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APR 30 1994

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION

STATE OF WISCONSIN
BEFORE THE ARBITRATOR

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In the Matter of the Petition of	:	
HALES CORNERS LIBRARY EMPLOYEES'	:	
ASSOCIATION, LOCAL NO. 810, L.A.W.	:	
To Initiate Arbitration Between	:	Case 32
Said Petitioner and the	:	No. 51218 INT/ARB 7342
	:	Decision No. 28357-A
VILLAGE OF HALES CORNERS (LIBRARY)	:	
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Appearances:

Local No. 810, Labor Association of Wisconsin, Inc.
by Patrick J. Coraggio and Kevin W. Naylor, Labor
Consultants.

Village of Hales Corners (Library Board) by Michael,
Best & Fredrich, by Robert W. Mulcahy, Esq.

ARBITRATION AWARD

The Labor Association of Wisconsin (L.A.W., Association or Union) was certified on January 31, 1994, as the collective bargaining representative for all regular full-time and regular part-time employees of Hales Corners Library (Library or Board) excluding all supervisory, managerial, confidential, seasonal, and temporary employees. The Association and the Village conducted a total of 10 bargaining sessions between March 23, 1994, and the arbitration hearing, in an effort to arrive at terms to be included in their initial collective bargaining agreement. On June 30, 1994, the Association requested the Wisconsin Employment Relations Commission to initiate arbitration

pursuant to Sec. 111.70(4)(cm)(6) of the Municipal Employment Relations Act. A representative of the Commission conducted an investigation and certified that the parties had reached an impasse. The undersigned, after having been selected by the parties, was appointed by the Commission to arbitrate this matter on May 2, 1995. Thereafter, the parties continued to negotiate. The Village's final offer was dated March 8, 1995, and was updated on December 22, 1995, to reflect additional agreements between the parties. The Village's offer is for the period from January 1, 1994, through December 31, 1995. The Union was permitted to amend its final offer to include the period January 1, 1994, through December 31, 1996. The parties reached a final impasse on November 15, 1995. The arbitration hearing was conducted at the Hales Corners Village Hall on January 8, 1996. Both parties presented sworn testimony and documentary evidence into the record. The record was closed at the conclusion of the hearing. Prior to receiving all of the parties' exhibits and closing of the record, the Board reserved the right to enter its objection to Union Exhibits 18a-f. On January 12, the Board filed its objection to the admission of Union Exhibits #18b-f. The Union responded to the objection on March 4, 1996, by withdrawing Union Exhibits 18b through f. Those exhibits have not been considered herein. On March 1, 1996, the Board submitted revised Board Exhibits 25 and 26. The Union did not object to the admission of the revised exhibits. They have been received in lieu of the original Board Exhibits 25 and 26. Initial briefs were exchanged through the arbitrator on March 5,

1996. Reply briefs were exchanged on March 20, 1996. Thereafter, the Union responded to "distortions in the Employer's reply." On April 3, 1996, the Employer filed a motion to strike the Union's response and the new exhibits which had accompanied it. That motion to strike was granted for the reason that the record was closed at the conclusion of the hearing on January 8, 1996.

ISSUES IN DISPUTE

Because this will be the parties' initial contract, there are a number of differences in their final offers. To their credit, the parties worked out a significant number of their initial disagreements prior to the commencement of the January 1996 hearing. Unresolved issues discussed below include: Appropriate comparables, wage structure, the amounts of wage increases, hours of work, eligibility for and the length of paid breaks, fair share issues and five less significant "other issues."

BACKGROUND

The Hales Corners Library is operated as a department of the Village of Hales Corners, with its governance shared between the Village's Board of Trustees and the Library Board of Trustees. For the purpose of this proceeding, the Library Board is referred to as the Employer.

The Hales Corners Library is a member library of the Milwaukee County Federated Library System, which facilitates County-wide sharing of library materials and services. For

libraries within Milwaukee County, money is made available from two main sources. They are property taxes and reciprocal borrowing fees. The Hales Corners Village Board establishes the property tax levy, because the Library Board does not have taxing authority. Borrowing fees are revenues that the Library generates by lending books to individuals from communities other than Hales Corners. If residents of Hales Corners borrow more books from other Milwaukee County Federated Libraries than are borrowed by residents of other Municipalities from the Hales Corners Library, the Hales Corners Library must pay fees to those other libraries through the Milwaukee County Federated Library System.

In 1994, the Library's budget was reduced by \$41,000. In response to that cut, it reduced the number of hours that it was open. Those reduced hours resulted in reduced reciprocal borrowing fees. The Library increased the hours it is open to the public during both 1995 and 1996. "The Library has attempted to maintain the highest possible access to patrons while also recognizing the budgetary changes." As a result of the foregoing, the Library has had to adopt different staffing patterns and gone from a six to a seven day work schedule. Additional facts are included in the arguments and discussion of the disputed issues which follows.

COMPARABILITY - The Library said that three separate groups of employees in Hales Corners provide the basis for internal comparisons. One is an 18 member unit represented by L.A.W. Its

members are either in Public Works, or are office and clerical employees, or dispatchers and crossing guards. Another is the 14 member police unit represented by "W.P.P.A." The third group consists of 23 unrepresented employees.

It suggested two groups of external comparables. The first group included library employees in Cudahy, Franklin, Greendale, Oak Creek and St. Francis, all smaller libraries in communities traditionally used as comparables by Hales Corners in arbitration proceedings. The Board also included the Cedarburg and Plymouth libraries in the primary group because of their size, proximity to Milwaukee, and union representation. It also suggested Greenfield and South Milwaukee as secondary comparables. It said that because of their size and other economic factors, the latter two libraries are clearly distinguishable from the primary group.

The Association said that the two other organized units in Hales Corners are appropriate internal comparables. It said that the parties had not discussed other library systems as comparables during bargaining. It suggested that Franklin, Greendale, Muskego, Greenfield, and New Berlin would make appropriate external comparables. It said that because there are so many issues in dispute, it would save its arguments for the other issues.

The Library responded to the Union's suggestions by arguing the importance of establishing a pool of comparables, "so as to assist the discussions in future bargaining." It argued that New Berlin is the largest city in terms of square miles, it also has

the largest number of volumes and the second highest level of circulation. Hales Corners is the second smallest library among the Board's comparables. New Berlin is a member of the Waukesha County Federated Library system. It argued that for these reasons, New Berlin is not comparable. It argued that its proposed comparables, "both internal and external, are sufficiently instructive to yield a reasoned determination ... and should be accepted."

DISCUSSION - The Board's observation that it is important to establish a set of external comparables in order to assist the parties during future negotiations is correct. It is not as important, however, as evaluating the disputed issues in this proceeding. There is some merit to the arguments for considering both parties' suggested comparables. There are also reasons to question including Greenfield, New Berlin, Plymouth, and Cedarburg in the mix. A cursory review of the issues and the evidence demonstrates that information on the record about all of the proposed comparables will assist the undersigned to evaluate one or more of the parties' arguments herein. All comparative data in the record will be considered in the discussions which follow. It will be observed that because of the number and the nature of the disputed issues in this proceeding, it has not been deemed necessary or advisable to distill the parties' proposed comparables to arrive at a balanced comparable pool for future reference.

WAGE ISSUES - The parties' tentative agreements include provisions that: (1) an employee who is promoted to a classification having a higher maximum compensation shall receive the next rate provided in the wage range of the new classification which is higher than the wage rate that the employee had been receiving; (2) "salary increases and step increases shall be paid on the first payroll period following the employees' anniversary date; "(3) evaluation ratings are not grievable unless used to deny a salary step... ."

The Association's offer would provide across the board increases of 3% on January 1, 1994, 1% on July 1, 1994, 3% on January 1, 1995, 1% on July 1, 1995, and 3.5% across the board on January 1, 1996. The Association's offer provides that these increases would be "across the board for all employees classification."

The Village's final wage offer provides that "effective January 1, 1994, compensation for library employees shall comply with Appendix A (1994)." Appendix A consists of nine job titles in six pay grades; each pay grade includes ten wage steps. The Village's offer provides that "effective January 1, 1994, employees shall be placed on the nearest step that gives the individual a minimum increase of 10¢ per hour." The Village's offer also provides that each pay grade spread across ten wage steps would receive a 2% wage increase effective on each January 1, 1995, and on January 1, 1996. The Village's offer also provides that:

Employees will be reviewed for advancement to a higher rate of pay in the steps for the classification upon meritorious completion of their anniversary date. No advancement of salary shall be granted to any employee when the Library Director indicates that such advancement in salary is not warranted, based upon overall substandard performance evaluation. Employees who do not meet the standards shall be counseled on ways to improve their performance and they will be re-evaluated in three month intervals. Such counseling shall not preclude the discipline or termination of any employee.

UNION - the Association said that the parties' tentative agreements for the most part mirror the Personnel Manual that was in place and resolutions by the Library Board that were adopted prior to the certification of the Association as the employees' bargaining agent. It said that the Association is attempting to "simply codify a majority of the existing wages, hours and conditions of employment that existed prior to the election petition being filed." The Union argued that its offer is in the best interest of the public because it would provide a stable and dedicated work force. It noted that the Library Board has adopted a policy that "recognizes that employees are valued resources and that hiring qualified and dedicated employees is essential to the success of the organization." The Union pointed to an exhibit that showed that eight of fourteen members of this bargaining unit have less than three years of service. It argued that the Board has not been successful in recruiting a dedicated work force. It said that the Board has not treated the employees fairly, "for the past three years, [the Board has] spent

thousands of dollars in order to deny them pay raises and reduce their level of benefits."

The Union said that it has no role in the hiring process, however, it does have a role in protecting the wages and working conditions of its members. "[E]mployees who are treated fairly do not turn to Unions for protection." It said that this was a non-union library from its inception, in 1975, up to 1993. It said that in 1993, the employees decided that they needed the protection of an outside organization. It argued that the Association's offer, which attempts to codify the existing benefits into a collective bargaining agreement, best serves the interest and welfare of the public."

The Association said that there is no evidence that the Employer is unable to meet the cost of the Association's offer. "The Library Board has not given a raise to any of the employees since July of 1992." It argued that the Employer has budgeted for raises that were not given to the employees, and that the Board was earning interest on the money. It said that the many employees who have left will not receive retroactive pay. It said that employees who received their last pay raise in July 1992, will not receive any pay raises for the period from July 1992 to January 1, 1994. "Only 7 of the 14 employees are entitled to retroactive pay going back to 1994." It argued that the Board can afford the Union's offer, and ability to pay is not an issue.

"The employer's proposal regarding merit pay is unreasonable and lacks comparability." The Union said that none of the locals recommended by either party have a comparable provision. It pointed to two Board exhibits which it said show that the merit pay proposal "conflicts with the existing practices and procedures of the Library Board." One of the exhibits dated November 1988, related to enforcing rules of conduct. "Nowhere in this procedure is the denial of a pay increase recommended or condoned." The other exhibit was minutes of a September 1988 Library Board meeting. It reflected a request to "implement some type of merit system in 1990." The Board asked the Director of Library Service to study the matter and report back during the next year. The Board then agreed to handle pay increases as it had in the past, and granted a 4% pay increase for 1989-90.

The Association said that the result of that study was not a merit system, "but a three year 'parity program' for the years 1990, 1991, and 1992. The purpose of this parity program was to make the wages in Hales Corners Library more competitive with other suburban libraries." The Union said that there never was a "merit pay system as described in the Employers' final offer, the Library Board, in fact, rejected the suggestion of implementing such a system."

The Association said that it had agreed to contract language which would permit the Employer to discipline or discharge employees for just cause. It argued that the merit pay system proposed by the Board would not provide employees any protection

against arbitrary denials of pay increases. It cited language in a section of the Board's offer which provides that, "No advancement of salary shall be granted to any employee when the Library Director indicates that such advancement in salary is not warranted, based upon overall substandard evaluation." The Union said that the performance evaluation form submitted by the Library Director contains "arbitrary conditions such as leadership, acceptance by others, decision making ability, fairness and impartiality. These broad and over vague categories clearly do not stand the test of reasonableness for determining whether an employee is entitled to a raise." The Association noted that inherent problems are associated with subjective evaluations. "Since there is only one person doing the reviewing in Hales Corners the merit system is even more suspect." The Union said that virtually every collective bargaining agreement contains a probationary period during which an employee who does not perform up to standards may be dismissed without recourse. It said once an employee has achieved non-probationary status, it is more prudent to provide corrective discipline rather than punitive discipline.

The Association said that the evidence showed that library employees had historically received pay raises on an annual, semi-annual, or anniversary basis. It said that the Board had rejected a merit pay system in 1990. It reviewed testimony relating to the three year plan commencing in 1990 to upgrade the salaries of existing employees. "The above testimony reflects

the fact that only probationary employees were subject to performance evaluations. Once an employee passed probation, the employee was not subject to performance evaluations and a merit pay system to obtain wage increases." The Union said that a Board witness had testified to past practice where merit pay had been used. It reviewed the exhibits that witness had referred to. "These exhibits demonstrate only that the employees mentioned received increased compensation due to increased job responsibilities or promotions." The Association said that the adoption of a merit pay system is an issue of such magnitude that it should be negotiated and not imposed in an arbitration award. It said that the Employer had not offered a quid pro quo for the proposed change.

The Association said that the wage increase it had proposed is more reasonable than the "uncertain wage offer of the employer." It said that the Employer had presented extensive testimony about the differences in the costs of the two offers. It said that there are "paltry differences" between the offers. It argued that "the major issue in the present case is not how much of an increase will be granted but how it will be granted." It said that the previous arguments about the merit system were based largely on theory. It said that the undersigned must consider how pay raises are handled by both internal and external comparables.

The Association reviewed three resolutions by the Library Board which implemented "parity" program wage increases. On

December 4, 1989, the Board adopted a resolution increasing the employees' wages on each January 1, and July 1, 1990. On December 12, 1990, the Board adopted increases which would become effective on January 1, April 1, and July 1, 1991. On November 4, 1991, the Board adopted a resolution increasing employee wages on each January 1, and July 1, 1992. Each of the resolutions indicated that a previously conducted salary survey of pay rates for suburban libraries "showed an inequity in pay rates for the Hales Corners Library staff, and ... approved a pay rate schedule based on the survey results." The Union noted that none of the resolutions mentioned a performance evaluation. The Association said that since the 1990-1992 raises were based upon parity, "the Association doubts that the employees in question would place such a financial strain on the Employer's budget as to render their final offer unacceptable."

The Association said that during the first year that parity increases were awarded, longevity benefits were incorporated into the senior employee's hourly rate. It said that only one current employee ever received longevity payments. "All other full-time employees who would have been eligible were hired after the removal of longevity and have been hired at rates unilaterally established by the Employer." The Union said that employees were required to pay a portion of their health insurance premiums by resolution 93-35. It argued that "the employees themselves financed the parity program through reduced fringe benefits."

"The Association would also like to point out that the last pay increase employees received was granted in July of 1992." It said that the past practice of granting probationary employees an increase after six months has been terminated. It said that under either parties' offer, retroactive increases will go back only to January 1, 1994. The employees will have worked at 1992 wages for 18 months. "The employer received a substantial windfall due to the fact that many employees who would have been entitled to back pay have quit and will no longer receive back pay." It reviewed the \$1,931 difference in the cost of the two wage offers and argued that, this difference is more than offset by the amount of back pay that will not be received by employees who have left the system.

The Association concluded its wage argument by saying that its offer, which establishes fixed raises at set intervals, is more reasonable than the Village's "offer where there is uncertainty to the amount of pay an employee will receive and when that raise will be delivered." It argued that the Union's wage offer is more comparable to either parties external comparables. "There is no doubt that the merit pay system has no comparability internally or externally."

VILLAGE - The Village said that the primary distinctions in the parties' wage offers are not so much related to the level of the increase, "but rather, the structure within which wages will be established and administered over the term of this contract and future contracts." It said that the Employer's offer

incorporates all of the "bells and whistles" of a modern classification and compensation program for those who work in a professional environment. It said that the Union's offer provided across the board increases tied to specific individuals, and provides no framework for salary attainment or progression. It said that the Board's offer features five employee classifications, each employee would be hired at an established wage rate and would progress through wage steps 1 through 10 "on an annual basis provided performance meets defined expectations." Each step in each classification represents a 3% wage increase. Step increases would be granted on the anniversary date of the employee's hire or last promotion subject to a meritorious written performance evaluation. "It goes without saying that the burden of proof is on the Library to conduct an appropriate evaluation pursuant to the form presently used for that purpose." The parties tentative agreements provide that the denial of a step increase is subject to the grievance procedure. The Board said that if it failed to perform an evaluation "the step would necessarily be granted." If the employee did not meet performance standards, the employee would be re-evaluated at three month intervals.

The Village said that the parties have agreed that employees would be eligible for step increases at 12 month intervals from the date of hire, promotion, demotion, or the date of the last increase. In the event of promotion, an employee will be paid at the next higher step in the classification to which the employee

is promoted. It said that the Board's offer provides that if an employee is demoted, the employee would be placed in the new pay range on the step closest to that of the former range. The Board's offer specifies that no employee would be hired above the mid-point in a range, "and the date of periodic step increases could be accelerated at the discretion of the Library for meritorious performance."

"The Employer offer codifies prior compensation practices developed over the 15 years prior to the certification of L.A.W. ... and in the process provides a regular and predictable method for salary attainment and progression." It said that evidence shows, past wage increases have been approved for a variety of reasons, one of the reasons was meritorious performance. It said that from 1990 through 1992, significant pay increases "were given based upon an overall plan to bring the Library pay rates up to 'market rate' or parity with positions in comparable libraries." It said these increases ranged from 5.5% to 21% depending on where a particular position ranked within the comparable grouping. It presented a chart that showed the cumulative parity increases ranged from 24% to 78% between January 1, 1990, and July 1, 1992. It said the Employer's offer recognizes the need to maintain competitive rates, as well as a uniform method of administering compensation consistent with the status quo. The Board said that it cannot be argued that any measure of "catchup" is required over the term of this first contract.

The Employer said that parity program adjustments resulted in a formal wage schedule, instead of a single rate for each job classification which formerly existed. "The ranges were adjusted by across-the-board increases in 1990, 1991 and 1992." The new rates were determined the "appropriate competitive rate applicable to each job ... based upon research." The Board said that it had attempted to reach a wage agreement with the Union. The Board considered it critical that employees be aware of the starting and maximum rates for each job, "also the rate of progression to reach that maximum." It said the Board's offer was a continuation of its prior practice, "albeit in a more formal structure." It said that the Union's offer, "with a rate for each person reflects an intent to establish an archaic and disparate pattern of compensation never used by this library."

"There are numerous difficulties associated with the implementation of the Association wage offer given the stipulation already reached by the parties." It said the Union has proposed wage rates per person, not rates for positions. It cited several issues "which make it difficult, if not impossible, for the Library to operate within the terms of L.A.W.'s offer. It asked, what is the appropriate rate for new employees? It used the example of a vacant library assistant position. Two current Library assistants receive different wage rates. It suggested that if the Library sets a starting salary either higher or lower than the incumbents' current rates of pay, it could be charged with a prohibited practice. The Village said

that it had implemented its new salary schedule and hired new employees, based upon that schedule during bargaining over this contract. "This action was not challenged by the Association." It said that if the Union prevails in this case, "those 'phantom salaries' would disappear." New hire rates would be open to speculation or reserved as a management right. The Board said if the Union prevails, the regular step progression would evaporate. It noted that one of the Union's objections to the Board's plan is that an employee who received accelerated merit increases could earn more than a senior employee. It argued that an even greater problem would exist under the L.A.W. offer, the Library could hire at any rate for any position within the bargaining unit. "The Employer is not tied under the terms of the agreement to a rate paid to incumbent employees since these are 'person' rates and not 'classification' rates." It said that the Board's offer deals appropriately with the potential for controversy arising out of hire rates. That problem is not even mentioned in the Union's offer. The Board said that the stipulations require step increases on the employees' anniversary dates. A number of employees have passed anniversary dates during bargaining over this contract. It said that the Union's offer is "thunderously silent on the amount due, if any, for these anniversary date increases." The Board said that the stipulation for step increases makes sense in view of the Employer's proposed 3% step increases toward a maximum rate. It said that the Union has not established the amount for step increases. It asked if the

Employer would be in violation of the contract for failing to implement the step increases? "Administration of the Association [offer] is impossible and constitutes a fatal flaw which demands rejection of the L.A.W. offer."

The Employer reviewed a series of exhibits which it said indicate that between 1982 and 1988, employees had received merit increases: "due to a greatly expanded range of responsibilities", "because of the expanded responsibilities included in the new job description", because of "the quality of her work and the desire to bring her salary more in line with other employees doing comparable work," and because an employee "has shown the ability and enthusiasm to handle more responsibility." It argued that pay increases have historically been granted for meritorious performance. The Board said that merit pay had been the subject of "intense and extended discussions" during bargaining. No employee will be denied step increases for 1994 or 1995 based upon performance evaluations. It said an evaluation of its proposal requires consideration of "a fixed guaranteed wage structure with across the board increases," wages that are competitive with other libraries, and annual defined step increases for employees who perform. "This is not exclusively a 'merit' pay system with a minimum and a maximum where an employee's total wage advancement is dependent upon a performance evaluation." It said employee evaluations have not been arbitrary in the past.

The Board said that it had prepared and the employees had reviewed current job descriptions. There have not been any objections to those descriptions which form the basis for performance evaluations. Those position descriptions are absolutely necessary for the employees to understand job expectations. It said that a comprehensive evaluation form has been adopted and used for two years. An important aspect of the form is that it permits employee input for personal goals and self-evaluation. An employee who disagrees with a performance rating that results in the denial of a step increase may grieve the denial pursuant to the parties' stipulations. The Employer said that it is puzzled why the Association objects to the use of performance evaluations which have been implemented for some time. "It is inconsistent for L.A.W. to agree to the grievance language on the one hand and contest the continuation of merit pay on the other hand." The Library said that its offer conforms to the status quo, there is no "problem" which merits abandoning the status quo. "Therefore, the Employer offer on this critical issue alone demands acceptance."

The Board said that its offer establishes a structure by which rates of pay for new hires, and wage rates associated with promotion and demotion will be handled "in a manner consistent with the salary history of the Library." It reviewed its "employment policy" and six examples of employee transfers and promotions, which it said, demonstrate how that policy has been applied over the past eight years. The Board said that the

Association's offer failed to address either these or other wage level issues. It argued that the Union's offer "departs profoundly from the status quo."

The Board said that it has offered highly competitive wage rates. It said that the Library Director had performed a salary comparison based upon a "Wisconsin Association of Public Libraries survey document which she helped to develop." The job descriptions in Hales Corners are in substantial conformity with those in comparable libraries. The Board presented a series of wage analysis summaries of maximum wages "within Tier I and Tier II comparables" and in Hales Corners. Those summaries purport to show that Hales Corners' average maximum wage rates are "above the midpoint" for the classifications of page and desk clerk, and are "substantially above the midpoint for library assistant, circulation/technical coordinator and librarian." Those relative positions would improve for 1995 and 1996 under either offer in this proceeding. The data indicates that over the three year period of 1994-1996, the page, library assistant and circulation technical coordinator positions would continue to receive above average maximum wages under either parties' offer. The desk clerk wage ranking, which at the maximum was close to average in 1994, will erode under either offer. The Union's offer would result in a substantial erosion in the maximum desk clerk wage rate through 1995. It appears that the Union's offer will also result in librarian maximum wages going from between 10% to 15% above the comparable average in 1994, to close to average in

1995. The Board said that with few exceptions, its offer exceeds, and in some cases, far exceeds comparable average wages. It said that L.A.W.'s offer reflects a range of rates, because, the Association refused to "establish a 'maximum' rate preferring instead a floating range not tied to a job and its market value, but rather the individual incumbents." The Board said that its offer is in many cases higher than the Union's offer for an individual incumbent.

In 1996, eight employees have higher hourly rates under the Library offer, while only six employees are higher under the L.A.W. offer. ... all of those employees hired after January 1, 1994 were placed on the Library salary structure at the appropriate rate of pay at the time of hire --- that is, after the Library had created the schedule in 1994 and/or applied its across-the-board increases for 1995. As a result, an employee hired in 1995 was placed on a schedule after the 2% across-the-board increase was added by the Library.

The Board said that under the Union's offer, that new employees would receive a total 6% increase in 1995 compared to the 4% lift that would be received by incumbent employees. It argued that this would be unfair to long-term employees.

The Village said that both internal and external comparables support the creation of a fixed salary structure. It said that its contract with L.A.W. covering the Department of Public Works, office clerical, dispatch, and crossing guards contain a fixed wage schedule, with longevity payments that tops out after 18 years of service. Its police officers' contract has a fixed schedule that tops out at five years for patrolmen and extends

longevity increases at fixed five year intervals to 15 years of service. "Library employees will achieve the maximum salary after nine years of service under the Employer offer." The Board reviewed applicable provisions in external comparables' contracts and concluded that, "a fixed salary range schedule is featured in every other external comparable, except for Cedarburg."

The Village, in response to the Union's argument, said that there is no evidence "as to what does or does not contribute to employee turnover nor is there any evidence whatsoever as to the basis for the employees to seek representation by L.A.W." It said that it disagreed with the characterization of wage increases granted to the employees "both before and after the Association was certified as the bargaining representative." It said that the last wage increases to the employees as a group were the parity increases of between 24% and 80%, which were granted from 1990 through 1992. "The last increase in July of 1992 would, in most compensation schemes, have been followed by an increase in July of 1993. However, parties have both agreed in their final offers that no increase would be effective until January 1, 1994." It said there was, "at most a small six month hiatus which followed three years of exceptionally large wage increases." It said that wage structure and comparable wage rankings that "lie at the heart of this dispute."

The Board said that it had not retained a pool of money from deferred employee wage increases. The Village had the responsibility to levy taxes for library operations. The Village

is not the employer in this case. It said that the Association's argument that the Board has excess economic resources is a smoke screen.

The Board reviewed many of the arguments that both parties made previously about the merit pay proposal. "There is no precise script for how a merit pay plan works." It said that it involves identifying employees who deserve reward, honor or esteem. It argued that the Union's offer would "throw out 15 years of employer/employee relations at the Hales Corners Library." It said that since this is the initial contract between these parties, "it is extremely important to establish the parameters for how wages will be determined in the future." It argued that because of the extensive history demonstrating merit pay increases, it is inappropriate for the Union to demand quid pro quo for the merit pay system. It argued that the Association is attempting to change the status quo.

The Library noted the Union's argument that employees contributed to finance the parity program through health insurance premium contributions. It said that there is no basis for this argument. The Board said that the parties had agreed to the level of employee health insurance contributions. Their agreement is consistent with contributions by internally comparable employees.

The Association said that the Employer was attempting to claim that conditions which either do not exist or conditions which were implemented after L.A.W. was certified, are the status

quo. It said that these are blatant attempts to distort facts. It pointed to evidence that the Wisconsin Employment Relations Commission entered a finding on November 30, 1993, that "there is no Library policy in place whereby an adverse annual evaluation could have any effect on an employee's pay."

The Union noted the Library's assertion that because the Union's offer does not establish hiring rates, the amounts of step increases or maximum rates, "administration of the Associations [offer] is impossible and constitutes a fatal flaw... ." The Association said that this "fatal flaw" can also be found in its contract with the City of Cedarburg, a comparable offered by the Employer. It also pointed to the Library Board resolutions which implemented parity program wage increases. "The very same 'fatal flaws' that the Employer claims render the Association offer unacceptable were present throughout the parity program."

The Association said that the Board had argued that it pays an above-average maximum wage. "However, it must be taken into consideration that it takes a minimum of nine years to reach the maximum pay, provided that the employee successfully passes the written evaluation... ." It said that employees have starting wages that range from 35¢ to \$1.42 an hour below average comparable starting wages. It argued that most employees do not get past the midpoint on the Employer's wage scale, "thus rendering the top pay moot."

DISCUSSION WAGE ISSUES - This library, which was created in 1975, was initially staffed by volunteers from the Hales Corners Woman's Club. In 1978, the Library Board adopted a resolution which included a compensation schedule and a personnel policy manual. That resolution provided for five positions (two of which were designated "CETA"), and provided a single hourly rate for each position. A similar practice appears to have been followed nine more times prior to 1989. Some of those resolutions granted across the board retroactive pay increases for parts of the calendar years between 1984 through 1988. Employer Exhibit #53, which is not dated, shows that for the period July 1, 1988, through June 30, 1989, there were nine positions. A single hourly wage was assigned to each position. This schedule was in effect when the Director of Library Services ("Director") assumed her responsibilities in Hales Corners, in June 1988. In addition to the foregoing wage increases there were the eight other instances, discussed by the Employer, where the Board either: established a starting rate, adjusted an individual rate for enthusiasm, recognized the quality of work, expanded responsibility, or granted promotions. The foregoing appear to demonstrate that the Library Board did not have an established compensation policy during the period in question. The Board appears, rather, to have responded in an ad hoc manner to whatever exigencies prompted it to act upon employee compensation.

The resolution passed by the Board on August 8, 1989, for the first time, listed each member of the Library's staff and assigned an individual pay rate to each staff member. On September 6, 1988, the Director had requested the Board to adopt some type of merit system commencing in 1990. The Board asked the Director to study the matter and report back during the next year. The Board's decision to request that merit pay be studied and that "1989-90 pay increases will be handled as in the past," make it clear that the Library did not have a merit system, and, it did not recognize individual employee pay rates during the period between September 1988 through the end of 1989.

The Board had emphasized the study that it conducted prior to implementing the parity pay program. However, it did not put that study into evidence. Instead, it argued that all of the pay raises it granted between January 1, 1990, and June 30, 1992, were implemented to further the new parity pay program. The Board's resolutions adopting 1990, 1991, and 1992 wage rates each state that those wage rate schedules are based upon the survey results from a survey of pay rates for suburban libraries in Milwaukee County. The wage rate schedule for each of those years consists of a list of library employees, including the Director, with an individual wage rate assigned to each employee. There is no dispute that the Library hired new employees between July 1, 1992, and the time of the hearing at wage rates that the Director believed were appropriate for the position. There is no evidence

that any employee was informed that the employee's hiring rate was pegged to an established wage rate schedule.

L.A.W. was certified as the employees' collective bargaining representative on January 31, 1994. The first evidence of a wage rate schedule appears to be "Appendix A" attached to the Library's final offer. The record is not clear when this schedule was first developed. However, it appears from Joint Exhibit #1 that the Association first saw Appendix A or its equivalent after negotiations for this contract commenced, probably sometime after August 26, 1994. It is clear that the Library's performance evaluation form was first developed by the Director sometime in 1994. There is evidence that employee performance has been evaluated in a less than formal fashion since 1989. There is no evidence that Hales Corners Library employee wage increases have ever been related to the employees' performance evaluations. It is clear that the Association has not agreed to the Board's proposal to include a performance based merit pay schedule in the parties' initial contract. It appears that the Employer is attempting to impose a series of formal procedural requirements, which have not been previously recognized by the employees or the Association, as preconditions for these employees receiving wage increases. It further appears that the proposed performance evaluation form provides for a number of subjective determinations which cannot be applied uniformly to all of the position classifications that are included in this bargaining unit. For the reason outlined by the

Board, "once established in an initial contract, such a pay for performance system will become the formalized status quo", if these new procedural requirements are to be included in the parties' agreement, they should be mutually understood and agreed upon. They should not be inserted into an initial agreement through arbitration.

The rates of the wage increases proposed by the Association appear to be both more comparable and more reasonable than the increases proposed by the Board. On December 4, 1989, the Library Board said that it had conducted a thorough salary survey of pay rates for suburban libraries in Milwaukee County. That survey, which was not placed into evidence, "showed an inequity in pay rates for the Hales Corners Library Staff." Between January 1, 1990, and June 30, 1992, the Library staff received "parity program" wage adjustments. It appears that the Library Board assumed that wage parity had been achieved for its employees for the period commencing July 1, 1992, through a reasonable review date.

The Board had previously reviewed wage levels and granted across the board wage adjustments annually. It appears that the last time the Library Board reviewed its staff's wage schedule, was November 4, 1991. That was the date that it established that "compensation rates in effect from January 1, 1992, through June 30, 1992, and July 1, 1992, through December 31, 1992, are as follows." The foregoing is sufficient to support the conclusion that the Board should have at least reviewed staff wage rates at

reasonable intervals after December 31, 1992. There is no evidence that such a review was ever conducted. Evidence that the Board established individual rates for new hires, and granted post probationary step increases after June 30, 1992, does not demonstrate that the Board reviewed its staff's wage structure or wage levels. The last time non-probationary staff members received a periodic wage adjustment was on July 1, 1992.

District Exhibits 16a through 16l include evidence of pay raises granted to library employees in eight "comparable" libraries. The parties agreed that two of these libraries are comparable. The Village suggested that four of the other libraries should be primary comparables and that one, South Milwaukee, should be a secondary comparable. The final library for which wage data was presented, Muskego, was recommended by the Association. Among these libraries, Cedarburg granted individual wage increases ranging between 8.6% and 8.8% for the period January 1, 1995, through January 1, 1997. Cudahy granted 5.6% increases between January 1, 1995, and January 1, 1996, according to its contract. It reported that it had granted 2% in each January and July 1995 and 3.5% in 1996, in response to the Board's questionnaire. Franklin reported 4% increases for each 1994, 1995, and 1996. Greendale reported 1995 increases ranging from 3.49% and 6.76%. St. Francis reported a 1995 increase of 3.5%. The Muskego contract appears to reflect wage increases between 3.8% and 7.6% in 1995. However, it reported 4% increases for each 1994 and 1995. Plymouth reported 3% increases in each

1994, 1995, and 1996. South Milwaukee's contract reflects a 3.5% increase for the period July 1, 1994, to June 30, 1995, and that an additional 2% was granted for the period July 1, 1995, to December 31, 1995.

The foregoing increases are more comparable to the Union's proposed 3%-1% split increases in 1994 and 1995, and 3.5% increase on January 1, 1996, than they are to the Board's proposal for placing the employees on a schedule that provides a minimum 10¢ increase on January 1, 1994, with 2% increases on each January 1, 1995, and January 1, 1996, with the possibility for additional step advancement as provided for in the Board's offer. It is also found to be more reasonable to grant those employees who have not received a wage increase since July 1, 1992, 3½% increases for each 1994, 1995, and 1996 than to award them a minimal 1994 adjustment, and 2% increases in each 1995 and 1996 along with the undetermined right to receive step increases if their performance is determined to have been meritorious.

CPI - The Board said that both parties' wage only offers exceed increases in the relevant consumer price index. It presented a summary of actual 1994 and 1995 CPI data along with a projection for 1996 increases. That data reflected 1994-96 increases at 8.1%. The Board said that its offer would provide 10.73% lift over this three year period, compared to the 11.5% lift included in the Association's offer. It noted that both wage offers exceed CPI increases. The Board said that in addition to wage increases, it assumed increased benefit costs of

8% in 1994 and 17% in 1996 for increased health care premiums and increased retirement contributions. The Board argued that based upon its proposed overall wage and benefit package its offer is more reasonable.

The Association said that the employees have not have a raise since July 1992. It pointed to CPI data that reflects the CPI increased 9.03% between July 1992 and November 1995. It said that projected inflation for 1996 is 3.1%. It said that for the three year period of this agreement, the Association is asking for 11.8%. The cost of living has increased by 12.13% since these employees have received a pay raise. "Therefore, the Association's offer does not keep up with the cost of living but is more in line with the cost of living when compared to the Employee's final offer which is impossible to calculate."

DISCUSSION - The Board stated that the parties' tentative agreements combined with its offer for a January 1, 1994, minimum step increase of 10¢ an hour, and 2% wage increases effective January 1, 1995, and 1996, will result in a three year lift of 10.73%. This assertion is predicated upon the assumption that employees who have been hired or will be hired at wage rates exceeding those rates that were in effect on July 1, 1992, have received a wage increase. If there is evidence in the record to support that argument, it escaped the undersigned, as does the argument. Based upon Employer exhibit 21, only six of fourteen current employees were hired prior to September 1993. Three of these employees received promotions since they received that July

1, 1992, wage increase. Two would apparently qualify for a merit increase in 1996. The average hourly increase, including promotional and merit increments, would average slightly less than 10% under the Board's offer. (Employer Exhibit 23).

Both parties discussed the fact that one or more of those six employees who were on staff in July 1992, have since left the library. The undersigned's hearing notes indicate that at the time of the hearing, it appeared that two or three such employees either had left or were leaving before a decision could be entered in this case. Since neither party presented hard evidence on employees who have left the system, that consideration has not been given much weight herein. It has, however, contributed to the undersigned's inability to reconcile the numbers which have been advanced by the Board to support its already strained cost of living argument.

If one considers the wage increases involved in this proceeding to cover the period July 1, 1992, to December 31, 1996, both offers are below CPI increases. The appropriate time frame to be considered is this contract period is January 1, 1994, through December 31, 1996. The Union's offer is high and the Board's offer is low for that time frame. The Union's wage increases are a function of annual across the board incremental adjustments which appear to have comparable support. If it were not for the promotional and merit increases that are factored into its average increase calculations, the Board's offer would

fall further below the average annual CPI adjustment for the 1994-96 period.

HOURS OF WORK AND BREAKS - The parties' stipulations provide that management has the right to establish the work day and the work week. Full-time employees have the right to select their shift annually based upon seniority. Part-time employees are assigned to shifts one month in advance, their schedules may be changed for unforeseen or emergency circumstances. The Association's offer also provides that:

15.02 - Normal Hours: The normal hours of work for full-time employees shall be not less than seven consecutive hours or more than eight consecutive hours with a paid 30 minute lunch period and two 15 minute breaks. ... Employees who work three hours or more but less than seven hours, shall be entitled to one 15 minute break sometime during the middle of their workday as approved by the Director. Part-time employees who work seven consecutive hours or more shall receive the same lunch and two 15 minute breaks as do full-time employees.

VILLAGE - The Village said that the parties' stipulations "essentially" represents the status quo and provides flexibility to adjust hours. The Library must be able to meet patron demand or it will lose revenue. It said that the Association's offer is restrictive and conflicts with the existing practice. The Director and employees currently resolve scheduling problems jointly. The Board said that full-time employees do not currently work 7-8 hour consecutive shifts as a fixed schedule. Part-time employees currently receive a ten minute break for

three hours of work. Part-timers who work seven hours currently receive a lunch break but not two additional 15 minute breaks.

The Board said flexible scheduling is important, because Library hours change annually based upon its budget and the patrons' needs. A \$41,000 budget reduction in 1994 resulted in reducing spring and fall hours from 64 to 59 hours a week. Summer hours were reduced from 64 to 48 hours a week. Weekly hours were increased to 61 in 1995 during the spring and fall. In 1996, spring, summer, and fall hours were increased to 64 and summer hours were increased to 50 hours a week. During these years, the number of weeks for some seasonal hours were also changed and the number of days that the Library was open was increased to include Sundays. The Board said that throughout this period of change, partial shifts and schedule adjustments were made "with an eye toward the personal preferences of employees." It said that the scheduling system has now been refined to permit schedules to be posted two months in advance for employee input. "The record is replete with instances of staff scheduling which conflicts with the L.A.W. offer."

The Board cited a August 1995 Work Schedule Procedures Memo, from the Director to the staff, as an example of the Director and the staff working together to meet scheduling requirements. These procedures were incorporated into the Library Personnel Manual. The Board said the procedures are simple and fair. They provide for the training and supervision of staff and service to the public. Procedures also permit staff the opportunity to

trade hours. The Board said that its criteria for vacation preferences was not always seniority, other employee related priorities are also considered. It said that it presently schedules employees to work split shifts under given circumstances. "This entire scheduling process could be destroyed if even one employee refused to work split shifts or demanded a consecutive 7/8 hour shift per the Association's final offer. The entire Cooperative effort or scheduling would be irreparably compromised." It argued that the Association's offer is not supported by any rationale on the record. It pointed to examples in the record that demonstrate flexible hours and split shifts are necessary to accommodate circumstances including jury duty, funerals, illness, and program requirements.

The Employer said that its scheduling problems are exacerbated because it is the only library that provides a paid lunch hour. It said that paid lunch hours and breaks for the full-time employees are not an issue. The requirement that part-time employees receive a 15 minute break rather than a 10 minute break for a three hour shift, and would receive two 15 minute breaks when they work a 7/8 hour shift, is an issue. It said there is no justification for these requirements which do not reflect the status quo. The Board said that the value of paid lunch and other breaks in 1996 totalled \$21,555. The Board said that it could not alter its current practice regarding these breaks, but, the value of the benefit should be recognized. "None of the other 22 area libraries routinely provide a paid

lunch break." The Board said that its Library employees enjoying better paid break benefits than any other group of employees in Hales Corners. It concluded that provisions in its offer relating to split shift hours and paid breaks are supported by comparisons with both internal and external comparables.

UNION - "The hours of work language set forth by the Association reflect the status quo that has been in existence since the Library opened in the mid-1970's." The Association said that its proposed Sec. 15.02 is intended to codify existing practices. It said that the Board had informed the Union that if the Union wanted to have mandatory subjects of bargaining included in the contract, the Union should ask to have them included. The Union said that it "believes very strongly in identifying this language due to the Employer's position that the Director has the unfettered right to change the paid breaks at will." It reviewed the Director's testimony, in which she said that she believed that she did have the authority, under the Management Rights Clause, to discontinue paid lunch and other paid breaks. It noted that the Board's attorney had testified "that the Employer does not have the unilateral right to change either the morning, the afternoon or lunch break." The Association argued that the Employer had intended to change its break policy. It said the difference of opinion underscores the need to include the existing hours of work and paid break language into the contract.

In its reply brief, the Association pointed to the parties' stipulation that, "split shifts are at the discretion of the Director. The hours of the split shifts shall be mutually agreed upon by the employee and the director." It also noted that the Director had testified that no employee had ever refused her request to split a shift. Finally, it cited the Management Rights Clause giving the Director the right to schedule employees and to "assign part-time employees as the Director sees fit." The Association argued that the foregoing "refutes the Employer's argument that the Director would lose the needed flexibility to run an efficient service orientated Library."

The Association took issue with the Board's argument, that the Association is trying to change the status quo relating to 15 minute breaks for part-time employees. It cited the Director's testimony:

I imagine if you were to interview every staff member they would have a different version of how breaks handle for themselves but what I have seen and since you have seen that the work schedule does not state when the breaks are taken or how long the breaks are. I've seen staff members take 10 minute breaks, staff members take 30 minute breaks, or longer and sometimes does not directly tie to the hours of work they are working. It's a very loose system.

The Association said that it is absurd for the Board to argue that the Union's proposal is not the status quo. It argued that it appears that the Board is attempting to eliminate benefits.

DISCUSSION - The controversy over which parties' offer relating to hours of work and breaks represents the status quo

appears to involve two elements. First is the question of whether the normal hours of work for full-time employees are currently not less than seven consecutive hours nor more than eight consecutive hours. The second question is whether part-time employees who work seven hour shifts currently receive rest breaks in addition to their lunch breaks. Except for the August 4, 1995, memo from the Employer relating to Saturday and Sunday scheduling and Employer Exhibit #61 (apparently prepared for this hearing) showing the hours of the week that the library is open, there is no documentary evidence relating to these questions. There was, however, extensive oral testimony from both parties entered into the record.

It seems clear from the testimony that normal shifts for full-time employees have traditionally been seven or eight hour shifts. It is also clear that since at least August 1995, the Director has implemented split shifts in order to spread weekend work hours between members of the library staff. It appears probable that some sort of split shifts were necessitated when the Library began to open on Sunday between 1 and 4 p.m. during the winter, spring, and fall of 1994. The record does not indicate what steps were taken to meet these scheduling requirements, except, that it was worked out by agreement between the Director and the staff. The foregoing procedures would not have to be affected or altered if the Association's proposed hours of work language is adopted. The language of the parties' stipulations give the Board the right to establish the work week

and schedule the employees. "Split shifts are at the discretion of the Director. The hours of the split shift shall be mutually agreed upon by the employee and the Director." The Board's objections to defining the normal work day appear to be based upon the assumption that the Library Director will not be able to make unilateral decisions relating to the assignment of the full-time employees' work shifts. The previously cited stipulations and Section 15.07 relating to "Mandatory Scheduling" indicates that a reasonable balance between the Board's need to assign staff and the employees' right to have a say in selecting their hours of work which has previously existed at the Hales Corners Library, will merely be formalized if the Association's proposed language is included in the parties' contract.

The disagreement over including the Association's proposed language for part-time employees' lunch and rest breaks would be a tempest in a teapot were it not for the Director's testimony, that she believed that she has the authority to discontinue the paid lunch break and the paid rest breaks that the employees currently enjoy. It is clear from the evidence that the Library has had a loose system which has permitted both full-time and part-time employees to take 30 minute or longer lunch breaks and to take 10 minute or 15 minute rest breaks. While these practices appear to be more liberal than the practices in most other libraries for which information has been provided, the Library's attorney testified that he agreed with the Union that the Director does not have the authority to discontinue the

employees' breaks. That being the case, the only remaining question is what kind of paid breaks have part-time library employees traditionally enjoyed in Hales Corners. The preponderance of the evidence indicates that part-time employees have received both paid lunch breaks and two 15 minute rest breaks when they have worked seven consecutive hours. They have received a 15 minute paid break when they have worked four consecutive hours. When the Board advertised for a page in September 1994, it said that Pages are entitled to a 10 minute rest break when working a three hour shift. From the foregoing, it appears that neither offer conforms strictly to the status quo. However, the Association's offer appears to more closely approximate to the employees actual practices regarding rest breaks than the position that is outlined in the Employer's brief. The Association's position that the employees are entitled to continue to receive both paid lunch and paid rest breaks is no longer a disputed issue in this proceeding. However, the fact that the Library Director believed that she had the right to discontinue the employees' breaks at the time that she entered testimony on the record, indicates that the Association's determination to outline the parties' hours of work and break policies in their contract is reasonable.

FAIR SHARE - The parties' offers both contain provisions for fair share dues deductions. The offers differ in two respects. First, the Library's offer would have the Association indemnify and hold the Library harmless against "all claims, demands,

suits, orders, judgments or other form of liability that shall arise out of or by reason of action taken or not taken by the Library" under the fair share section. The Union's offer would limit the hold harmless provision to judgments taken against the Library under the fair share provision. Second, the Library's offer would exclude employees who: are grant-funded, work less than 11 hours a week, or who are on leave or laid off and receive no pay from fair share deductions.

VILLAGE - The Board cited two WERC decisions that said fair share benefits neither the employer nor the employee, but, only the Association. It said that in this proceeding, it had agreed to fair share as an accommodation to the Association. "Therefore it is utterly unthinkable that the Association should refuse to fully indemnify the Library, which has such a small budget with no contingency funds for claims brought as a result of the operation of this clause." The Board reviewed the indemnification and hold harmless language in the Village's agreements with its Public Works, office and clerical employees, dispatchers and crossing guards (LAW unit) and with the Police Department (WPPA unit). It said that those contracts are more detailed than the Association's offer and "the provisions of the Village contract with the W.P.P.A. align perfectly with the offer of the Library Board in this matter." It said that since the Police Department does not have any part-time employees and the L.A.W. agreement for Public Works and other employees excludes employees who work less than 16 hours a month from fair share,

the Board's offer in this proceeding is supported by internal comparables.

The Village cited indemnification provisions from library contracts in Cedarburg, Cudahy, Muskego, and Plymouth. "In each case, the external contract language is more extensive and protective of the employer than under the Association offer." It said that L.A.W.'s offer in this case limits its liability to court proceedings where the Union does not prevail. "The Employer is also exposed to grievance arbitration awards and decisions of the Wisconsin Employment Relations Commission on this issue," because the WERC determines appropriate fair share assessments. The Board argued that it should not be faced with semantic hairsplitting over the level of indemnification with potentially severe economic ramifications where fair share benefits only the Union.

The Village said that imposing the union dues/fair share requirement on employees who only work a few hours a week "may cripple the Library in its attempts to recruit and retain staff." It said that several high school students may only work four to six hours a week. Another employee's hours have been reduced to eight hours in a week in 1996. It described various circumstances which require limited hour employees to be available. The Board said that it has experienced difficulty in meeting all of its objectives and has created a four hour a week position to meet some of its requirements. It said that some employees, who work limited hours, have said it is not

economically feasible for them to continue to work if they must pay union dues. "It was in response to these comments and the changing patron needs that the Employer proposal to exclude employees working less than 11 hours per week was added." It said that this exclusion would effect only three current employees who are after school pages, and the new library page position.

The Village said that the lowest hourly pay rate for the other L.A.W. unit is \$7.42 an hour for starting crossing guards, this advances to \$8.17 after three years. Part-time dispatchers earn from \$9.59 to \$11.26 an hour. These part-time employees pay \$8.50 a month in union dues. It said that dues represent an hour or less pay per month for that unit. It said Library pages would earn between \$4.43 and \$5.78 an hour under the Board's offer. It said for most pages, the L.A.W. dues represent two hours of pay or 6% of monthly income. "In the interest of maintaining these employees, it is appropriate to exclude these employees from mandatory fair share contributions."

The Board said that its part-time employees work less hours a week than part-time employees in comparable districts with union agreements. It reviewed data for five comparable districts which showed that the average number of hours requiring fair share deductions is 14.6 hours a week. The average contribution for part-time employees in these districts is \$14.76 a month. In the two of those districts which are represented by L.A.W., the hours to qualify "is 1 to 1.5 hours higher than under the Hales

Corners Library Proposal." The Board said that the parties have stipulated to a voluntary fair share provision. The Union can deal with the issue of union dues for low income employees by soliciting the employees for voluntary authorizations. It cited a prior arbitration award in which the arbitrator found a voluntary deduction for substitute teachers was more reasonable than fair share, because, "there is likelihood of increased recruiting difficulties for the Board if Fair Share becomes mandatory." The Board argued that the evidence demonstrates that its Fair Share is the more reasonable.

The Board said that the Association's "intimations at hearing ... that it would 'offer the same deal'" to library employees as L.A.W.'s agreement with Village Hall employees must be rejected, because, that statement is not in evidence. It said that there is evidence that the offer was never extended to the Library.

The Board pointed to evidence which it said shows that grant employees are casual employees who are not eligible for bargaining unit status. It said that grant funds must be applied for, there is no guarantee that funding will be renewed when it expires, and the employees know that they will be terminated when grant funds are exhausted. "Therefore, the exclusion of grant employees ... reflects the status quo, and is legally required under MERA." It said that the Board's proposal to exclude grant employees has no impact upon the Association.

The Village anticipated that the Association might allege that the Board's proposal, to limit fair share to employees who work eleven or more hours a week, "Constitutes some kind of prohibited practice." It cited a WERC ruling which held that a union could have requested the WERC to decide that issue by a declaratory ruling. It said that since the Association did not make that request, it has waived its right to make the argument.

UNION - "The Association is willing to hold the Employer harmless for any judgments that are rendered against the Employer but does not want to give the Employer a blank check on expenses." It said that the Village's offer is unreasonable, because, it would make the Union liable for any and all claims paid as a result of the Employer's participation in a challenge to a fair share provision. The Union said that it is unreasonable to expect it to be responsible for paying the Board's legal fees and other expenses without the Union having any ability to control these expenses. The Association said that there is evidence that the Union's concerns were not discussed during bargaining. It said that it was imprudent for the Board to not ask about an issue that is holding up an agreement. The Union said that it had expressed concern about the Board's proposal, but, the Board did not question the language of the Union's proposal until after the arbitration hearing. The Association said that this is not a big issue, it does not believe that it will be determinative in deciding which offer is the more reasonable.

The Association said that the Village was attempting to control the amount of fair share dues paid by certain members of the bargaining unit. It reviewed the Library Director's testimony that part time employees would be required to pay "full boat union dues." It said that the employer's exhibit that showed full-time employees would be charged \$17 a month and part-time employees would be charged \$8.50 a month, is not accurate. It said that the correct amount would be \$20, \$10, and \$5 a month for full-time employees, part-time Class A employees, and part-time Class B employees respectively. No dues would be deducted from any employee who works less than 16 hours a month. The Association stressed that it has the responsibility to represent every member of the bargaining unit, whether they pay dues or not. The Union said that the Library Director testified that she had not been informed of the Union's proposed dues structure, which it said is none of the Board's business. The Association, noting that the Director had received her information from the Village bookkeeper, asked, why if she had concerns about union dues didn't she ask the Union? It argued that the Director "was told repeatedly at the bargaining table that union dues were not collected from anyone who did not work more than 16 hours in a month."

In response to the Board's concern that some employees do not work sufficient hours to pay union dues, the Association said, "scheduling is at the sole discretion of the director." It pointed to an exhibit that shows part-time employees work four

hours a week in Hales Corners compared to an average of 15.25 hours a week in other libraries with collective bargaining agreements. The Association said that matters relating to union dues are association issues. "The fact that the Employer has tried to restrict who pays is paramount to a prohibited practice." It said that the arbitrator should not condone conduct prohibited by law.

In response to the Association's arguments, the Board suspected "that this is the most important issue for the Association in this dispute." It said that the Association had intentionally missed the point that its hold harmless clause is not a "blank check, but language consistent with the vast majority of other internal and external comparable contracts." It argued that the Union can control disputes about fair share dues deductions. It said that the employer "is an innocent bystander as to any type of claim, demand, suit, order, judgment, or other form of liability that appropriate fair share amounts were deducted." It argued that there is no evidence that this language will make the Association liable for the Board's attorney's fees. It said that when such disputes arise, it is standard practice for the employer to tender the defense to the Union. It said that contrary to the Union's contention, this issue has been a featured part of the Board's offer.

The Board said that the Union had failed to place evidence of its dues structure for these employees on the record. It argued that information about this matter contained in the

Union's brief, should not be considered. It said that the evidence it had provided about the L.A.W. dues structure is the only evidence which may be considered. The Board said that the record shows that the Director schedules part-time employees in a manner to meet public service demands and budgetary limitations. "Therefore, it is wholly inappropriate to argue that somehow the staffing patterns in this library must change to accommodate the Association's need for fair share/dues monies.

DISCUSSION - Based upon their arguments, it appears that the parties did not attempt to refine their disagreements about the fair share issue during negotiations. The Employer's concern about the limited nature of the Association's hold harmless agreement has merit. The Association has proposed language that is more restrictive than the indemnity contained in any other contract in evidence. The Association's stated concern about giving the Employer a blank check for attorney's fees may have some merit. That concern, however, does not appear to be as valid as the Library's concern that the Association's offer to "indemnify and save the library harmless against any judgment pending... " would not shift all of the potential costs and expenses that the Library may incur in a fair share dispute to the Union. The language of the parties' contract should grant the Employer reasonable assurance that it will not be exposed to costs or expenses by performing profunctory administrative duties that are requested by the Association.

"Although it has been said that the right to indemnity springs from a contract

... the modern cases note that contract furnishes too narrow a basis, and that principles of equity furnish a more satisfactory basis for indemnity.... The rule proposed in the Restatement of Restitution ... appears to be based on principles of equity; it provides that a person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor (indemnatee) is barred by the wrongful nature of his conduct."

"Probably ... no one explanation can be found which will cover all of the cases; and the duty to indemnify, like so many other duties, arises where community opinion would consider that in justice the responsibility should rest upon one ... rather than another." Kjellsen v. Stonecrest, Inc., 47 Wis. 2d 8, 11-12 (1970).

The Employer's argument about the impact of the Association's proposed fair share dues deduction upon the Library's ability to hire and retain part-time employees has limited merit. The three full-time and 11 part-time members of this bargaining unit (based upon revised Employer Exhibits 25 and 26) have selected L.A.W. as their collective bargaining representative in accord with Sec. 111.70(2) Wis. Stat. The Union has the right to establish the fair share deduction subject to the limitations set forth in Sec. 111.70(1)(f). There is insufficient reliable evidence on the record for the undersigned to determine what fair share deduction the Union will certify for part-time employees. The Association is responsible for determining and certifying that amount in accord with the provisions of MERA.

If at least 30% of the affected employees do not support the fair share agreement, they may initiate a referendum to terminate the fair share agreement. There may be some merit to the Employer's concern that some part-time employees, who earn between \$4.43 and \$5.78 an hour, would either quit their job or not accept employment at the Library because of fair share dues deductions. Based upon the record, the Board's concern about attracting and maintaining part-time personnel is as material a consideration as the Association's right to compel its members to pay their proportionate share of the cost of the collective bargaining process and contract administration. The Board's fair share proposal appears to be more reasonable than the Association's.

OTHER ISSUES - OVERTIME COMPENSATION - Both offers would provide overtime compensation to non-professional employees at time and one-half. The Association would provide the same benefit to professional employees. The Board would limit the professional employees to straight pay or straight comp time for overtime hours worked. Employer Exhibit 4a provides that "all overtime hours over 40 regular hours in a week shall be compensated at the rate of time and a half... ." It appears that this policy has been in effect since July 1991.

DISCUSSION - Both parties argued that their proposals continue the status quo with regard to overtime compensation. There is insufficient evidence in the record to establish the past practice. There is merit to the argument that overtime

compensation for "professional employees" is incorporated into their professional salaries. That argument loses persuasion when the employees' compensation is based upon hourly wage rates, even if the employees are considered exempt under the Fair Labor Standards Act. The record shows that these employees are seldom, if ever, requested to work overtime. That is the reason that neither the Employer nor the Union have been able to show that past practice supports its position on this issue. Neither party has shown comparable support for its position. The fact that the Board's policy manual provides for time and one-half and the fact that on at least one occasion the Director approved time and one-half compensation, appears to support the Association's position.

UNUSED VACATION - The Association's offer provides that an employee who has completed one year of continuous service and chooses to quit or retire, will be paid for unused vacation time. The Board's offer does not mention payment for unused vacation. The Board argued that its offer maintains the status quo. The Association neither disputed the Board's contention nor presented evidence to the contrary. Since the parties' existing vacation policies would be continued under the Board's offer, that offer is preferable.

RETIREE HEALTH INSURANCE - The Library's Personnel Policies Manual provides that "Retired employees shall be allowed to continue under the group plan at group rates at their expense if permitted by the carrier until Medicare eligible." The Association's offer mirrors this provision, except that it

deletes the phrase "until Medicare eligible." The Board's offer would permit retired employees under the Wisconsin Retirement System to continue under the group plan at group rates at their own expense under COBRA if permitted by the carrier. The Association's argument that its offer mirrors the status quo appears to be essentially correct. It is not apparent that the deletion of the phrase noted above would have any practical effect.

The Board argued that it has been the practice of the Village to process and handle all retiree health insurance claims provided that they pay the premiums. It said that there has never been a retirement from the Library. The Union responded that a number of its members are approaching retirement and that by limiting these employees' eligibility for insurance to COBRA, the Employer is taking away the employees' right to maintain insurance until they become eligible for medicare. That argument appears to be correct. The Union is also correct in its assertion that under the terms of the Village's other contracts, the retirees' eligibility for participation is not limited to COBRA. The Association's position on this matter is the more reasonable.

GRIEVANCE PROCEDURE - The Library's offer contains the following provision: "The grievance procedure shall not be used to change existing wage schedules, hours of work, working conditions, fringe benefits and position classifications established by ordinances and rules." The Board said that it had

specifically requested the Association to identify those practices and matters which the Association wanted to be included in the contract [so] "that there would be no attempt to back door issues into the contract by virtue of subsequent grievance proceedings." The Board said such problems are endemic in first contracts, its proposed language will avoid the problems. It said that its proposal would only prohibit the Union from changing existing language and position classifications which are not appropriate subjects for collective bargaining.

The Union said that the proposed language is an attempt to take away benefits presently enjoyed by the employees "through seemingly innocuous language and subterfuge." It said that it is concerned that the proposal would permit the Employer to take away paid breaks and other benefits through the grievance procedure. It hypothesized a series of questions about the Board's ability to refuse to implement the terms of the contract, and concluded that the proposal "would prohibit the Association from grieving ... conditions granted in the collective bargaining agreement." It argued that such a provision was contained in only one external comparable's contract. It said that the language is so vague and overboard that it will surely result in litigation. The Board said that the Association's interpretation of its proposal is illogical. It said that it would be a prohibited practice for the Board to fail to implement the terms of the contract. "Simply stated, what the Library proposal means

is that the Association cannot grieve in order to seek a change in those established wages, hours and conditions of employment."

DISCUSSION - If the Board's proposal language means what the Board has argued that it means, the language is unnecessary, because, it is simply a restatement of the law. Grievance arbitrators may not change the terms of a contract. However, it is possible that the terms of the contract may vary from ordinances and rules now in effect in Hales Corners. If that is the case, one of the parties may feel that the contract is ambiguous. In which case, the grievance process is the vehicle by which either party may seek to resolve questions arising out of contract language. The problem with the Board's proposed language is that it presumes to place the entire burden of identifying such potential conflicts upon the Association. If the Board was concerned that the provisions of some ordinance or rule now in effect in Hales Corners should take precedence over the terms of the parties' collective bargaining agreement, the Board had a responsibility equal to that of the Union to identify and bargain those provisions. The Association's position on this matter seems preferable.

TOTAL COMPENSATION - The Board argued that both wages and benefits for Hales Corners Library employees are well above the average in comparable libraries. It said there is no justification for "catch-up" increases. The most costly benefits are health and dental insurance. It compared employee contributions of \$12.50 and \$25 a month for single and family

health insurance premiums in Hales Corners with \$16.67 and \$35.11 in Cudahy, \$5.87 and \$14.78 in Oak Creek and potential costs of 5% of premium in Greenfield and South Milwaukee. It said that the Employer provided fully paid dental insurance in Hales Corners, whereas, seven comparable employers make no contribution for dental insurance. It noted that Hales Corners and most comparables also pay the entire cost for the employees' life and short term disability insurance. "The exceptional level of other benefits mandates acceptance of the Employer offer."

The Association responded to the Board's total compensation argument by saying that the Board had failed to provide complete information. It said that "only 3 of 15 employees are full-time and enjoy benefits ... to the full extent." Five part-time Class A employees receive pro rata benefits, none of these take health insurance. Seven part-time Class B employees receive no benefits. "Therefore, based upon the overall lack of benefits offered to a majority of the bargaining unit, the Employer's assertion falls short."

DISCUSSION - The Board's position on this issue would be entitled to some consideration if the Association had argued that catch-up wage increases are required in this case. That argument has not been presented. It appears that the benefits that have been traditionally been provided to the members of this bargaining unit are in league with the benefits provided to other employees in Hales Corners and to library employees in comparable library systems. The only difference between the two fringe

benefit offers in this proceeding, which has not been discussed above, is the Association's proposal that "full-time employees shall be eligible for three personal days off each calendar year." That provision appears to be similar to the provision for personal leave included in the Village's other labor contracts. Neither party discussed its position on the Union's personal days proposal. Neither party presented total cost comparisons for either the two offers in this proceeding or for any comparable. Neither party demonstrated that the total compensation criteria favors its proposal herein.

CONCLUSION

The parties' representatives managed to negotiate an impressive series of tentative agreements before they arrived at an impasse. Those agreements will form the basis for their first contract. It appeared to the undersigned that differences about wage schedules and wage increases were the most significant unresolved issues in this proceeding. The Association's offer in both instances were found to be more reasonable than the Board's offer. The foregoing observation is not intended to diminish the significance of the other issues. The parties' positions on those matters have also been carefully considered and discussed above. The parties will have to continue to work together in order to work out the loose ends that would exist after either of the offers and the parties' tentative agreements have been fashioned into their first collective bargaining agreement. It seems clear that the Association's offer is both more reasonable

and it more closely approximates the parties' past practices than the Library Board's offer. For that reason, the Association's offer should be incorporated into the parties' 1994 through 1996 collective bargaining agreement.

Dated at Madison, Wisconsin, this 29th day of April, 1996.



John C. Oestreicher, Arbitrator