractors to perform certain maintenance and clerical tasks. There have been no disputes with the Union regarding the interpretation of the parameters of the current language. The problem for the District is theoretical, and they have not established with clear and convincing certainty that a need exists for the proposed change in the status quo. In addition, there was no showing that cost projections from private contractors would provide an economic benefit to the District. Contracting out of services might be a wise thing from the perspective of cost efficiency and it might not. Therefore, the relative merits of this aspect of the District's argument are quite unclear.

With respect to the removal of disciplinary notices, again the Union admitted that the status quo language in question provides employees with stronger protection from unjust discipline than comparable contracts do for similar groups of employees. However, the District has not made a compelling argument that there is a need for a change. The District is certainly free to retain records for whatever period of time it so desires. It is just that those records cannot be used in any disciplinary matters. The District's argument regarding penalty

enhancers is so ludicrous and insulting that it deserves little argument.

In conclusion, the Union believes that it has demonstrated that its final offer is the more reasonable of the offers. The final offer is well within the settlement pattern of comparable districts and the Union asks the Arbitrator to issue an award which incorporates the Union's final offer as the settlement of this case.

DISTRICT POSITION

The following represents the arguments and contentions made on behalf of the District:

The state has enacted revenue limits in addition to the current economic conditions which have resulted in a trying round of negotiations regarding this Collective Bargaining Agreement. The current realities indicate moderation in any wage and fringe benefit increases that can be received by public sector employees. The state statute should serve as a guideline in ascertaining percent wage and benefit increases which can be afforded to any school district employee. In addition, the revenue limits have drastically altered the manner in which a

school district can provide essential services to its pupils while at the same time compensating employees in a appropriate fashion. A currently proposed bill in the legislature would go even further in restricting the increase in school district revenues. Even so, the Board has proposed an 11.3% increase in wages and a 10.2% increase in total compensation for support staff employees in the two years of the proposed agreement. This offer significantly exceeds the cost of living, the settlement pattern set forth in the comparable group, and settlements in the public and private sectors. The Board's compensation offer represents an adequate quid quo pro, if one is even needed, for changes proposed in the management rights and disciplinary sections of the labor agreement.

Regarding sub-contracting, it is the District's position that sub-contracting can occur if no bargaining unit employee is laid off or suffers a reduction in regularly scheduled hours as a result of such sub-contracting. The Union is proposing the status quo. With respect to the expunging of personnel records, the District wishes to eliminate the one-year removal of records from disciplinary files, whereas the Union again wants to maintain the status quo. The Parties are in agreement as to the wage and total package increases during the term of the contract. However, the District has characterized its proposal as a quid pro quo and the Union has not provided any valid justification for its wage and total compensation offer.

The District is concerned regarding the expunging of records that the District is not complying with the appropriate Wisconsin statutes. School districts are directed to retain public records for seven years, and yet the contract requires expungement after one year. In addition, this language makes it very difficult for the District to meet the just cause tests required under the labor agreement. This limits the District's ability to show progressive discipline to an employee. In addition, the District noted that limitations on tort action range from three to six years. Expunging of documents would not allow the District to show a court that it took measures to discipline an employee in a situation where the employee was negligent or contributorily negligent. This language directly affects the health and safety of every pupil in the District.

Regarding the sub-contracting language, the District witnesses testified that they wished to obtain flexibility and cost efficiency. The proposed language would allow the District to more efficiently operate under the state imposed revenue limits. The District further testified that in the past custodians had performed some work that has been contracted out even though it historically has been performed by a member of the bargaining unit. The size of the District directly affects the support services that the District can provide. Employees are generalists with wide ranges of duties. Unlike large districts

with significantly more support staff employees and more District positions with distinct duties, the Merton District employees are asked to perform a wide array of duties on a sporadic basis. Therefore, the sub-contracting language change would allow the District to bring in specialists to perform duties for the school district. Under the proposed change no current employees would be affected by the District's decision.

The Union and the District agree on comparables with the exception of Arrowhead High School. The Union noted in its brief that Arrowhead Union High School would be an acceptable comparable. These comparables meet all of the criteria generally recognized by interest arbitrators for inclusion in a comparable group both primary and secondary. With respect to the comparables and the sub-contracting language proposed by the District, the District notes that none of the twenty-eight comparables has language similar in nature or in purpose as the current language in the contract. There exists no comparable support for the Union's position on sub-contracting. The Union has asserted that several school districts have similar sub-contracting language, yet an analysis of that language shows that those contracts which contain sub-contracting limitations have more in common with the District's proposal than with the current language of the contract. Eleven of the twenty-eight comparables have an unfettered right to some contract. In addition, nine of the comparables possess the same language as proposed by the

District. The District offer is, therefore, favored on a comparability basis. The District desires a change in the sub-contracting language to provide for flexibility and for cost efficiency. The present language has a detrimental impact on a small school district. The District presently has twelve support staff positions.

While the Union may argue that restrictions on sub-contracting was voluntarily agreed to by the Parties during the course of bargaining over the first contract between the Parties, there has been a significant change since the first contract. The state of Wisconsin has imposed limits on revenues which may be raised by a public school beginning with the 1993-94 school year. The previous contract was agreed to prior to the imposition of such limits. In order to raise revenues above those set forth in the cap, the District must go to a referendum. The revenue increase amounts to $190 per pupil for the 1994-95 school year. The District is just asking for the minimum flexibility in sub-contracting which is afforded to every other comparable school district.

With respect to the expunging of personnel records, twenty-five of the twenty-eight organized comparable units do not contain a provision which addresses the expunging of records from an employee's personnel files. Of these twenty-five districts, twelve of them are represented by the same union which

represents the employees at Merton. Only three of the twenty-eight comparables have any language concerning the expunging of records from an employee's personnel file. Records are expunged in Hartland Lakeside after two years and Muskego after three years. The other comparable has language which is not at all similar to the language in the Merton contract.

The District's proposal finds support not only in the analysis of the comparables, but also on the basis of public policy. In addition, there is an impact on the public records law which places requirements on the District. The District would have difficulty in meeting the just cause provisions that are required for discipline in the labor agreement. Also, the District could be exposed to tort liability claims and be unable to adequately defend itself by demonstrating that it had taken appropriate action regarding employee misconduct. The District offer still provides for progressive discipline. It merely adresses the issue of destruction of records. The District's position is supported by an analysis of the comparables.

The Union asserted that the District had not provided adequate justification or sufficient quid pro quo for the proposed change. The District has justified its proposal on the expungement of records on the basis of overwhelming comparables support, public records law, public policy, increased liability, and adverse disciplinary implications. In addition, the District

contends that it has provided an adequate quid pro quo, if one is even needed, for the changes it has proposed. The wage offer is in excess of the cost of living and in excess of those settlements found in comparable school districts, other public sector employers, and private sector employers. The District provided citations in support of its position.

When comparing the Board's proposal to the comparables, based on maximum wages, average wage increase, total compensation increase, the Board's offer is undeniably preferred on this item. The Union has ignored the new realities which confront school districts and their employees. The wage proposal also significantly exceeds the cost of living which is one of the statutory criteria required. The District provided citations in which arbitrators have viewed cost of living on the basis of total compensation costs which clearly favor the District position. The total compensation offer is significantly in excess of the cost of living in each year of its proposal. There is no legitimate claim of catchup when historical prospective of wages and the cost of living are compared. Therefore, based on the cost of living criterion, it is the Board's final offer which emerges as the most reasonable when measured against the objective and measurable cost of living criterion in the statue. In addition, when comparing wages, hours and conditions of employment with other state and local government employees, the Merton employees have been offered a settlement which is greatly

in excess of the average total compensation increases and wage increases for state and local employees during the period in question. Likewise, comparison to the private sector employees clearly supports the selection of the Board's final offer.

Finally, the interest and welfare of the public would be best served by the District's offer given the revenue limits imposed and the requirement of holding referendums for districts who wish to exceed the revenue limit. If districts do not receive voter approval and still exceed the revenue limit, the District will be penalized by the state. All of the evidence positively proves that the interest and the welfare of the public would be best served by the most modest final offer submitted before the Arbitrator by the District. The District also responded to the Union's brief in this matter. The District notes that the Union did not even consider several of the statutorily required factors in its brief. There should be a and a comparison to private sector employees, comparison to overall compensation, which should be utilized when evaluating the cost of living criterion. The District also argued that step increases should be considered and that Arbitrator Petrie was quoted out of context by the Union in its brief.

The Union argued that the District's current financial position is a result of a decision made in prior years. This could be said of practically every school district in the state.

The difference is that not every school district was in the same financial situation at the time that the revenue limit went into place. Revenue limit is the result of state action and not anything done by the Merton School District.

The Union asserted that confidential staff received a salary increase of 5% and a total package increase of 9.2%. This is true and reflects the result of the employees joining the Wisconsin retirement system for the first time.

It is the District's position that in spite of the Union's argument, status quo and quid pro quo are applied on a case by case basis. The District has presented numerous arbitral authorities to justify its position on the language items in this case. The Union has stated that the sub-contracting language has a vital connection to the survival of the bargaining unit. If this language is vital, why do other comparable districts represented by the Union not possess the same or even less restrictive language than that proposed by the District. Finally, the District has shown that the maximum wages in benchmark positions are quite competitive or in excess of the comparables. Therefore, there is no need or evidence for catchup provisions.

For all of the above reasons, the Board has proven its

offer is favored on each of the statutory criterion and, therefore, it is the Board's offer that should be selected.

DISCUSSION AND OPINION

First contracts are always difficult for the Parties to resolve and, in fact, the Parties were unable to resolve their initial contract and resorted to interest arbitration as they have done in this case. The District is asking this interest arbitrator to approve two significant changes in the current language of the contract. There is no question, and even the Union admitted, that the sub-contracting language and removal of disciplinary notices language afford protections to this bargaining unit that are not available to other bargaining units in the comparable group. However, this language is the status quo and resulted from the first round of bargaining and subsequent interest arbitration. This Arbitrator can only assume that this language resulted from a give and take among the Parties.

The Union and the District have agreed on the wage increases for the two years of this agreement. That is 3 1/2% across the board for each year. What they have not agreed upon is the characterization of these wage increases. The Union

characterizes its offer as within the range of increases that have been granted to comparable units. The District characterizes its offer as a quid pro quo for the language changes requested. The Arbitrator has reviewed the voluminous amounts of data given him by the Parties with respect to these increases and he finds that the wage increases are within a range that would not be considered extraordinary when utilizing the comparable pool even if that pool were to include Arrowhead Union High School. When making comparisons to other public sector employees and even private sector employees, again these increases, while on the higher end, are not outside of the mainstream of wage increases. This is particularly true when you look at the actual rates of pay given to the employees within this bargaining unit.

However, quid pro quo is not the only way that a party may deviate from the status quo. The proponent of such change must fully justify its position, provide strong reasons and a proven need. There is an extra burden of proof that is placed on those who wish to significantly change the Collective Bargaining relationship. It is the District that wishes to change the status quo in this contract and it is the District that bears this burden.

Regarding the sub-contracting language, the District has attempted to justify its position by arguing that this would

provide more flexibility of operation and would be a more cost effective way of operating the District. There is no doubt that this is true. However, what the District must demonstrate is that it was unduly and unjustifiably kept from operating the District in such a manner as to meet the needs of the public, and it simply has not met its burden in this matter. The record is clear that the District has had contractors perform duties which have been performed by bargaining unit personnel. Printing, copying, painting, boiler repair, etc. have been done during the term of the previous contract and, presumably, into the present without objection from the Union. The Union made representations at the hearing that indicated that it had no objection to bringing in of specialists to perform certain duties that were not easily or economically able to be performed by bargaining unit personnel as long as it is done on a job by job basis and not on a permanent basis. This seems to be a reasonable interpretation of the current contract language. In any event, the District was unable to provide hard data that would demonstrate to this Arbitrator that substantial economic benefit would accrue to the employer during this time of economic constraints imposed by the legislature.

With respect to the expungement of records, again it is true that there is little support in the comparables for the removal of disciplinary records after one year. Only two of the twenty-eight comparables have even similar type language. Both

of those are much more favorable to the District. The District brought forward a number of arguments with respect to this provision, the first of which is impact of statutory requirements. The Arbitrator is not persuaded by the argument. There is nothing in the contract that requires the District to destroy these records after one year. They may be kept in a separate file for whatever purpose and for whatever length of time the District deems appropriate and may be used in other legal proceedings other than arbitration cases based on discipline. Regarding the mutual agreement argument, a labor contract constitutes mutual agreement and the Arbitrator is not persuaded that this violates Section 103.10(4) of the statutes. With respect to the just cause arguments, it is true that this language makes it more difficult for the District to show progressive discipline which is generally considered an element of just cause and they result in the District taking harsher positions with respect employees in this bargaining unit. However, there is no showing in the record that anything like this has occurred. In fact, there have been no warning letters at all or discipline of any kind during the term of the previous contract regarding employees in this bargaining unit. Certainly, one of the elements of proven need is to demonstrate that an actual and not a potential need exists.

Regarding the increased exposure and liability, again the District may retain these documents in separate files other than

personnel files to utilize in other potential proceedings to show that it had taken action against employees who have become disciplinary problems. The current language in the labor contract only covers incidents which would be relied upon in future disciplinary matters and arbitration cases which would result from those matters. All in all the District has failed to provide arguments compelling enough for this Arbitrator to justify a change in the status quo. Again, with respect to this provision, there was no showing that there have been any actual problems, only anticipated problems causing the District to consider this change.

AWARD

On the basis of the foregoing and the record as a whole, and after full consideration of each of the statutory criteria, the undersigned has concluded that the final offer of the Union is the more reasonable proposal before the Arbitrator and directs that it, along with the stipulations reached in bargaining, constitutes the contract effective July 1, 1994 through June 30, 1996.

Dated at Oconomowoc, Wisconsin this 14th day of June, 1995.

Raymond E. McAlpin, Arbitrator