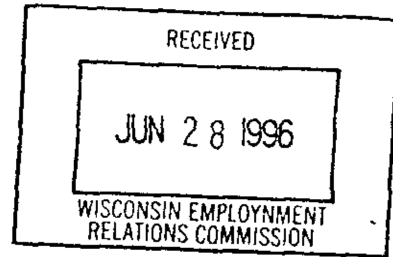
9M

STATE OF WISCONSIN

Before

HARVEY A. NATHAN
Arbitrator



In the Matter of the Interest Arbitration between MADISON METROPOLITAN SCHOOL DISTRICT and MADISON TEACHERS, INC.	Voluntary Impasse Resolution Procedure American Arbitration Association Case 51 390 00496 95S

Hearing Held: March 25 - 28, 1996

Record Closed: May 1, 1996

For the District: Mark F. Vetter,
Davis & Kuelthau, S.C.

Susan Hawley,
Madison Metro School District

For the Teachers: Lee Cullen,
Cullen, Weston, Pines & Bach

Robert C. Kelly,
Kelly & Haus

John A. Matthews,
Douglas P. Keilor,
Madison Teachers, Inc.

A R B I T R A T I O N   A W A R D

I. TABLE OF CONTENTS

	Page
I. Table of Contents	2
II. Introduction	3
A. Opening	
B. Bargaining History Leading to the Agreement to Arbitrate	4
C. Voluntary Impasse Resolution Procedure	7
III. Final Offers	8
A. Union's Offer	8
B. District's Offer	9
C. Clarification of the District's Offer	10
IV. Applicable Statutes	14
A. Statutory History	14
B. Applicable Statutory Provisions	19
V. Costing	24
A. The Parties' Costing	24
B. Discussion of Costing Methods	27
VI. The "Greatest Weight" Factor	36
A. Analysis of the Factor	36
B. Application of the Greatest Weight Factor	40
C. Conclusions Under the Greatest Weight Factor	46
VII. The "Greater Weight" Factor	51
A. Analysis of the Factor	51
B. Application of the Greater Weight Factor	52
C. Conclusions Under the Greater Weight Factor	54
VIII. The Other Factors	55
A. Lawful Authority	55
B Stipulations of the Parties	55
C Interests and Welfare of the Public	55
D. Comparability with Employees Performing Similar Work	56
E. Comparability with Public Employees Generally	60
F Comparability with Private Sector Employees	61
G The CPI and the Cost of Living	61
H Overall Compensation	63
I Changes During the Pendency of These Proceedings	64
J Other Relevant Factors	64
IX. Final Conclusions	68

II. INTRODUCTION

A. Opening

This is an interest arbitration between Madison Teachers, Inc. ("MTI" or "Union"), a labor organization representing a bargaining unit of professional educators, and Madison Metropolitan School District ("MMSD" or "District"), a municipal employer operating the second largest K through 12 school district in the State of Wisconsin. The parties have had a long and complicated bargaining relationship and come to this proceeding pursuant to a voluntary impasse agreement for a final and binding award of salaries and other benefits for the 1995-96 and 1996-97 fiscal years.

This proceeding is unusual in that it arises pursuant to a voluntary procedure under new statutory standards for arbitration awards in the public arena. The Arbitrator has been advised that this is a case of first impression using a voluntary procedure to resolve a bargaining impasse under legislation severely limiting the right of public school teachers to go to binding arbitration, as well as the first case under the statute which establishes new standards for public sector interest arbitration cases. While it is agreed that the Arbitrator is limited to selecting one party's final whole package offer, and that the Arbitrator must apply the new standards for resolution, the parties do not agree on how those standards are to be interpreted and applied. In addition to addressing the facts peculiar to this case, the parties have also argued the purpose and meaning of the new standards. This Award will review the parties' own bargaining history as well as the

background leading to the passage of the new laws.

B. Bargaining History Leading to the Agreement to Arbitrate

The District encompasses the cities of Madison, Fitchburg and Monona, the villages of Maple Bluff and Shorewood Hills, and the towns of Madison, Blooming Grove, Burke, Westport and Middleton. It covers 66 square miles and operates 29 elementary schools, 10 middle schools and 5 high schools, one of which is a small alternative high school. The 1995-96 enrollment is 25,046. There are 2250 teachers, 1200 support personnel and 135 administrators.

MTI represents four bargaining units composed of teachers and other professionals, of educational assistants, of clerical and technical employees, and one of substitute teachers.[1] The Union began its bargaining relationship with the District in the early 1960s and was recognized as the exclusive bargaining agent for the teachers in 1964. The first agreement was signed the following year.

In 1993 collective bargaining for school district professionals radically changed with the passage of the 1993-95 state budget. This breakthrough legislation, enacted as 1993 Wisconsin Act 16, made three significant changes in the operation of school districts:

---

[1] The teacher bargaining unit also includes social workers, psychologists, psychometrists, school nurses, attendants and visitation workers, work experience coordinators, librarians, catalogers, reference librarians, counselors, therapy assistants, interpreters (signers), braillists, science material specialists, and special need nurses.

1. It restricted the total revenue raised by state aids and property taxes.

2. It placed limits on wages and benefit increases for professional employees, including administrators.

3. It severely constrained access to interest arbitration under the Municipal Employment Relations Act ("MERA").[2]

Following the passage of this legislation and in response to the proposal of a wage freeze by the District, MTI began a series of job actions as the 1993-94 school year began. These included a slowdown and/or work-to-rule procedure, picketing, mass use of compensatory time off, media campaigns, unfair labor practice complaints and law suits challenging portions of the new law. The collective bargaining agreement expired on October 15, 1993. Amidst the protests and the picketing the District planned the implementation of a Qualified Economic Offer ("QEO"), in effect, the imposition of the economic terms and conditions for the next two years. In November, 1993, the Union secured a temporary restraining order against the District preventing the implementation of the QEO, which was made a permanent injunction three weeks later.[3] Thereafter the District appealed the lower court's order, filed an action with the Wisconsin Employment Relations Commission ("WERC") and also sought an agreement from

---

[2] The parties have advised the Arbitrator that prior to this case and since the passage of 1993 Wisconsin Act 16, no public school district in the state has gone to interest arbitration.

[3] The Union's successful theory in the courts was that the QEO law, since amended, did not apply to this bargaining unit because it was a mixed unit of licensed teachers and other professionals unlicensed by the Department of Public Instruction.

MTI to arbitrate the matter. The Union's response was a sick out which closed six schools. A week later, in mid-December, with the dispute back in court, the parties exchanged final offers and thereafter the parties settled for what the District costed as a 4.2% increase for each of two year. This contract expired on October 15, 1995.

On September 5, 1995, the parties exchanged initial offers for the next two year agreement. Both parties submitted impasse resolution procedures. The Board's proposal included an offer for interest arbitration. After more bargaining sessions, the District declared an impasse. Six mediation sessions followed in October and both sides prepared for a possible work stoppage. On October 19th, after two more meetings with the mediator, the parties agreed to an impasse arbitration procedure. They had four more sessions with the mediator in late October and exchanged final offers in November. Thereafter the undersigned was selected as arbitrator, and after an initial scheduling for January, the hearing was held in late March, 1996.

Susan Hawley, Labor Contract Manager for MMSD, testified that the District proposed interest arbitration at the outset, foregoing any option to submit a QEO, provided that MTI gave a no strike pledge. The District wanted to avoid the disruption which occurred during the 1993 negotiations. It believed that an arbitration proceeding pursuant to the new state law was the best way to do so. However, Hawley stressed, it was never MMSD's intention to waive any of the arguments it might have made under the QEO statute.

MMSD also emphasizes that although it computed its final offer at 3.8% for each year and used QEO costing methodology, its final offer is not a QEO.

C. The Voluntary Impasse Resolution Procedure

The parties' impasse arbitration agreement is as follows:

Whereas, the parties to this Agreement recognize that a protracted labor dispute between them is not in the best interest of the students, the teachers or the community; and

Whereas, the parties to this Agreement wish to establish an impasse resolution procedure for the negotiations of the 1995-97 Teacher Agreement which assures continued labor peace and educational programming.

Now, Therefore, the undersigned, Susan Hawley representing the Madison Metropolitan School District and John Matthews, representing Madison Teachers, Inc., hereby agree as follows:

1. Pursuant to the statutory authority expressed in Wisconsin Statutes Sec.111.70(4)(cm)(5) the parties hereby agree that in the event the parties are deadlocked and unable to reach a voluntary settlement for the 1995-97 Teacher Agreement, they will submit the dispute, both mandatory economic and mandatory non-economic issues, to binding interest arbitration in accordance with procedures set forth in Sec.111.70(4)(cm)(6) and (7), (7g) and (7r) Wis. Stats., with an out-of-state arbitrator mutually selected by the parties.

2. If the parties are unable to reach agreement, the District and MTI shall immediately request a panel of out-of-state arbitrators with significant public sector (preferably public school labor arbitration) experience from the American Arbitration Association.

3. Upon the WERC certifying final offers, the parties shall notify the arbitrator of his/her selection, request hearing dates and shall request an expedited arbitration proceeding.

4. The parties shall submit briefs two (2) weeks after the close of the hearing by simultaneous exchange through the arbitrator. Each party may submit reply briefs within seven (7) days of receipt of the opposing party's initial brief.

5. The arbitrator shall issue his/her award within twenty (20) days of his/her receipt of the reply briefs.

6. The Agreement to submit the dispute to final and binding interest arbitration is expressly contingent upon the agreement that the Madison Teachers Inc. will not authorize, encourage or condone any illegal strike or other unlawful concerted activity which disrupts the programs and services normally offered to students and the community by members of the bargaining unit.

7. The parties further agree that nothing in this Agreement prohibits either party from lawful communication with employees, public officials or the community.

8. This Agreement to submit the dispute to final and binding interest arbitration is expressly contingent upon the agreement that the Board of Education will not include any modifications in Section VII-B of the Collective Bargaining Agreement, i.e. Group Health Insurance, in the Board of Education's final offer for arbitration. However, this Agreement shall not preclude the District from proposing changes and modification of Section VII-B of the Collective Bargaining Agreement during negotiations, provided that any such proposed changes or modifications submitted after the date of execution of this Agreement shall not be admissible in the arbitration proceeding referenced herein.

9. A copy of this Agreement shall be filed with the Wisconsin Employment Relations Commission in accordance with Sec.111.70(4)(cm)(5).

10. This Agreement shall establish no precedent for any future negotiations.[4]

III. FINAL OFFERS

A. Union's Offer

1. Salary Schedule - Base Salary (Level 1, Track 1)

Effective 8/22/95 through 8/19/96 $24,212 (.4%)
Effective 8/20/96 through 6/30/97 $24,938 (3.0%)

Full time employees shall be paid one time bonus of $1,000 within thirty (30) days of the arbitration award. Part time employees to be paid pro rata sum.

---

[4] The parties adjusted the dates for the receipt of briefs and the deadline for the award.

2. Salary Schedule - Other Related Professionals (Add. C)

Delete placement on schedule on basis of 52 weeks. Positions of cataloger, educational reference librarian and text librarian shall be on basis of an academic year. (Also, reference to these employees as covered by Addendum C in description of bargaining unit, Article I B, to be deleted.)

3. Salary Schedule - Extra Duty Compensation

a) Add language: "In conjunction with any non-appointment, the principal shall notify the teacher of the reasons therefore."

b) Change notice of vacancy language so as to require that notice of a vacancy be sent to each school and shall be posted for five (5) days prior to due date for applications. (Delete language requiring posting only in schools in the attendance area, only where practical, and only for five (5) days prior to filling the vacancy.)

4. Insurance - Income Continuation Plan - Sick Leave Bank

Increase deposit into sick leave bank from forty percent (40%) to sixty percent (60%) of unused personal sick leave and retirement insurance accounts of employees who die or resign.

5. Insurance - Income Continuation Plan - Addenda B and C

Employees included in Addenda B and C (paraprofessionals at Shabazz High School, and therapy assistants, interpreters/ braillists, science materials specialists and special needs nurse) shall be covered by Article VII G relating to the sick leave bank and the income continuation plan for the purchase of retiree health benefits.

B. <u>District's Offer</u>

1. Salary Schedule - Base Salary (Level 1, Track 1)

Effective 8/22/95 through 8/19/96	$24,212 (.4%)
Effective 8/20/96 through 8/19/97	$24,454 (1.0%)

If the health insurance premium increase, now projected at 9.3% effective January 1, 1996 and 9.3% effective January 1, 1997, shall be less than as now projected, the base salary (Level 1, Track 1) shall be increased by an amount sufficient to result in a total package increase of 3.8% in the applicable academic year using the costing methodology set forth in the rules for the WERC.

C. Clarification of District's Offer

After the close of the hearing and during the consideration of the record, the arbitrator solicited comments from the parties regarding the dates contained in the District's proposal for salaries for the second year of the contract. The proposal extended the salary schedule beyond the expiration of the contract, through August 18, 1997. The arbitrator also asked the parties to comment on the effect the difference in ending dates had in the costing. The District initially responded that it had made an error and that the expiration date for second year salaries should have been June 30, 1997, the same as the stipulated date for the termination of the contract. The District also commented that this error did not affect its costing because all of its computations were based upon a full year's expenses.

The Union responded that the August 18th date was not simply an error but was a substantive decision by the District which materially affected its offer. According to the Union, the District's proposal was one for terms and conditions beyond the period of the contract and was contrary to Sections 111.70(4)(CM)8m.b and 111.70(4)(cn) of the Wisconsin Statutes. These provisions require that all contracts covering school district professional employees terminate on June 30th of odd numbered years.[5] According to the Union, by proposing that salaries be prolonged through the summer, after the expiration of

[5] The text of the applicable statutory provisions are recited later in this award.

the contract, the District was suggesting that teachers on extended contracts be paid the rate of what would then be the old contract instead of the rates negotiated for the July 1, 1997 through June 30, 1999 contract. According to the Union, this would be a prohibited contract term for interest arbitration and would be unenforceable (citing cases). The Union argued that in asking the arbitrator to conform its salary proposal to the expiration date of the contract, the District was seeking a correction of its mistake and a modification of its final offer. Citing WERC decisions, the Union contended that Wisconsin law is clear that the arbitrator has no such authority. The Union concluded that this impermissible feature in the District's offer was "a strong additional factor supporting adoption of MTI's final offer in this proceeding." [6]

The District then countered that the August 18th termination date for the second year salary proposal was an immaterial oversight which was contrary to numerous other provisions in the remainder of the agreement to which the parties had already stipulated. The District disagreed with the Union's interpretation of WERC decisions and argued that the cases cited by the Union were distinguishable. The error the District wants corrected, it maintained, was merely technical in order to conform the language

[6] With regard to costing, the Union commented that both it and the District erroneously costed the second year of the contract on the basis of 12 months when, in fact, the terms for the second year of the contract can only be effective for a little more than 10 months. Thus, the Union claimed that both parties overstated the costs for the second year of the contract.

with the plain meaning of the proposal and the stipulated remainder of the contract, read as a whole.

The District also pointed out that the parties had both voluntarily agreed in the stipulated portion of the salary article that any salary increase negotiated for the successor agreement shall be effective with the first day of the 1997-98 school year. Thus, the District argued, if its proposal was contrary to the expiration date of the contract, the Union's proposal was no less contradictory because it had also agreed that the salary provisions to be effective in the second year of this contract would run until August 18, 1997.

There is ample evidence to support the District's contention that the August 18th date was neither a substantive nor material error, but one of drafting which may be corrected in order to conform the language of the proposal to the obvious intent and the prior stipulations of the parties. While what occurred here was more than just a typographical error, it was no more than an oversight resulting from the change in the law on expiration dates. The District merely copied the old language, which extended salaries until the next school year. Because the prior expiration dates were always at this time, there was no contradiction in the past. That this was a drafting error and not an intentional proposal to extend a single term beyond the expiration of the agreement is demonstrated by the following:

> 1. The Union made a similar error when it stipulated to what had previously been pro forma language that "any increase negotiated for the successor agreement shall be effective with the first day of [1997-98] school year

pursuant to Section II-A-2(b)(2) ***."

2. The parties stipulated in at least six different places in the contract that this agreement would end on June 30, 1997.

3. The introductory page of the District's final offer recites that its proposal together with the stipulations "constitute the entire proposed agreement covering a period of time from October 15, 1995 through June 30, 1997."

4. To seek an extension of current salaries beyond the expiration date of the agreement would make no sense in that the parties are required to continue such salaries until a new agreement is reached.

The cases cited by the Union are distinguishable. In New Lisbon School District, WERC Dec. 27632 (1993), the Union sought an extension of terms which the employer was not otherwise required to continue upon the expiration of the old agreement. In Lafayette County, WERC Dec. 27739-A (Yaffe, 1994), the Union proposed an insurance provision which would not go into effect until after the expiration of the contract. Likewise, the Union's cases pertaining to an arbitrators authority to correct an obvious error are not on point. In City of Wausau, WERC Dec. 28529 (Bellman, 1996) and Outagamie County, WERC Dec. 27849-A (Bilder, 1994), the arbitrators rejected attempts by the unions to actually change the substance of its offers.

In the present case MMSD did not intend to extend a term of its agreement. Its error was the result of sloppy drafting, a circumstance no less applicable to the Union which likewise agreed elsewhere in the contract to extend salaries until August.
To accept the District's offer as literally written would be contrary to an intent which was mutually understood and accepted

by the parties. The correction is one of form, not of substance. (See, WERC Rule 33.21, Modification of Award.)

Accordingly, the District's second year salary proposal is corrected so as to read:

"Effective 8/20/96 through 6/30/97 $24,454"

Finally, the Union is correct when it acknowledges that <u>both</u> parties, ignoring their mutual mistake, misstated the costs of the second year by including teachers on extended contracts and those other employees working a full year. However, the difference is minimal and the mutuality of the error maintains the respective relationship between the offers.

IV. APPLICABLE STATUTES

A. Statutory History

The right to bargain came to public school employees in 1966.[7] In 1978, Wisconsin's mediation-arbitration procedure applicable to school employees became law, and in 1986 mediation was separated from arbitration. At that time, and continuing through 1992, the statute (Sec. 111.70(4)(cm)(7)) provided that "(i)n making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:" In summary form, these factors were:

1. Authority of the employer.
2. Stipulations of the parties.

---

[7] Ch. 111.70, giving municipal employees the right to be represented was enacted in 1959. In 1962 the WERC was given jurisdiction and fact finding was established for police. Interest arbitration for police and fire employees came in 1972.

3. Interests and welfare of the public and the employer's ability to pay.
4. Comparability with employees performing similar services.
5. Comparability with other public employees generally.
6. Comparability with private employees generally.
7. The cost of living.
8. Overall compensation and benefits and stability of employment.
9. Changes in the above during the pendency of arbitration.
10. Other traditional factors.

The law did not prioritize these factors. Arbitrators were free to give them what weight they judged appropriate, if any weight at all. Over time, the comparability of wages and benefits paid to employees performing similar services in other similar jurisdictions emerged as the pre-eminent factor. Some observers commented that this was caused by the difficulty in securing accurate data for other factors, while some remarked that in the absence of a real economic crisis (a real inability to pay vs. a preference not to pay) the market place, as measured by what others were getting for the same work, was the only true measure of what were fair wages and benefits. In any event, the Council on Municipal Collective Bargaining concluded that interest arbitration under the present law was "driven by comparables."[8] A perception also emerged that teachers were obtaining awards in interest arbitration which were far in excess of inflation and this was causing an (unacceptable) increase in local property taxes.[9]

---

[8] "Recommendations for Successor Law to Sec. 111.70(4)(cm) and (7m) of the Statutes," Council on Municipal Collective Bargaining" (January, 1995).

[9] The Council on Municipal Collective Bargaining, commenting on the Governor's proposal to restructure the law, stated:

"Unquestionably, since 1978 teachers have proven to be

In 1993, the Governor proposed, and the Legislature enacted, sweeping changes in the way in which school districts could raise revenue and pay increases in salaries and benefits to its professional employees. Wisconsin Act 16 capped per pupil expenditures derived from general (state) aids and from certain tax levies. In 1993-94, school districts were permitted to increase their per pupil revenue by $190, or the rate of inflation (CPI-U). In 1994-95, the rate was $194.37. Thereafter the law was changed and growth for 1995-96 was capped at $200 per pupil, and at $206 for 1996-97.[10] Because the MMSD already had a relatively high per pupil spending level, these fixed dollar increases represent a low percentage growth rate.[11]

1993 Wisconsin Act 16 also made major changes in impasse procedures for professional school district employees subject to

---

exceptionally successful in organizing themselves, state-wide, and obtaining state-wide bargaining goals -- goals which sometimes included economic packages more than double the cost of living increases. Many observers believe that the perceived impact of that success on local property tax rates constituted the primary catalyst for the legislature to offer school districts a means of avoiding interest arbitration on economic issues."

[10] Pupil population is based upon the average of the count on the third Friday in September for the present year and the two prior years. A district with an increasing census will be able to levy more taxes because the money needed to be raised by taxes is based upon the total sums at issue. This method generally favors growing larger districts, such as Madison, over small rural districts which frequently experience declining enrollment. Statutory revenue limits may be exceeded pursuant to referendum.

[11] In Madison, general state aids and tax levies for the general fund and community service fund, the two levies directly affected by this law, amount to about 82% of the total revenue from all sources received by the District.

Sec. 111.70(4)(cm). First, collective bargaining agreements were limited to two year periods ending on June 30th of an odd numbered year. The law also established "Qualified Economic Offers" (QEOs). Under this statute, if a school district submitted an economic package the value of which was at least 3.8% more than the total FTE compensation for the base year, with 1.7% going to increased fringe benefit costs on an annualized basis and the balance for salary increases including step and lane increases, the district could avoid interest arbitration on all economic items.[12] This statute effectively ended interest arbitration for school teachers.

One of the Governor's proposals which was not adopted in 1993 was the categorization of factors to be used by arbitrators in impasse cases in order to "shape" results more closely with legislated standards. The Governor had proposed two levels of consideration: eight factors given the greatest weight and seven others to be given (some) weight. These proposals were eventually submitted to the Council on Municipal Collective Bargaining for review and recommendations. The Council was critical, of among other things, too many factors in the "greatest weight" category and the continuation of other factors which sometimes appeared to be contradictory. In January, 1995, the Council issued a preliminary report recommending that in making any decision in impasse cases the award should be based upon the following factors in descending order:

---

[12] Under the formula if the increased cost of existing fringe benefits exceeded 1.7% the balance could be offset against the 2.1% allowed for salary items.

1. Greatest Weight: State legislation and administrative directives which place limits on local spending or revenue.

2. Greater Weight: Local and/or state-wide economic conditions.

3. Weight: (a) Comparability with other employees of the subject employer and with employees of other employers, public and private, performing similar service; (b) other traditional factors.

In commenting on its suggestions, the Council stated that if the legislature retained QEOs and caps on local revenue, that factor must be given the greatest weight and, it "would be absolute if they apply to an employer and its bargaining units." The Council commented that the "greater weight" factor could not be used to defeat the "greatest weight" factor. Two further categories were recommended as having the "least weight." The first was comparability, which the Council criticized as the application of others' solutions to the issues at hand without real regard to whether they fit.[13] Finally, the Council commented that the all other factors category was an adoption of what was left from the old law and might be applied to non-economic issues.[14]

The Council's recommendations were never finalized. The 1995-96 legislature took the initiative before the Council was able to finalize its recommendations.[15]

---

[13] However, the Council commented that in the absence of evidence in the higher weight categories, "comparables would continue to play a decisive ... role" in the process.

[14] The Council concluded that its recommendations were designed to work with or without cost containment devices such as QEOs.

[15] The Legislature actually repealed the Council's obligation to complete its report.

The 1995-96 Legislature made several changes in the bargaining law and with revenue caps for school districts. While there appears to be no official legislative history explaining the changes, drafting instructions from Representative Ainsworth, following a recommendation of the Republican Assembly Caucus, explains that the QEO provisions for school district professionals was to be permanent and that nonprotective municipal employees would continue to have access to interest arbitration, applying the modified standards set forth in Sec. 111.70(4)(cm). Arbitrators would have to give the "greatest weight" to state laws and administrative directives which limited local government or school district spending or revenues. Arbitrators would have to consider this factor "prior to considering any other factor." Thereafter, 1995 Wisconsin Act 27 was enacted establishing the three categories of factors.

Additionally, 1995 saw a modification of the revenue caps. The Legislature set per pupil growth for 1995-96 at either $200 or the rate of inflation, and 1996-97 growth at $206 or the rate of inflation. Using his amendatory veto power, the Governor struck the inflation factor, leaving the growth for the two years involved in this case at a flat rate of $200 and $206, respectively.

B. Applicable Statutory Provisions

The relevant portions of Section 111.70 of the Wisconsin Statutes are as follows:

(1) **DEFINITIONS.** As used in this subchapter

(nc) 1. "Qualified economic offer" means an offer made to a labor organization by a municipal employer that includes all of the following, except as provided in subd. 2.:

a. A proposal to maintain the percentage contribution by the municipal employer to the municipal employes' existing fringe benefit costs as determined under sub. (4)(cm)8s, and to maintain all fringe benefits provided to the municipal employees in a collective bargaining unit, as such contributions and benefits existed on the 90th day prior to expiration of any previous collective bargaining agreement between the parties, ***.

b. In any collective bargaining unit in which the municipal employee positions were on August 12, 1993, assigned to salary ranges with steps that determine the levels of progression within each salary range during a 12-month period, a proposal to provide for a salary increase of at least one full step for each 12-month period covered by the proposed collective bargaining agreement, beginning with the expiration date of any previous collective bargaining agreement, for each municipal employe who is eligible for a within range salary increase, unless the increased cost of providing such a salary increase, as determined under sub. (4)(cm)8s., exceeds 2.1% of the total compensation and fringe benefit costs for all municipal employes in the collective bargaining unit for any 12-month period covered by the proposed collective bargaining agreement, or unless the increased cost required to maintain the percentage contribution by the municipal employer to the municipal employes' existing fringe benefit costs and to maintain all fringe benefits provided to the municipal employees, as determined under sub. (4)(cm)8s., in addition to the increased cost of providing such a salary increase, exceeds 3.8% of the total compensation and fringe benefit costs for all municipal employees in the collective bargaining unit for any 12-month period covered by the proposed collective bargaining agreement, in which case the offer shall include provision for a salary increase for each such municipal employee in an amount at least equivalent to that portion of a step for each such 12-month period that can be funded after the increased cost in excess of 2.1% of the total compensation and fringe benefit costs for all municipal employes in the collective bargaining unit is subtracted, or in an amount that can be funded from the amount that

remains, if any, after the increased cost of such maintenance exceeding 1.7% of the total compensation and fringe benefit costs for all municipal employes for each 12-month period is subtracted on a prorated basis, whichever is the lower amount.

(4) POWERS OF THE COMMISSION. ***

(CM) Methods for peaceful settlement of disputes.

5. Voluntary impasse resolution procedures. In addition to the other impasse resolution procedures provided by this paragraph, a municipal employer and labor organization may at any time, as a permissive subject of bargaining, agree in writing to a dispute settlement procedure, including authorization for a strike by municipal employees or binding arbitration, which is acceptable to the parties for resolving an impasse over terms of any collective bargaining agreement under this subchapter. A copy of such agreement shall be filed by the parties with the commission. If the parties agree to any form of binding interest arbitration, the arbitrator shall give weight to the factors enumerated under subd. 7.

5s. Issues subject to arbitration. In any collective bargaining agreement consisting of school district professional employees, if the municipal employer submits a qualified economic offer applicable to any period beginning on or after July 1, 1993, no economic issues are subject to interest arbitration under subd. 6. for that period. In such a collective bargaining unit, economic issues concerning the wages, hours or conditions of employment of the professional school district employees in the unit for any period prior to July 1, 1993, are subject to interest arbitration under subd. 6. for that period. In such a collective bargaining unit, noneconomic issues applicable to any period on or after July 1, 1993, are subject to interest arbitration after the parties have reached agreement and stipulate to agreement on all economic issues concerning the wages, hours or conditions of employment of the professional school district employees in the unit for that period.

6. Interest Arbitration. If a dispute relating to one or more issues, qualifying for interest arbitration under subd. 5s. ***

7. Factor given greatest weight. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislature or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision.

7g. Factor given greater weight. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.

7 r. Other factors considered. In making any decision under the arbitration proceedings authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interest and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employees in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.

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

f. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours

and conditions of employment of other employes in private employment in the same community and comparable communities.

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

h. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally and traditionally taken into consideration in the determination of wages, hours and conditions of employment through collective bargaining, mediation, fact finding, arbitration or otherwise between the parties, in the public service or in employment.

8. **Rule Making.** The commission shall adopt rules for the conduct of all arbitration proceedings under subd. 6., including, but not limited to, rules for:

8m. Term of agreement; reopening of negotiations.
b. Except for the initial collective bargaining agreement between the parties, every collective bargaining agreement covering municipal employees who are school district professional employees shall be for a term of 2 years expiring on June 30 of the odd-numbered year. ***

8s. **Forms for determining costs.** The commission shall prescribe forms for calculating the total increased cost to the municipal employer of compensation and fringe benefits provided to school district professional employees. The cost shall be determined based upon the total cost of compensation and fringe benefits provided to school district professional employees who are represented by a labor organization on the 90th day before the expiration of any previous collective bargaining agreement between the parties, or who were so represented if the effective date is retroactive, or the 90th day prior to the commencement of negotiations if there is no previous collective

bargaining agreement between the parties, without regard to any change in the number, rank or qualifications of the school district professional employees. For purposes of such determinations, any cost increase that is incurred on any day other than the beginning of the 12-month period commencing with the effective date of the agreement or any succeeding 12-month period commencing on the anniversary of that effective date shall be calculated as if the cost increase were incurred as of the beginning of the 12-month period beginning on the effective date or anniversary of the effective date in which the cost increase is incurred. In each collective bargaining unit to which subd. 5s. applies, the municipal employer shall transmit to the commission and the labor organization a completed form for calculating the total increased cost to the municipal employer of compensation and fringe benefits provided to the school district professional employees covered by the agreement as soon as possible after the effective date of the agreement.

(cn) Term of professional school employee agreements. Except for the initial collective bargaining agreement between the parties, every collective bargaining agreement covering municipal employees who are school district professional employees shall be for a term of 2 years expiring on June 30 of the odd-numbered year. ***

V. COSTING

A. The Parties' Costing

The parties sharply disagree as to the methodology to be used for costing their respective offers. The District argues that it must use the formula and forms developed by the WERC for QEO measurement because the statute (111.70(4)(cm)8s.) so requires. The Union argues that the WERC methodology was designed to measure whether offers made under the new formulae meet the definition of a QEO. Because this case does not involve QEOs, the Union argues, there is no reason to use what is otherwise an artificial

measurement. It proposes using an actual cost formula because, it reasons, the "greatest weight" criteria is essentially an "ability to pay" factor, although it is not called that.

The District's QEO Cost Analysis

1995-96	Base Year	MMSD	MTI	Difference
Salary	$89,103,955	$91,591,917	$91,680,917	$89,000[16]
Bonus			2,106,000	2,106,000
Fringe	28,643,776	30,630,263	31,096,000	466,348
Total	$117,747,731	$122,222,180	$124,883,528	$2,661,348

% Increase	MMSD	MTI
Salary & Bonus	2.11 %	3.97 %
Fringe	1.69 %	2.08 %
Total	3.80 %	6.05%

1996-97	MMSD	MTI	Difference
Salary	$94,592,878	$96,518,831	$1,925,953
Fringe	32,273,744	32,682,931	409,187
Total	126,866,622	129,201,762	2,335,140

% Increase	MMSD	MTI
Salary	2.46 %	2.18 %
Fringe	1.34 %	1.27 %
Total	3.80 %	3.45 %

---

[16] Attributable to the increase in salaries and sick leave benefits for the employees covered by the Addenda.

Two Year Difference	Salary	Fringe	Total
	$4,120,953	$875,535	$4,996,488

Two Year % Increase	MMSD	MTI
Salary & Bonus	4.57 %	6.15 %
Fringe	3.03 %	3.35 %
Total	7.60 %	9.50 %

The Union's "Actual Cost" Analysis[17]

Total Package	Base Year	MMSD	MTI	Difference
1995-96	$122,793,128	$125,653,866	$128,356,424	$2,702,558
		2.33 %	4.53 %	
1996-97		128,757,987	131,007,197	2,249,210
		2.47 %	2.07 %	
Totals		4.85 %	6.69 %	$4,951,768

It should be noted that each party, using its own method for costing, reached almost the same total cost difference between their respective two year package offers.

[17] The Union also did a QEO analysis of the respective offers. Its base using this method is about $200,000 more than the District's, and its package totals are also greater than what the District computed. However, according to the Union, the difference between the two offers is $4,899,100, which is about $100,000 less than the District's computation.

B. Discussion of Costing Methods

The determination of the appropriate costing mechanism is seen as critical by the parties in assessing the merits of the proposals. The method used by MMSD appears to the Union as an overstatement of costs while MTI's method is deemed equally artificial by MMSD and, according to the District, represents a dilution of the real costs.

The QEO cost method is a modified cast forward procedure. It requires that costs be determined by looking at the employee census on the 90th day prior to the expiration of the current collective bargaining agreement. Based upon standard contract expiration dates, this census will include teachers who are retiring, and who, in most cases, are higher paid than average. The total package costs of this census becomes the base against which the statutory allowances for salaries and fringe benefits are measured. The allowance of 2.1% for salaries and 1.7% for fringes, means that a district must spend 2.1% of the total package costs of the base for salary increases and 1.7% for fringe benefit increases.[18]

Each teacher in the base census is then moved down a step, if eligible, or moved over to a higher track, if eligible, and the costs of these movements become the starting cost against which the statutory 2.1% is measured for salaries. Whatever is left after the automatic movements, if anything, can be used for general

[18] The statute has provisions if maintaining either the salary schedule costs more than 2.1% or if maintaining the existing fringe benefits cost more than 1.7%. These special situations are not applicable in this case.

increases.[19] Any new teachers who are thereafter hired are placed on the new schedule. Their cost is not part of the QEO computation. For the second year the same snapshot census from the expiring contract is moved another step on the schedule even though by the second year there might have been substantial teacher turnover. In a district with a shrinking enrollment where there may be layoffs, or when there are retirees who may or may not be replaced (and, if so, by lower paid new teachers), the basic cost of the schedule movements does not reflect actual costs.

In the present case there is another unusual circumstance. The old agreement expired on October 15, 1995. Applying the QEO 90 day formula, the District used a teacher census during the period after the resignees and retirees were no longer employed and before any new hires were on the payroll. This produced an artificially low base year cost, although it is somewhat offset by not having to compute the movement, if any, of the retirees and resignees.[20] Inasmuch as the same census is used for the second year of the contract as well, and inasmuch as Madison is an expanding district hiring additional teachers, the second year computation is only marginally related to actual costs.

The rules for costing fringe benefits are different, but equally artificial. Increases in fringe benefit programs are to

---

[19] In this case the parties agree that the cost of schedule movements using the QEO methodology is so expensive that the amount left over will only generate a .4% increase on the salary base.

[20] According to MTI, there were 62.3 FTE retirees and 25.1 FTE resignees whose combined salaries were a little less than $4 million.

be computed as if the cost increase was applicable for the entire year. Thus, an increase in health benefit premiums coming in mid-year are costed as if they would be in effect for the entire year. In such a case the 1.7% increase includes costs which actually do not exist. In the present case, both the increase in medical care premiums (scheduled at 9.3%) and in contributions to the Wisconsin Retirement System do not coincide with the contract years and therefore the QEO computation greatly overstates the true cost to the District for these benefits during the life of the contract. In the case of medical premiums, the distortion is about $79,000, while the overestimation of retirement contributions is approximately $400,000.[21]

The Union's costing process uses actual dollars spent during the base year and compares it with actual dollars to be spent under the respective proposals. In so computing, the Union prorates all fringe benefit increases and utilizes turnover savings as an offset. Thus, MTI has removed retirees and resignees from its costing for 1995-96 and added in the cost of the replacements. For the second year, 1996-97, MTI made an estimate of turnover savings based upon the average turnover in the prior three years. MMSD argues that the Union's methodology is unconventional, has never

[21] Although not true in this case, a fringe benefit increase near the end of a school year would be counted as if it were in effect for the entire year. The maintenance of this benefit, which is required by the statute, would actually cost only a small fraction of what the QEO method would determine. If this totally artificial calculation then exceeded the 1.7%, the excess would come from the 2.1% available for salary increases. In other words, a non-existent fringe benefit cost could be used to reduce a salary increase for a bargaining unit which does not even exist.

been used by these parties in the past, and relies on facts known in this case but which were not available to parties in other school districts who did their costing before the first year of their contracts was nearly over.[22]

The Union argues, however, that its costing is more accurate for purposes of establishing whether the District can actually afford a proposal. While it concedes that traditionally it has used a cast forward method of computation when bargaining with MMSD, it argues that in those instances, as in the arbitration cases cited by MMSD, the parties were seeking to establish the "worth to returning teachers" and not its "budgetary impact." (emphasis supplied) Because, it argues, the examination required in the "greatest weight" analysis addresses budgetary impact in the face of laws limiting revenues and expenditures, the worth of the schedule must take a subordinate position to actual costs.

The Union is correct in arguing that the "greatest weight" factor is a form of an "ability to pay" standard. It may be that the legislature did not use those words because often in the past arbitrators interpreted "ability to pay" as possible to pay, and, barring insolvency, an ability to pay was frequently found even when it was not "prudent" to pay.[23] As will be discussed again, below, a standard which requires the arbitrator to consider the

---

[22] It has also been argued in some cases that parties generally assume some turnover for which the lower costs simply become a factor in the next negotiations.

[23] See, for example, Hamilton School District, Dec. No. 27924-A (Krinsky, 1994).

impact of laws which restrict a district's finances is in effect an ability to pay standard.

On the other hand, the Union is incorrect in arguing that the worth of the schedule is not a critical issue in this case. The actual dollars to be expended in 1995-96 might be lower than the schedule reflects because of the turnover savings, but the schedule remains long after the turnover savings evaporates. While it might be argued that this will be offset in the future by additional turnover, the Union's own calculations show that the turnover savings in 1995-96 were unusually high. Just as the District's QEO summer census artificially reduces the base, the Union's use of turnover savings artificially reduces first year costs.

It is clear that the Union's case is substantially buttressed by the "actual cost" analysis. Moreover, its proposal for a one-time bonus in the first year followed by a schedule increase in the second year appears less expensive in actual new dollars, but not in schedule dollars. But the schedule remains (perhaps forever under the QEO law) and the District must continually fund it long after the "actual dollars" for this contract are a faint memory.[24]

---

[24] Interestingly, both sides rely on a decision by Arbitrator Joseph Kerkman in Deerfield Community School District, Dec. No. 26712-A (1991), in support of their respective decisions. Kerkman aptly discussed the principles as follows:

> The undersigned has considered all of the evidence and prefers the cast forward method for both years. The actual costing proposed by the Association *** includes cost savings that were generated by reason of senior teachers retiring or leaving the District's employ and being replaced by less senior employees who then occupy

On the other hand, the District is incorrect in its assertion that the statute <u>requires</u> it to use the WERC forms developed pursuant to subd.8s. It is true that the statute does not say specifically that the forms should be used only in QEO cases. The statute simply says that the WERC is to develop a form according to the formulae set forth therein. But the formulae are those for the measurement of a QEO and the statute requires that this form be used in cases "in which subd. 5s applies." Thus, the forms by definition are for bargaining units of school district professional

---

> a lower spot on the salary schedule ***. [This] method accurately defines the expenditures for teacher salaries and constitutes an accurate budget figure. That, however, *** is not the measure of the worth of a salary increase on a salary schedule. A salary or wage increase is measured by the percentage or dollar increase over the predecessor salary schedule. Were it not for the practice of including step increases when costing the dollar and percentage increases in teacher negotiations, it would be simple to calculate the percentage increase per cell at the same spot in the salary schedule from the predecessor schedule to the new schedule. Because the practice is to cost the step increase, it is necessary to "cast forward" in order to take into account the step increases that are generated in addition to the negotiated increases to the salary schedule itself. When replacements are factored into the equation at a different step on the salary schedule than the one occupied by the replacement's predecessor, there is no longer a measure of the percentage increase negotiated for the improvement in the salary schedule and the movement of one step. Therefore, while the actual costing is an appropriate budgetary measure, it does not accurately reflect the amount of the negotiated increase. The actual costing becomes significant if the Employer pleads poverty or inability to pay because, then, it becomes a matter of whether there are sufficient dollars in the budget to cover the cost of the negotiated settlement. The actual costing, however, does not measure the amount of the negotiated increase in the opinion of the undersigned.

See, Marshall School District, Dec. No. 24072-B (Nielsen, 1987).

employees where the employer has chosen the QEO route. The statute does not say that the forms are only for use in QEO cases and it does not say that it should not be used in non-QEO cases. But it is somewhat disingenuous for the District to argue that even in a non-QEO case it must use this form.

Nor is MMSD's argument persuasive that the QEO forms should apply because it never intended to waive any arguments it might have made under the QEO statute although it chose not to offer a QEO . This is an "apples and oranges" argument. However applicable the QEO law is for other purposes in this case, the District's offer is not a QEO and the MMSD chose not to exercise its rights under that statute to make a QEO. Thus, the arbitrator is not bound by the costing restrictions contained within the forms used for determining whether an offer is a QEO even though he may take notice of the QEO law for other purposes in this case.

The Union argues persuasively that in school district cases there are now three paths the parties can follow to resolve a bargaining impasse. The municipal employer may impose a QEO under subd.5s., or it may choose not to make a QEO and proceed to arbitration under subd.6. following traditional procedures regulated by the WERC, or the parties can negotiate a written alternate impasse resolution procedure which may or may not utilize QEO-type formulae, provided, however, that if the alternate method involves arbitration, "the arbitrator shall give weight to the factors enumerated under subd.7." In this case the employer chose the third path, the use of an independent impasse procedure. Thus,

regardless of the impact of the QEO law in assessing the factors under subd.7., there is no requirement that QEO costing mechanisms be used in the absence of an express agreement between the parties to do so.

Having said all of this regarding no requirement that costing under subd.8. be used, there is another argument to be made in its defense. All other districts use the QEO costing techniques. As will be more fully discussed below, most of the large districts in Wisconsin settled their impasses with QEO-type offers. Very few actually imposed QEOs although they all used its costing methodology. Thus, if any assessment of comparability is to be made, and comparability does remain a marginal factor in the new statute, QEO costing must be available for the comparisons. However, in the absence of a need to determine whether an offer is a QEO, and other than as a relative measurement against costs in other districts which use the same costing mechanism, the statutory formulae is not an accurate cast forward procedure and should be viewed with caution in a non-QEO case.[25] In this case, the use of the summer census as the base to be cast forward makes the situation that much more unfortunate.

In this arbitrator's opinion, the appropriate costing methodology for this case is a cast forward methodology which takes the teacher population at the end of the 1994-95 school year (as

---

[25] In this regard, QEO costing is similar to measuring the cost of living by using the CPI-U. Its value is not as a precise measurement of anyone's real cost of living, but the use of an agreed formula establishes a level playing field on which relative positions can be measured.

if the 90th day preceding the expiration of the old agreement was at the end of the school year) and cast it forward. While this will have the effect of creating a larger base, some of the impact will be offset because this larger base will have that many more schedule increases which will diminish the money available for a base increase. However, because the bonus is not on the schedule and cast forward methods are schedule oriented, and because the actual number of FTEs getting the bonus is known, the actual cost method for computing the $1,000 bonus should be used. For fringe benefits the same cast forward census should be used but the costs of the fringes should be prorated so as to reflect the actual costs for the group which had been cast forward. This method does not consider turnover savings and more realistically measures increased costs for fringe benefits.

Exact costing in this case using this modified cast forward approach cannot be determined from the present record.. However, according to the Union (see U. Ex. 24), the cost for the 2231.4 professionals employed in the base year was $90,636,725. The cost of salaries after giving this group the agreed upon schedule increase in 1995-96 would be 90,864,570. The difference of $227,845 divided by the total package costs for the 2231.4 teachers in 1994-95 (an amount not in the record) would represent the cast forward view of the salary portion of the total package costs for the first year. If this same base were then moved the appropriate steps on the schedule, and the base increase proposed by each party were factored in, the cost of the respective second year salary

proposals could be determined.

The same methodology should be used for the fringe benefit increases. The base group (teachers employed at the end of the 1994-95 school year) should have the actual additional fringe benefit increases brought about by medical insurance premiums and retirement contributions factored in for each of the two years.

Nevertheless, the parties, using costing methodology which benefits their respective positions, still come up with total package costs which are just $44,720 apart. This is less than a 1% difference. Thus, whether or not one can determine the percentage value of the respective proposals, the record is clear that the issue is a matter of about $5 million.

VI. THE "GREATEST WEIGHT" FACTOR

A. Analysis of the Factor

As recited above, the statute provides that in making any decision, the arbitrator shall give the greatest weight to any law or directive which places limitations on expenditures or revenues of a municipal employer. Inasmuch as the legislature had just placed such limitations on school districts, it is obvious that it was saying to the parties, to WERC and to arbitrators, that impasse resolution cannot be used to circumvent the public policy reflected in the revenue/expenditure caps. In effect, the law "shapes" the concept of ability to pay by requiring that above all else the municipal employer's ability to work within the budget limitations imposed on it must be given the greatest weight.

Numerous questions arise regarding the meaning of this provision. What did the Legislature mean by "greatest?" Do the conclusions under this factor weigh more than any combination of all of the other factors (i.e. the greater weight and the other weight factors)? In other words, if this factor weighs strongly in one party's favor, can any combination of lesser factors in favor of the other party cumulatively overcome the results of the "greatest weight" analysis? Must the arbitrator quantify the results of the analysis? Can this factor be deemed neutral in a particular case? That is, can the arbitrator decide that the evidence under this standard does not clearly favor one party or another and therefore the case must be determined by the lesser factors?

Even with scant legislative history, there is some evidence of intent. It is known that the Legislature wanted to change a system which was "driven by comparability." It certainly appeared that teachers' unions were whipsawing employers to follow a standard which repeatedly exceeded the rate of inflation and resulted in higher property taxes. The concept of "greatest weight" originated with the Governor but was criticized because the presence of eight factors in this category diluted the priority of these factors. The Council on Municipal Collective Bargaining recommended that the "greatest weight" be reserved for legislation and directives which placed limits on spending and revenues. The Council, made up of an equal number of representatives from labor and management, suggested that if such restrictions clearly applied

to the parties, the results would be "absolute." By this it appears that the Council was suggesting that if the application of laws restricting revenues and expenditures clearly limited an employer's ability to pay and thereby favored one offer over the other, the results could not be overridden by a combination of lesser factors. To have the greatest weight meant that nothing else, even in combination, could have a greater weight.

It is here being suggested that the Legislature did not adopt this interpretation. First, the drafting instructions from Representative Ainsworth state that the arbitrator must consider the greatest weight factor "before" examining the other factors. If the greatest weight factor was absolute, as the Council had suggested, there would be nothing further to examine. That Representative Ainsworth spoke in terms of considering all of the factors must have meant that while the greatest weight factor counted more than the others, and to this extent it was "greatest," the other factors also applied. If so, it necessarily follows that some combination of the lesser factors could outweigh the results of the greatest weight factor. This concept was picked up in the actual language of the statute which requires that "in making any decision, *** the arbitrator *** shall consider and give" (emphasis added) greatest weight, greater weight and weight to the factors then described. In other words, all of the factors must be considered in every case. Thus, if all of the factors must be considered, no heavier factor has an absolute veto over lesser factors without regard to the evidence supporting those lesser

factors. To reach a contrary conclusion the statute would have to read that if the evidence supporting the greatest weight factor favored one party over the other, that conclusion would control the outcome of the case. Instead, the law provides that all factors be considered in all cases.

Another area of inquiry is what laws and directives are applicable in the greatest weight analysis. While the parties agree that the $200 and $206 spending caps are certainly legal restrictions upon the municipal employer in this case, MMSD also argues that the QEO law itself is a statute limiting the District's expenditures. MTI argues that the QEO law does not apply in this case because this is not a QEO case; the District did not submit a QEO. Although it is true that the arbitrator is not bound by the QEO formulae, and is not statutorily limited to awarding a 3.8% offer, there is a basis to find that the QEO statute is a consideration under the greatest weight factor. The 3.8% rate, even without the statutory computation, represents an expression of public policy. Albeit contrary to the freedom to bargain a good, bad or foolish contract, which is at the heart of collective bargaining, the people of Wisconsin, speaking through their elected representatives, have determined that an increase which is 3.8% (or, given the formulae, more or less 3.8%), of the base year's costs, is an adequate offer. The law in Wisconsin tells the parties that although QEOs are not mandatory, collective bargaining as it used to be, without some controls, is no longer acceptable in Wisconsin. As a practical matter, 3.8% represents the

presumptively appropriate rate of increase which the public will accept. In this light the QEO law impacts interest arbitration to the extent that a party seeking anything measurably greater than a 3.8% increase has the burden of demonstrating a real need for that variation.

The District has argued from the outset of this case that although it did not want to hide behind a QEO, and was willing to take its chances at the bargaining table and before a neutral, it was not waiving its argument that the QEO law still has some applicability in this case. The District is probably correct. Although the QEO provision is not mandatory, it is still a law limiting expenditures and is an expression of public policy. This does not mean that the arbitrator must award the offer which is closest to the 3.8% standard. Such a conclusion would, in effect, nullify the right to go to arbitration at all. It does mean that in the "greatest weight" analysis the arbitrator must take that rate into consideration as an expression of public policy.

B. Application of the Greatest Weight Factor

There are several components which go into an assessment of the District's ability to pay given the limitations on its finances. They include the revenue growth and the amount of new money which can be generated by the general fund, the District's continuing budget surplus and its growing operating reserve, and the District's need to pay for expenses other than teacher salaries and benefits.

Because per pupil expenditures have been fixed in flat dollar

amount's, Madison's rate of growth is very low. Inasmuch as MMSD already has substantially above average per pupil costs, growth at $200 and $206 per pupil for 1995-96 and 1996-97, respectively, is very small. Among the many problems with the new financing restrictions is that districts such as MMSD, which previously have made strong commitments in per pupil expenditures are now being penalized for past support. No other major school district in Wisconsin spends as much per pupil as MMSD. All of the districts which are close to MMSD in size spend several hundred dollars less per pupil. Milwaukee spends about $1,000 a year less per pupil. For these districts the $200/$206 limitation does not have nearly the impact that it has on Madison.

The allowable increases for Madison pupils represent only a 2.9% growth rate. While the 2.9% does not directly correlate to salary costs, in Madison, 87.8% of Funds 10 and 80, the General Fund and the Community Services Fund, the funds subject to the revenue caps, goes for salaries and fringe benefits.[26] To the extent that salary and fringe benefit growth exceeds allowable per pupil growth, the ratio represented by the 87.8% will grow larger. As teacher salaries and benefits grow faster than the allowable per pupil growth, there will be less money available from current

---

[26] This is for all employees of the District. The Union points out that only 74% of the regulated funds are attributable to teacher salaries. However, for the purposes of analyzing the District's overall financial picture, and to fully grasp the revenue squeeze the District faces vis-a-vis its other needs, I find the larger percentage to be more appropriate.

revenues for other expenses.[27]

The Union argues vigorously that the District will not receive only 2.9% in new money. The Union correctly asserts that MMSD will actually receive a 4.7% increase in regulated funds. However, the Union's computations are based upon growth attributable to increased enrollment. Using this money to fund salaries and benefits without regard to the additional staff and facilities needed for the increased enrollment is short-cited at best.[28] The appropriate measurement in a cast forward analysis is the measurement of new money for the existing pupils and staff.[29]

It is of considerable significance that this school district

---

[27] On the other hand, The District's chart showing the squeeze between revenue caps and new labor costs of 3.8% annually up to the year 2000 is unpersuasive. The primary concern in this case is to address the parties respective needs for the two years covered by this agreement. An award for the current contract years cannot be based upon what might or might not happen five years down the road. Additionally, for the purposes of its draconian projection the District assumes that all present factors will remain the same, e.g. student enrollment and per pupil growth of $206. Clearly these assumptions demonstrate the speculative nature of the projections. There are simply too many variables to worry now about what will happen in the year 2000.

[28] The Union argues that additional staff are not all that costly because their starting salaries are relatively low. While this assertion is correct as far as it goes, additional students need additional classroom space, additional supplies, additional maintenance, etc.

[29] The Union also argues that the District's total operating budget will increase substantially and that in terms of the entire operating budget its proposal in this case will not have a measurable impact. The problem here is one of relevancy. Except for special education (which has its own funding problems), teacher costs do not come out of the total operating budget. The only fair measure is the availability of revenue for the funds out of which teacher salaries and benefits are paid.

has such a high percentage of the regulated funds already earmarked for salaries. Less money is available for all other items paid from the general fund. Any additional salary increases which would increase the percentage which salaries take from regulated funds puts unreasonable pressure on other general fund items such as textbooks, computer equipment, library materials, additional staffing, staff development, special programs (not special ed), supplies, maintenance, and the myriad of other costs associated with running a large metropolitan school district.

The District has presented substantial evidence that the demographics of the population it serves are changing. The percentage of children living in poverty has increased dramatically and certain data indicate that about one quarter of all of the students in the District come from low income families. Many of these children have special needs, much of which is not fully covered by traditional special education funding or federal aid, if it is covered at all.[30] Evidence shows that it simply takes greater resources to give poor children a meaningful education than it does to provide the same education to children from more traditional middle class homes.

The District has demonstrated that it has significant maintenance needs. The District has failed to appropriate sufficient funds in the past to address all of its maintenance requirements. In February, 1995, MMSD attempted to fund some of

---

[30] In the last four years the number of children for whom English is not their primary language has grown at twice the rate of overall student enrollment.

the backlog along with needed capital improvement projects through a special referendum. This would have authorized a tax increase of $29.5 million for new buildings, building improvements, athletic facilities, electrical wiring, computer equipment and ADA compliance. The referendum failed and in May, 1995, a more limited version was passed authorizing expenditures of $17.9 million. However, it has become clear that some of the maintenance projects which were folded into the initial referendum and labeled as capital improvements must still be funded. While it is true some of these costs can and will be funded from the District's surplus, continuing maintenance costs should not be taken from a non-recurring account. The District must maintain its facilities out of current income.

In what is perhaps the Union's strongest argument, MTI maintains that the District can pay for its proposal for the first year out of its substantial general fund balance. As of the close of fiscal year 1994-95 the ending Fund 10 balance was 25.37% of its total fund expenditures. This is twice the average for the largest 15 districts in the state. MTI correctly asserts that even with limited resources, MMSD has and will continue to accrue a surplus.[31] The District argues that it needs a large operating surplus because it receives relatively less money from the state in general aids

---

[31] In the first two years of revenue caps, the District increased its general fund balance. From June 30, 1993 through June 30, 1996 general fund balance will increase nearly $7 million, or about 18%. Some of this surplus was planned, some of it has resulted from staff turnover, and some simply resulted from spending less than what was budgeted in other areas.

and because the timing of tax receipts conflicts with the District's fiscal year. The District points out that it uses its surplus as working cash and in this way avoids borrowing money.

It appears on the evidence of record that the District overstates its argument. At times its ability to invest money and earn more than it would ever incur in borrowing costs makes it appear as if it is operating a small bank. A school district which has unplanned surpluses year after year loses some credibility when it comes to the bargaining table and complains that fiscal restraints prevent it from paying responsible salary increases. In the present case the District argues that limits on its ability to spend require that the arbitrator select its proposal while at the same time it is scheduling an additional surplus and has budgeted several million dollars in increased maintenance costs out of this surplus. Additionally, the District will also receive about $10 million in additional state aids and better timing of its disbursement will help cash flow substantially.

The District responds that its long range forecasts show a reversal in accumulated balances and possible deficits which will draw upon the fund balances. While I find it inappropriate to rely on a projection of needs for the year 2000, which is little more than a guess, to justify a salary offer in 1996, the very full record in this case still demonstrates real needs for maintenance, equipment, innovative programs, teacher training and the like.

C. Conclusions Under the Greatest Weight Factor

In reaching conclusions, it must be emphasized that the wisdom, if any, of either offer is not at issue under the greatest weight analysis. The unusual nature of a one-time $1,000 bonus for each employee, that the parties have never negotiated bonuses before, and that an across-the-board payment to all employees disproportionately rewards younger and less educated employees, are all of little consequence in a greatest weight analysis.[32]

One of the problems with the greatest weight test is that it puts the emphasis on ability to pay in light of government restrictions and does not allow consideration of whether an offer otherwise justified or makes sense. A low ball offer in the face of severe fiscal restraints would pass the greatest weight test regardless of how foolishly distributed that proposal was. In this case, whether the teachers even deserve a $1,000 bonus is beside the point in the greatest weight analysis. Indeed, another very strong argument against the notion that a clear showing under the greatest weight analysis negates all evidence under the factors, is that a proposal by one side or the other might be financially acceptable under the law but just simply unacceptable in terms of labor relations and personnel policy.

---

[32] On the other hand, it can also be suggested that in giving all teachers an additional $1,000 in the first year the parties would have to at least match that amount in the second year. Otherwise, teachers would make less in 96-97 than in 95-96, not a particularly good idea from a labor relations standpoint. Thus, it can be argued that the $1,000 is not appropriate under the greatest weight analysis even though it will be paid only once and MMSD's surplus could handle it because of the implied impact it has on the second year of the contract.

Likewise, in this case the appropriateness of giving additional salaries and benefits to the employees included in the addenda, as proposed by the Union, has been given little consideration in the greatest weight analysis because the total amount of money at issue is so small in relation to the rest of the proposal that it could not possibly be impacted by any statute or directive restraining the District's fiscal abilities.[33] Thus, although there is considerable appeal in the District's arguments against putting the three Addendum C employees on the teacher schedule after having obtained substantial salary increases in the recent past, the unfairness of the overpayments to three isolated librarians has almost no impact in a greatest weight analysis.[34] Likewise, the cost of allowing the approximately 40 Addenda A & B employees to participate in the sick leave bank and the retirement insurance account. The sick leave bank utilizes pooled sick leave days which have already been earned by employees as part of their compensation. The new employees in this program will contribute some of their own days and will have the right to draw upon the earned days of others in cases of long term illness. The retirement insurance account allows the employees to purchase insurance upon retirement drawing upon earned but unused sick leave. Again, these days have already been earned by employees.

---

[33] The cost of these proposed increases is probably less than one tenth of one per cent.

[34] On the other hand, the unfairness of requiring these employees to work 12 months instead of 10 has absolutely no bearing whatsoever in greatest weight analysis.

There is no additional cost to the District. The days at issue have already been negotiated by the Union and paid for by the employees.[35] The greatest weight factor does not consider the District's arguments against these proposals. This is a straight-forward examination of the municipal employer's ability to balance all of its needs against the costs in light of government restrictions on revenue and expenditures.

I find that the weight of the evidence does not strongly favor either party under this factor of fiscal controls. To begin with, the District could probably pay the cash bonus proposed by the Union in the first year of the contract without a measurably negative impact on the general fund as a whole. The District's continuing ability to generate a surplus in this fund in the face of spending caps, competing demands for the limited new money and non-QEO settlements since 1993, demonstrates that a one-time payment could be managed without serious financial disruption. Another key factor in this examination is the patently unfair way in which the increased of fringe benefits was costed. As

---

[35] There is some merit to the District's argument that an increase from 40% to 60% in the amount contributed to the sick leave bank from terminating (resigns or dies) employees has an economic impact on the District. The District is currently able to recapture 60% of the earned but unused sick leave from employees who die or resign. The sick leave bank gets the balance of 40%. The Union is seeking a flip in the ratio. It wants 60% to go to the bank and 40% back to the District. This proposal will cost the District the lost recapture value of the 20%. There are few equities here for the District because this is in a sense "found money," i.e., a return of earned income. For purposes of the greatest weight analysis, however, the impact will be about $25,000 a year, although this can vary widely. The effect on the budget is minimal and has no real impact in a greatest weight analysis.

discussed above there is no good reason to double the costs of increased pension payments and health care premiums if this is not a QEO case. The effect of the artificial funding by the District for these fringes is to provide less than a 3.8% increase for the employees in this unit. While the 3.8% is itself an artificial number because of the strange costing mechanisms which apply in QEO cases, the District here is certainly offering these employees less than what it is claiming. If there is any thrust to the public policy statement inherent in the statute, it is not being embraced by the District in its first year proposal. Inasmuch as the parties' offers of are the same for the first year of the contract at issue except for the bonus, which is amply covered by the District's surplus from earlier years, and the slight costs associated with the handful of employees covered by the addenda, it would appear that the fiscal restraints which make up the greatest weight factor favor the Union's first year proposal. Stated another way, the limitations in the funding for this District do not justify the low first year offer from the District, and the higher offer from the Union will not hurt the District in any meaningful way.

Of course, the proposals here are not for a one year agreement, and the real point of departure for the parties in the greatest weight analysis is with the second year. The Union's proposal puts 3% on the base while the District claims that only 1% is justified. The Union's proposal may not appear as a large increase over the prior year because of the bonus is not repeated.

In fact, the Union's proposal primarily shifts the same dollars expended in the bonus to now favor the more senior teachers who benefit from the schedule. However, the permanent impact on the schedule is considerable.

While the Union's arguments point out again and again that the District can pay its second year offer, the problem here is that the Union's perspective comes from the old "possibility to pay" approach. All too often that point of view ignored competing needs and simply dismissed these as matters of judgment. This arbitrator believes that the new greatest weight standard means something more than a quick look to see if the dollars are there. One must also analyze whether the restraints contained in statutes and directives will hamper the District's overall ability to operate the schools with economic prudence. All of the District's financial needs must be examined with an eye on the realities of the per pupil caps put in place by the state government. Clearly, the District will not come to an unhappy end if the Union's second year proposal were adopted. However, for purposes of the greatest weight examination, the evidence taken as a whole supports the District for the second year. There are simply too many financial demands upon the District's limited new money to support the Union's proposal for the second year. Unlike the one-time bonus which comes from the old surplus, the permanency of the schedule increase must come from new dollars and not fund balances.

Accordingly, the conclusion under the greatest weight factor is that the factor favors the Union for the first year and the

District for the second year. This factor cannot be determinative regardless of how much weight it is given. This is not a poor district. It has sufficient resources to pay the Union's demand for the first year without any measurable impact on its ability to function. The District also has the ability to pay the Union's second year proposal if it had to. This arbitrator, as amply discussed above, believes that the greatest weight test requires an examination of the municipal employer's other needs. It is this examination which yields the conclusion that the District's second year proposal is more in line with the legislative intent of the greatest weight factor. When both years are considered together, however, the arbitrator cannot say that this factor favors either party. The case must turn on the greater weight factor and the other conventional factors.

VII. THE GREATER WEIGHT FACTOR

A. Analysis of the Factor

Subd. 7g requires that in making any decision the arbitrator "shall consider and give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r." Very little is known about legislative intent for the "greater weight" factor. The Council on Municipal Collective Bargaining initiated this factor as a separate category to be above all other factors other than those

which make up the greatest weight factor.[36] It is tied in with the traditional factors set forth in 7g and does not stand alone as does the greatest weight factor, which must be considered separately and given weight above all else. The 7g factor should be considered with the 7r factors except that 7g is given more weight than any of the others. The implication is that the remaining (regular) weight factors, can be combined to overcome the greater weight factor.

The type of data necessary to make a considered opinion under the greater weight factor should include employment and household income, employment and household income, and student enrollment data, where available. Other evidence such as reports regarding the ranking of the community among similar communities and/or the relative quality of life are all appropriate.

B. Application of the Greater Weight Factor

The Union has produced considerable evidence showing that the City of Madison and MMSD are currently enjoying a high level of economic success. Unemployment as of January, 1996, was a little over 2%, which was half of the state-wide percentage. None of the other major cities in Wisconsin are close to Madison's almost negligible unemployment rate. Madison is ranked by the Bureau of Labor Statistics as having the lowest jobless rate among the 272 metropolitan statistical areas in the country. Its rate of

[36] Actually the Council included state-wide economic health as part of this factor. The legislation as passed refers only local conditions.

unemployment is only one third of the national rate. For the first ten months of 1995, Madison's job growth was 4.53%. According to a 1995 survey by "Sales and Marketing Management," Madison was ranked first in the state in household effective buying power.[37] Additionally, the District's enrollment is growing as more families are attracted to Madison's positive employment picture.

According to the Wisconsin Realtor's Association, the 1995 median resale price of existing homes was $108,576, second to Waukesha among the larger school districts in the state. This was substantially above the state-wide average. The economic well being of the community is further supported by the high equalized property values in Madison, which are also second state-wide. More significantly, they have been going up at a strong, steady rate, having increased 18% from 1992-93 to 1994-95.

Finally, the Union submitted a number of newspaper and magazine articles which proclaim Madison as one of the best cities in the country in which to live based upon the strength of the local economy. Evidence from MTI shows that the combination of state government, the university and high tech jobs has produced an oasis of success among the major cities in Wisconsin and in the country as a whole.

---

[37] It is ranked 32nd in the country. "Buying power" is defined as personal income less taxes and other required payments. It sometimes referred to as "disposable income."

C. Conclusions Under the Greater Weight Factor

To the extent that the legislature wanted arbitration awards to reflect the economic climate as a whole, there can be no question that the health of Madison's economy and the economic growth it has experienced since the negotiation of the last contract supports a relatively larger rather than a relatively smaller package for the employees in this bargaining unit. The more difficult conclusion to reach is whether the strong economy can support MTI's package which is about $5 million more than that of the District. At some point even an economy as strong as Madison's cannot justify a proposal which is simply too costly.

The conclusion in this case is that the Union's package will not unfavorably impact the robust economic health being experienced by the Madison area and MMSD. The money is going to be spent regardless which package is selected and the state's control over taxes and revenue means that how the money is spent will not have an effect on the economy. At least for the second year of the contract if the money is not spent on the teachers it will be spent on other things. From purely an economic point of view it can be argued that it is better to spend the money on teachers' salaries and benefits, and keep the money in the community, than to either tax the populace and not spend the money or spend it on purchased items manufactured elsewhere.

No matter how the greater weight factor is analyzed, it supports the Union's more expensive proposal rather than the District's lower proposal.

VIII. OTHER FACTORS

A. Lawful Authority

Other than the restrictions discussed as part of the greatest weight factor, there are no issues in this case which bring the lawful authority of the employer into question. The District has not asserted that it is without authority to meet the obligations required by the Union's proposal. Except to the extent that legal restrictions were discussed in the greatest weight factor, consideration of this factor neither helps nor hinders either party.

B. Stipulations of the Parties

There are no stipulations which bear upon the propriety of either of the proposals in this case. The parties have stipulated to the arbitrator's jurisdiction to hear this case and have agreed that the factors set forth in 111.70(4)cm) 7, 7g and 7r of the statute apply. The parties have also stipulated to all other provisions of their agreement and upon the award of the arbitrator the parties will have a complete and final contract.

C. Interests and Welfare of the Public

The District argues that this factor overlaps the greatest weight factor because the statute defines the interests and welfare of the public as economic in nature. Therefore, the District argues, the public is best served with a bargaining agreement which is within the guidelines of the QEO law and the spending caps. Therefore, MMSD concludes, its offer is favored by this factor.

The District's argument is a little too simple. It is also in the interests and welfare of the public to provide competitive salaries and benefits so as to attract and retain a superior teaching staff. While, of course, this factor is self-serving, it is not true that the public's only interest is paying less money. In this case, the interests of the public are not being hurt by either proposal.

D. Comparability with Other Employees Performing Similar Work

The parties have traditionally used the 15 largest school districts in Wisconsin as a comparability group. Based upon 1995 enrollment they are as follows:

Milwaukee	99,846
Madison	24,359
Racine	20,944
Green Bay	18,610
Kenosha	17,326
Appleton	13,468
Waukesha	12,669
Eau Claire	10,984
Janesville	9,948
Sheboygan	9,626
Oshkosh	9,558
Wausau	8,907
West Allis	8,879
Stevens Point	8,204
LaCrosse	7,821

The parties have submitted a variety of exhibits intended to show that comparability factors favor their respective positions. According to the Union, over the last several years Madison has drifted towards the bottom among the comparable districts in terms of the BA base. In the last contract it fell from 8th to 11th place. It suggests that the rate for 1995-96, agreed to by both sides, will put MMSD in 13th place and that its proposal would move

it to 9th for 96-97, while the District's would only restore it to 11th place. (None of these comparisons include the $1,000 bonus.) Teachers with a Masters Degree at Step 10, according to the Union, earn the second lowest salary. The Union states that these teachers have fallen to last place in 1995-96 and that its proposal for 1996-97 will place these teachers in 13th place. The Union has also presented a chart showing that in a variety of benchmark steps, except for track maximums, Madison teachers are near the bottom. Finally, the Union argues that benchmark comparisons are not the only thing to look at. The Union points out that nearly half the staff are on longevity steps and only get step increases every third year. In two of three years these employees will only get the indexed rate of the low base increases. Many of these senior teachers will therefore receive only negligible increases under the District's .4% and 1% proposal.

The District disagrees with these computations, particularly regarding 1996-97, where several of the districts have not yet settled. The District also challenges the methodology of simply comparing steps to similar steps in other districts because the structures of the other schedules are different. The District emphasizes that in Madison there is a strong index which means that most of the money allocated for salaries goes to senior teachers. Comparisons at lower steps are simply not relevant.

The District acknowledges that the agreed upon rate of increase for the first year of the contract is the lowest among the comparable districts which have settled, and is well below the

average. It also recognizes that its proposed total salary increase with steps is the lowest salary package among the comparables. It suggests, however, that the Union's salary proposal for 1995-96 is second only to Waukesha, which experienced a benefit decrease which offset the salary increase. According to MMSD, the Union's total salary proposal (including the bonus) is the highest in the group. The District also argues that no other district had a cash bonus for teachers.

The District notes that nearly half of the teachers are at step 15 or above. Thus, it argues, a comparison must be made at the high end of the schedule. In this regard, the District points out that the schedule has no maximum step because of the longevity schedule which gives senior teachers a modified step increase every three years. Thus, the District contends, it ranks first among the comparables at the high end of several tracks as well as at 30 years, and is also competitive at 20 years. However, although it ranks 3rd in the MA lane at 30 years, it is 9th at 20 years. It agrees with the Union that the first year proposal with the $1,000 would do more to maintain the status quo than the schedule increase without the bonus. However, it also finds that the schedule increase alone would improve its position at the BA base, the BA 6th year step and at several steps in the Masters lanes. It also argues that there would be no appreciable difference in the rankings for 1996-97 under either its or MTI's proposal at these benchmarks among those districts which have already settled .

There are no decisive conclusions which can be reached with

external comparability. Many Madison teachers do earn substantially less than their counterparts in other less prosperous districts. But this is not a sudden circumstance. Madison has been slipping in the rankings for many years. Whether this is just a result of the schedule structure, as the District argues, or whether it is the result of bad bargains, the undeniable fact is that these schedules were the result of voluntary agreements made over an extended period of time. On the other hand, it is also true that as a bargaining unit ages, comparisons at schedule steps have little probative value. One should look at what the average increase was for teachers in the unit compared to the average increase received by teachers in other units.[38] Instead, the Union in this case has focussed on the low steps where there are few teachers while the District has addressed 30 year steps where there are some, but not many, teachers.

There is no doubt that the District's proposal will do nothing to improve MMSD's ranking anywhere on the schedule. In quite a few places it will hurt it. MTI's proposal with the $1,000 bonus does not address the schedule problem in the first year, but its second year proposal does repair some of the damage incurred in the first year. Because District's .4% and 1% proposals will hurt the District's comparability with the other large districts, over the two year period, the conclusion must be that this comparability

---

[38] One cannot simply look at average teachers' salaries because these numbers are more a product of the seniority of the unit rather than the relative worth of their schedule. Another probative test is to place the scattergram of the unit at issue and place it on the schedules of the comparative units.

factor favors the Union's proposal.

E. Comparability with Public Employees Generally

This factor measures the proposals against what other employees in the community are or will receive as well as public employees generally in comparable communities. The District's evidence consisted of the QEO worksheet for its administrators for the first year of the contract. The Union provided a variety of settlement information for other District employees and for the Madison Area Technical College. It also provided data for Madison police and fire employees and for state employees generally. According to these exhibits, the average salary increases for all of these groups of employees is about 3%. The Union argues that for the with the MMSD proposal for the second year of the contract, Madison teachers will receive less than anyone else among the employee units described by the Union. The District responds that many of these other employees are not on a schedule or do not have the type of indexed increases available to MMSD teachers. It argues that in terms of total cost, its offer is closer to the 3% used by the Union than the Union's offer is.

To the extent that the data submitted is sufficient to draw any conclusions at all, it would appear that the District's offer for the first year, due to the cost of fringe benefits, is below what the public sector marketplace is providing. In the second year, the District's proposal is fair for that half of the unit still receiving step increases and not comparable for those who are not. I find this factor favors the Union.

F. Comparability with Private Sector Employees

The Union has offered evidence of wage increases for organized employees in insurance, utilities, construction and food processing. While the increases range widely, the average among most large private employers surveyed by the Union is between 3% and 4%. The District offered no evidence for this factor and objects to the Union's evidence as not relevant.

While there may be some relevance in making comparisons between public employees and private employees doing similar work, there is little point in comparing public school teachers with employees whose terms and conditions of employment are by definition completely unrelated. (See, Fond du Lac School District, Dec. No. 27443 (Vernon, 1993).) At most this factor reflects part of the general economic picture which makes up the greater weight factor. To this extent, this factor favors the Union's proposal for the first year and the District's for the second.

G. The CPI and the Cost of Living

From July, 1994 through June, 1995, the CPI-U increased 2.88%. The rate since that time has been a little lower. Based on these figures, the District argues that its proposal is more in line with the increase in the cost of living.

The Union argues that the national CPI-U is too broad geographically and that more precise data exists. It has presented evidence showing that the CPI for small metropolitan areas in the

North Central region has been slightly above 3% for the same period referred to by the District.[39] The CPI-U from February, 1995 to February, 1996, for these North Central areas went up 3.2%.

The Union also argues that over the last several years the value of teachers' salaries has gone down against the CPI-U. In so arguing, the Union relies only on the base salary and not the value of step increases. It states that schedule increases are a product of experience and education and do not reflect the relative value of salaries. Therefore, it suggests that average teacher salary increases cannot be compared with the CPI-U. It argues that in this light the District's proposal of .4% and 1% on the base does not match up with the CPI-U and will therefore create greater erosion.

For there to be an apples with apples comparison in terms of inflation and teachers' salaries, extraneous must be held constant. Salary increases based upon experience or additional education are not fairly measured against inflation. The only true test is to track the base increases against the rate of inflation. (See, Madison Board of Education, Dec. No. 13984, (Somers, 1970).) In this case the CPI-U for small metro areas in the North Central region is a lot more relevant than a national CPI-U diluted by its shear size and the many variances in economic conditions in our vast nation. While it is doubtful that a long term study of the

[39] The North Central region includes Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Nebraska, North Dakota, Ohio, South Dakota and Wisconsin. Small metropolitan areas are those with populations between 50,000 and 360,000.

deterioration of the base to inflation is helpful in this case because that deterioration was the result of voluntary agreements, it is true that the District's proposal for base increases is contrary to the rate of inflation. This factor clearly favors the Union.[40]

H. Overall Compensation

The District presented some evidence on the value of overall compensation. It shows that in 1994-95 average compensation in the District was $58,670, a 4.2% increase over the prior year. Similar data for all of the comparable districts was not supplied. The data for the current contract period is seriously incomplete. The Union objects to these exhibits as flawed because the District relied on a costing mechanism which does not accurately show the value of total compensation.

The record for consideration of this factor is incomplete. The parties supplied insufficient information from which to make conclusions regarding overall compensation. While there is a lot of data on salaries there is no data on the comparability of fringe benefit programs, workload, days of work, etc. Accordingly, no

---

[40] The District relies on a decision by Arbitrator Zel Rice, in Slinger School District, Dec 26757-A (1991). In that case the arbitrator said that step increases are relevant in a cost of living analysis because the "increments represent increased compensation to the employees and increased costs to the employers." This arbitrator believes that that observation is irrelevant. Step and lane increases are not cost of living increases. However flawed the theory (and there is substantial evidence that it is flawed), these are considered merit increases because years of experience and greater education make for better performance and greater productivity.

conclusion can be reached as to which party this factor favors.

I. Changes During the Pendency of These Proceedings

The parties did not report any changes in any of the foregoing circumstances during the pendency of these proceedings. The arbitrator takes notice, however, of recent articles in the popular press regarding the superior esteem in which Madison is held as a livable city and notes that these reports refer to Madison's strong economic base.

J. Other Relevant Factors

Other relevant factors include a discussion of the Union's proposed changes in language, particularly with its proposal for a change in the provisions for coaches. Generally speaking, the current language provides that teachers employed in an extra duty position shall be notified of their reappointment by May 10th. The language also provides that qualified faculty members shall have preference over other persons who apply for coaching positions, but that when a vacancy occurs only schools in the attendance area (there are four) get notice, where practical, of the vacancy and that the notice must be posted for five days before being filled. The Union wants notices of non-reappointment to state the reasons. It wants notices of all vacancies sent to all schools and it wants the five days of posting to be prior to when the applications are due.

In support of these changes, the Union points to an

instance where a long term coach was dismissed by his building principal without any obvious reason and the principal refused to give the teacher a reason. The Union argues that the notice provisions are in conflict with the parties' intent to open coaching positions to all qualified teachers. Limiting notice to only those schools in the geographic area is contrary to this intent. The Union also wants a clearer period in which individuals can apply for vacancies. According to the Union's evidence, exactly when the five days runs is unclear and has been interpreted differently at different times. According to the Union, nothing in the current language requires the principal to wait for the five days to run before filling the position, as long as the notice is up for 5 days. The Union's proposal would tie in the five days with an actual application period.

The District objects to these language changes as impractical because it needs to act on vacancies for coaches quickly. It objects to expanding the area for the notice postings because it is impractical to have teachers at one end of the District coaching at the other end of the District. The District objects to giving a non-reappointed coach reasons for the dismissal because the coach has no recourse and providing reasons for something which is discretionary can only lead to bad feelings and needless controversy. The Union, MMSD points out, is not seeking to make non-reappointments appealable. However, regardless of the relative merits of the Union's arguments, the District's basic position in these proceedings is that these changes do not belong before an

arbitrator. The District argues that arbitrators generally exercise caution before changing language which the parties have bargained, unless the party seeking the change shows a real need and the party seeking the change provided a quid pro quo. (D.C. Everest School District, Dec. 24678-A (Malamud, 1988).) In this case, the District argues, the Union has neither shown need nor offered a quid pro quo.[41]

The District is correct with regard to the absence of a quid pro quo, although it is unclear what the District might have sought in exchange or what the parties already agreed to before arbitration. The bargaining history for this proposal, as with the proposals for the sick leave bank program, is scant. The arbitrator has no real sense of need for these changes other than isolated ad hoc or anecdotal evidence. On the other hand, some of the reasons behind the Union's coaching proposal are supported by common sense. If the parties have agreed that teachers have preference for coaching positions over outsiders, the preference is useless if only some teachers know of the vacancy and have a meaningful opportunity, that being five days, to apply for the vacancy. With regard to reasons for non-reappointment, the arbitrator notes that dismissals during a season must be for just cause. Certainly, at least the reasons for a dismissal after the season is appropriate.

Conclusions here are difficult. There is no financial impact

---

[41] The District also makes this argument for the changes sought by the Union in the sick leave bank program and with regard to the salary schedules for the Addendum C employees.

maintaining what it got in the first year rather than try to increase the schedule to the degree it has proposed. However, the District's 1% proposal for the second year, coming after its .4% offer over states the economic impact of the spending caps. On balance, the Union's two year proposal is no more out of line than the District's. The District can pay what the Union is seeking without threatening its present financial stability. There will still be <u>some</u> money for the District's other needs. Were it otherwise, the Union's second year salary proposal would have sunk its package in the greatest weight analysis. On balance, the good and bad of each proposal in the greatest weight analysis offset each other and prevent this most important of considerations under the new law from controlling the outcome of this case.

The greater weight analysis is another story altogether. For whatever its true relevance in interest arbitration cases, the legislature has mandated that the arbitrator consider the general economic conditions of the public employer at issue and give it greater weight than any of the other traditional factors. If there is a correlation between the economic stability of the jurisdiction and the ability of the employer to pay what the Union is demanding, the conclusions here overwhelmingly favor the Union. If MMSD's jurisdiction is as economically vibrant as the statistics say it is, the management of the school system and the quality of the education delivered by its teachers must be part of the equation. The District's proposal is what this arbitrator considers a "crisis offer." It is not supported by the "greater weight" factor.

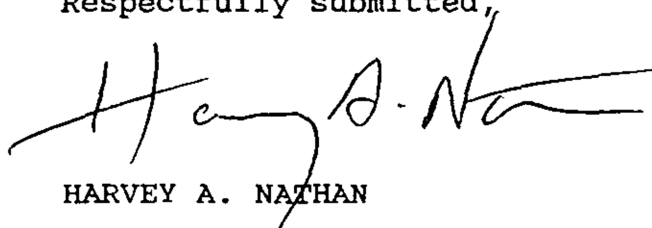
The evidence similarly supports the Union's proposal under most of the minor factors. Thus, the District's crisis offer is measurably below the modest increases in the CPI-U for north central small metropolitan communities. The District's proposal would reduce the standing of most Madison teachers within the comparability group. The District's proposal is significantly lower than what other public employees in the area are getting and are below wage and benefit private sector increases generally.

In light of the neutral conclusion reached in the greatest weight analysis, the remaining factors taken as a whole substantially support the Union's proposal over that of the District.

AWARD

The Union's final package proposal is selected.

Respectfully submitted,



HARVEY A. NATHAN

June 21, 1996