ARBITRATION OPINION AND AWARD

In the Matter of Arbitration Between THE VILLAGE OF SAUKVILLE And VILLAGE OF SAUKVILLE EMPLOYEES UNION, LOCAL 108, AFSCME, AFL-CIO	CASE 13 NO. 52122 INT/ARB 7537 **Decision No. 28426-A**

Impartial Arbitrator

William W. Petrie
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Hearing Held

Saukville, Wisconsin
October 16, 1995

Appearances

For the Village

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BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between the Village of Saukville, Wisconsin and the Village of Saukville Employees Union, Local 108, AFSCME, AFL-CIO, with the matter in dispute the terms of a two year renewal labor agreement covering January 1, 1995 through December 31, 1996. The only residual impasse item is the Employer proposed contractual right to sub-contract during the term of the renewal agreement, certain public works, water treatment and wastewater treatment services previously performed within the bargaining unit.[1]

The parties met on three occasions following their initial exchange of proposals, but were unable to reach complete agreement on the terms of their renewal labor agreement. The Village, on January 18, 1995, filed a petition requesting the Commission to initiate arbitration pursuant to Section 111.70(4)(cm)(7) of the Wisconsin Statutes. After preliminary investigation by a member of its staff, the Commission on June 6, 1995 issued certain *findings of fact, conclusions of law, certification of results of investigation* and an *order requiring arbitration*, and on July 11, 1995, it issued an *order appointing arbitrator*, appointing the undersigned to hear and decide the matter.

An interest arbitration hearing took place in Saukville, Wisconsin on October 16, 1995, at which time both parties received full opportunities to present evidence and argument in support of their respective positions. Both

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[1] Since February 15, 1994 these services have been performed by RUST E&I, pursuant to a contract for services between this firm and the Village of Saukville, Village Exhibit #26. The Union filed prohibited practice charges with the WERC as a result of the contract, which charges were sustained by the Hearing Examiner on October 31, 1994, Village Exhibit #6. The disposition of the charges by the WERC has been under appeal by the Employer since this date.

closed, thereafter, with the submission of post-hearing briefs and reply briefs, after the receipt of which the record was closed by the Arbitrator effective December 26, 1995.

THE FINAL OFFERS OF THE PARTIES

The final offers of the parties, hereby incorporated by reference into this decision and award, indicate that the single remaining issue is *the Employer proposed right to subcontract certain work* during the term of the renewal agreement.

(1) The *certified final offer of the Village*, received by the Commission on May 3, 1995, contains specific proposed modifications to Article III and to Article XIII, Section 13.01 of the prior agreement, and includes a *four page addendum*, proposed to be incorporated by reference into Article III.

(2) The *certified final offer of the Union*, received by the Commission on April 10, 1995, proposes *retention of the status quo ante* in the above described residual changes proposed by the Village.

THE ARBITRAL CRITERIA

Section 111.70(4)(cm)(7) of the Wisconsin Statutes directs the Arbitrator to give weight to the following arbitral criteria:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

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

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

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

f. Comparisons of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees

in private employment in the same community and in comparable communities.

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

h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays. hospitalization benefits, the continuity and stability of employment, and all other benefits received.

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

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

POSITION OF THE UNION

In support of the contention that its is the more appropriate of the two final offers before the Arbitrator, the Union emphasized the following principal considerations and arguments.

(1) Relative to the arbitral criteria described in Section 111.70(4)(cm)(7) of the Wisconsin Statutes, that the Employer relies upon neither sub-sections (a) nor (i), and the Union relies upon sub-sections (b) through (h), and (j).

(2) That the Union proposed retention of the *status quo* is preferable to the Employer proposed changes in Article III, in that the Village has failed to demonstrate a *clear and convincing need* for the language changes.

(a) That the consensus of Wisconsin interest arbitrators is that *language changes should not be taken lightly*, and that they *generally adopt final offers which preserve the language previously agreed upon by the parties.*[1]

(b) That the *proponent of change in the status quo ante* should be required to establish by clear and convincing evidence, both *the need for* and *an appropriate quid pro quo for* the

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[1] Citing the July 10, 1987 decision of Arbitrator Christianson, in Menomonee Falls School District, Decision No. 24142-A.

proposed change(s).[3]

(c) That *the Village has failed to satisfactorily establish any need for its subcontracting proposal*: that while EX #22 and #23 indicate cost savings of over $50,000 in 1994 and $60,000 in 1995, these figures were not provided by the Employer until the day of the arbitration hearing; that while EX #9 to #25 attempt to show how the purported cost savings would come about, the Village has not isolated the impact upon the projected savings of its decision not to fill one vacant Water Department position; that this single unfilled position would account for the bulk of both the 1994 and the 1995 projected savings[4]; that the Village's decision to eliminate this position is not mutually exclusive with bargaining unit employees continuing as Village employees; that the "*value-added services*" referenced in EX #28 should not be accorded significant weight, because they are both potentially inaccurate and speculative; that the Village's agreement to provide secretarial services at no cost to the sub-contractor as referenced in EX #26, could limit any cost savings; that the Village's levy rate is in line with or lower than both the primary and the secondary comparables identified in a prior interest arbitration[5]; that UX V and G reflect the financial health of the Village.

Accordingly, that the Village has failed to establish a clear and convincing need for its requested change in the status quo.

(3) That the language which the Village seeks to change was voluntarily agreed to be the parties, and it represents the heart of the labor agreement.

(a) That the result of the change would separate five of seven employees from the bargaining unit, and would almost entirely erode the bargaining power of the Union.

(b) That the evidence does not establish the need for a change of the magnitude proposed by the Village in order to enable it to enter into an outside contract, in that it apparently could have achieved the same result by contacting out only

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[3] Citing the February 18, 1988 decision of Arbitrator Malamud, in D. C. Everest Area School District, Decision 24678-A.

[4] Citing one Water Department employee who had left employment prior to the contracting out of services, who had been figured into the cost projections for 1994 and 1995, and whose prior job had not been filled for 1994 and 1995.

[5] Citing the February 26, 1994 decision of Arbitrator Frank Zeidler in Village of Saukville, Case 8 No. 48942 INT/ARB-6834.

the *management* of the Wastewater and Water Departments.

(4) That the Village has offered no appropriate *quid pro quo* for its proposed language change.

(a) That the parties' initial agreement and stipulations were the product of give and take bargaining, and the Village should not now be able to achieve concessions in arbitration without an appropriate quid pro quo.

(b) That the fact that the parties' agreement on other issues already meets the pattern of the external comparables, supports the need for an appropriate quid pro quo.

(c) That employees impacted by the decision to subcontract would no longer have the right to participate in the State of Wisconsin's public employee pension fund, which right would not be replicated in private employment.

(5) That the Village's proposed language change is not supported by the comparison criteria.

(a) That consideration of the six primary *external comparisons* does not support the final offer of the Village, in that two contain written requirements that no bargaining unit employees will be laid off or suffer a reduction in hours, one protects full-time unit employees from displacement, one requires the Employer to impact bargain with the Union, and two allow for no protection from the subcontracting sought by the Village in the case at hand.[6]

(b) That while *internal comparisons* frequently carry significant weight in language disputes, the Village has offered no such comparisons in these proceedings.

In its reply brief, the Association emphasized or reemphasized the following principal considerations.

(1) Contrary to the arguments of the Village, that it would not be

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[6] Utilizing the six primary comparables established by Arbitrator Zeidler's February 26, 1994 decision in Village of Saukville, Case 8 No. 48942 INT/ARB-6834, the Union emphasized as follows: that the *villages of Jackson and Slinger* allow contracting out providing no bargaining unit employees are laid off or suffer a reduction in hours as a result thereof; that the *Village of Kewaskum* allows contracting out provided that no regular employee is laid off; that the *City of Plymouth* provides for subcontracting, subject to bargaining with the Union on the impact of such action; and that the *cities of Port Washington and Sheboygan Falls* have no specific contractual limitations upon their rights to subcontract.

precluded from subcontracting the management of the bargaining unit employees under the existing agreement.

(a) That the Village seeks to deny affected employees a substantial benefit, in the form of WRS eligibility.

(b) That the Village has failed to establish that Saukville taxpayers would be financially burdened by its retention of the bargaining unit employees who would otherwise be affected by subcontracting.

(2) That the Village's assurances that if it had failed to bargain in the past it was now doing so, are deceptive.

(a) That the Village has not refrained from subcontracting the positions in question, but had appealed the WERC Hearing Examiner's decision and has taken no action to remedy their illegal conduct.

(b) That the Village apparently intends to first implement its proposals, and then to bargain them on after-the-fact bases.

(3) That the Village argument that the Union's offer is flawed by its failure to address the matter of sick leave payout, should not be credited. That when the WERC rules on the Village's appeal, the matter of remedy will be addressed by both parties.

(4) That the Village's arguments that many of the statutory arbitral criteria are not applicable to this dispute and that the interest and welfare of the public should be determinative, should not be credited. That the Village has a responsibility to recognize how other communities provide municipal services, just as it must recognize how other communities pay their employees.

(5) That the Village, as the proponent of change, has the burden of establishing that the level of retirement benefits for affected employees is equivalent to those provided under dthe WRS.

(6) That the Village's arguments relating to the significance of external comparisons versus municipal autonomy, are inconsistent with its references to external comparisons in connection with its quid pro quo arguments.

(7) That certain evidence and arguments advanced by the Village in support of its anticipated savings are not persuasive.

(8) That the Union's past requests for evidence of any clear cost savings have not been fully complied with, as is apparent from the fact that the Village waited until the day of the arbitration hearing to specifically identify various purported savings.

In summary, that the position of the Union is favored by the arbitral consideration of all of the above factors, including the Village's *failure to*

establish a clear and convincing need for, and/or to offer an appropriate quid pro quo in support of its proposed change in the status quo, the *external and internal comparisons*, the fact that *the prior language was the product of agreement between the parties*, and *the significant impact of the proposed change* upon the affected employees and the bargaining unit.

POSITION OF THE VILLAGE

In support of the contention that its is the more appropriate of the two final offers before the Arbitrator, the Village emphasized the following principal considerations and arguments.

(1) That the dispute is not about wages, insurance, vacations, holidays or other terms and conditions of employment, but, rather, it relates to the subcontracting of municipal services.

(a) That the Village proposes modification of the expired collective agreement in two ways: *first*, the elimination of the previous "laundry list" of management rights, including limitations upon contracting-out; and, *second*, the addition of new language allowing the subcontracting of public works, water treatment and/or wastewater treatment services.

(b) That the Village's proposed right to subcontract would be subject to the following conditions precedent: the contractor would offer employment to all of the Village employees in the affected job classifications; the contractor would recognize AFSCME Local 108 as the bargaining representative of the affected employees; the contractor would, to the extent legally permissible, comply with the economic terms and conditions of any collective agreement covering employees in the affected job classifications; that the Village will guarantee to affected employees, terms and conditions of employment equivalent or better than those currently in existence, including changes in wages and benefits resulting from the current negotiations; conditional reemployment of affected employees by the Village in the event of termination of the contract with the outside service provider, including restoration of full seniority and accrued sick leave, and the right to buy back previously paid sick leave.

(c) That the practical effect of the Union's final offer would be to preclude the Village from subcontracting, and to deny its citizens any economic benefit to be gained from such subcontracting.

(2) That the case at hand should not be viewed in the abstract,

because the Village currently contracts with RUST E&I for municipal services and the arbitral decision will determine whether this contractual relationship will continue.

(a) That the Village began consideration of a contract for municipal services in 1993, at which time there were vacancies in a number of jobs.

(b) On September 23, 1993 the Village Administrator informed the Union that its Finance Committee had authorized him to explore contracts for municipal services; at this time, that the parties' prior contract renewal negotiations had reached impasse, had proceeded to arbitration, and were awaiting post-hearing briefs.

(c) Following the Employer's entry into a contract for municipal services with RUST E&I the Union filed prohibited practices charges with the WERC, which charges were sustained in a decision rendered on October 31, 1994.[7]

(d) Implicit in the Commission's reasoning in the above decision was that if the Village wished to make changes in the management rights/subcontracting provisions, it should be done during the negotiations for a successor agreement to the 1993-1994 agreement.

(e) That the WERC decision and the subsequent conduct of the parties has two practical effects: *first*, the alleged prohibited practice is only applicable for the time up to the expiration of the 1993-94 collective agreement; and, *second*, the past conduct of the parties, including that of the Village, is not relevant to the resolution of this dispute.

(f) That the Employer's final offer has addressed both the payment to employees for employment lost or rejected as a result of subcontracting of municipal services, and the restoration of sick leave in the event of termination of such a contract; by way of contrast, that the Union's failure to address the restoration of sick leave could result in an inappropriate double payment for affected employees.

(3) That the dispute over the ability of a municipality to contract with an outside provider for municipal services, arose out of the criteria used by the Courts and the WERC in determining whether an item is a *mandatory* or a *permissive* subject of bargaining, principally those defined by the Wisconsin Supreme Court in Beloit Education Association v. WERC, 73 Wis 2d 43 (1976), and in Unified School District No. 1 of Racine County v. WERC, 81 Wis. 2d 89 (1977).

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[7] A copy of the WERC decision comprises Village Exhibit #6.

(a) That in the second of the two cases the Court rejected the private sector standard that *mandatory bargaining* was not required over subjects which involved either a "*change of direction*" of the employer's operation or an alteration of its "*essential enterprise*,"[8] and indicated in part as follows:

> "The question is whether a particular decision is primarily related to the wages hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of public policy. Where the governmental or policy dimensions of a decision predominate the matter is properly reserved to decision by the representative of the people."[9]

(b) In the case at hand, that the Village was placed in a dilemma: it could accept the risk of claiming that the decision to contract for services was *permissive* and refuse to bargain, but if it were wrong the existing contract for services would be "out the window"; or, it could view the decision to contract as *mandatory*, which could ultimately result in submitting a *political decision* to the statutory interest arbitration process. That the problem with the latter approach is the fact that the interest arbitration process favors the status quo.

(c) That the Trustees of the Village wish to alter the method by which the institutions which deliver municipal services are staffed and managed, which decision has elements which affect municipal employees and at the same time go far beyond these factors; accordingly, that the nature of this case requires the Arbitrator to depart from the traditional methods utilized in the resolution of interest arbitration cases and to look with favor on a rational change rather than support the status quo.

(4) That the arbitral criteria to be utilized in these proceedings are those set forth in Section 111.70(4)(cm)(7) of the Wisconsin Statutes, but since major *economic* proposals concerning wages, hours and other benefits are not in issue, many of the statutory arbitral criteria are inapplicable to the case at hand.

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[8] In Libby, McNeill & Libby v. WERC, 48 Wis. 2d 272 (1970), the Wisconsin Supreme Court referenced the decision of the United States Supreme Court in Fibreboard v. Labor Board, 379 U.S. 203 (1964), and indicated in part as follows: "From Fibreboard, supra, we can conclude that most management decisions which change the direction of the corporate enterprise, involving a change in capital investment, are not bargainable."

[9] Citing Unified School District No. 1, at note 24, page 95.

(a) By way of example, that the *lawful authority of the municipal employer* is not a consideration, and, in the absence of a wage or benefits question, *cost of living* is not in issue.

(b) That the Wisconsin interest arbitration process has become *comparability driven*, and the wages, hours and other conditions of employment of employees in the same or similar work in comparable communities normally plays a major role in the final offer selection process.

(c) Given the nature of the dispute at hand, that the Village submits that *how other communities provide for municipal services* is not relevant to the resolution of the dispute at hand.

(d) That if any of the statutory criteria are relevant, *the interest and welfare of the public* clearly supports the selection of the final offer of the Village.

(5) That while the Union has claimed that the Village, as the proponent of change in the status quo, has failed to demonstrate the need for and/or to provide an appropriate quid pro quo for such change, the Village has more than fulfilled its obligations in these areas.

(6) That the *stipulations of the parties* and the *overall compensation* criteria are not relevant to the resolution of this dispute.

(a) That neither wages, insurance, holidays, vacations and/or other economic benefits are in issue in these proceedings.

(b) That in their preliminary negotiations the parties agreed to one additional holiday, to increase wages for all employees by 4% in 1995 and by 3.75% in 1996, to add an additional 10¢ per hour to the Secretary/Dispatcher and the Clerk/Typist classifications in both 1995 and 1996, and to replace the short-term disability insurance with a long-term disability plan.

(c) That the Village's proposal concerning the impact upon affected employees of any contract for services requires the maintenance of wages and other economic benefits where legally possible.

(d) That the referenced 1995 and 1996 wage increases are either comparable to or exceed the increases within the comparable communities of Jackson, Kewaskum, Plymouth, Sheboygan Falls, Slinger, Port Washington and Thiensville.

(e) That the parties' economic settlement exceeds the current published cost of living figures.

(f) That the Union would not have voluntarily agreed to the

economic settlement if it had placed those in the bargaining unit at a disadvantage.

(g) That the Union has not presented any data showing that the stability of employment of any bargaining unit employee was affected as a result of the disputed contract for municipal services: that the Village's final offer and the contract with RUST E&I guarantees continued employment for those employees who wish to continue; that all affected employees continued working in the same location performing duties which were the same or similar to those previously performed; and that the Union has failed to show that any employee will, as a result of a contract for service, be deprived of benefits previously earned under the State's retirement trust.

(h) That no individual is guaranteed Village employment or a specific benefit, or is guaranteed the right to continue in the State of Wisconsin municipal employee pension program.

(7) That the *conditions of employment in comparable communities criterion* is neither relevant nor controlling.

(a) That the dispute at hand involves organizational structure, methods utilized and employees used to provide basic municipal services such as public works, wastewater treatment and water, which are within the realm of political decisions which vary from community to community.

(b) That there is no legitimate reason why the organizational structure or employees utilized to provide municipal services in one community has any relevance to what is done in another.

(c) Without prejudice to the above, that consideration of contract/subcontract language in comparable communities is not controlling: that the *Jackson and the Slinger agreements* permit subcontracting provided no unit employees are laid off or suffer reduced hours; that the *Kewaskum agreement* permits subcontracting on the same basis as the expired agreement; that the *Plymouth utility, the Port Washington and the Sheboygan Falls agreements* contain provisions similar to the Village final offer; and that the *Thiensville agreement* lists various management rights but contains no subcontracting provision.

(d) Pursuant to the WERC's prohibited practice decision, the Village must raise the issue of subcontracting in contract renewal negotiations.

(8) That the *interest and welfare of the public criterion* favors selection of the final offer of the Village.

(a) That *the economic advantage* gained by contracting for

municipal services makes the Village offer the more reasonable: that the RUST E&I projections presented to the Village indicate projected savings of $56,843 per year or $284,215 over a five year period, and that the Village additionally realized a $17,618 reduction in worker's compensation premium costs; that the actual net 1994 savings to the Village were $50,097; that the Village has determined that the 1995 savings from the RUST E&I contract amount to $60,124, and that RUST E&I's assumption of 56 budget line items has resulted in miscellaneous additional savings.

(b) That *various additional benefits of contracting out* render the Village's final offer more reasonable, and include a *cross training program, annual support services, annual instrumentation services, CADD system mapping* (streets), a *safety program, standardization of procedures,* an *emergency response plan, facilities and equipment evaluation,* and *various management programs;* that such value added programs represent a total value to the Village of $60,700.

(c) That the Union advanced possibility that a contract for administrative services would meet the Village's needs is not practical; that a contractor would be unwilling to assume the liability for an operation without control of the employees who were providing the services.

(d) That both the direct savings and the value added services received as a result of the Village's ability to contract for municipal services, are in the best interest and welfare of the public.

(9) That practical application of the sick leave proposal supports the Village's final offer.

(a) That the final offer of the Union would leave intact the contract provision providing for partial payment of accumulated sick leave upon retirement.

(b) That the Employer has already paid out a total of $30,365.50 for accumulated sick leave upon their transfer to RUST E&I on February 18, 1994.

(c) That upon either selection of the final offer of the Union or termination of the contract by the Employer, employees would return to Village employment without any sick leave, and/or that employees would also have the potential of being paid twice for the same benefit. That neither of these results is appropriate.

(d) That the final offer of the Village eliminates the possibility of double payment of the same benefit, and it also addresses potential restoration of sick leave.

(e) That the final offer of the Village is more reasonable in the above respects, and it should be selected by the Arbitrator.

(10) That the Village has demonstrated the *requisite need* and has provided *an adequate quid pro quo* in support of its proposal.

(a) That the Village has established the need for its proposed language change on the following bases: it intends to contract for municipal services; the WERC's prohibited practice decision indicates the need for modification of the management rights clause; the final offer eliminates any restriction on contracting and/or subcontracting and would permit the Village to elect to contract for services if it meets certain conditions; without the proposed language modifications contracting cannot occur, and the citizens of the Village would thereby be deprived of the economic benefits and operational efficiencies flowing from the contracting.

(b) That the concept of "need" in the context at hand, is different that the "business necessity" defense which may be utilized to justify changes in the status quo without bargaining. That the Village's "need" is established by the following considerations: the opportunity to restructure its public works, wastewater and water department provided by the resignation of two department heads and the transfer of one bargaining unit employee to the police department; the opportunity to create a structure where only one individual would be reporting to the Village Administrator, and he would be relieved of the day-to-day operational responsibility in the three areas; the opportunity to eliminate the day-to-day administration of approximately 56 separate budget line items; the elimination of matters concerning work performance, conduct and discipline of employees in the three areas; elimination of the obligation for operation of the three areas in compliance with EPA and DNR guidelines; the opportunity to gain efficiencies from cross training and training provided by the service provider; the opportunity to save the taxpayers approximately $50,000 in 1994, $60,000 in 1995 and $285,000 over the five year term of the contract for municipal services, and to receive approximately $60,000 worth of value added services as a direct result of such contract.

(c) That the Union inappropriately equates "need with *economic necessity*, in effect saying that if the Village isn't "broke" it has no need to contract for service.

(d) That an *adequate quid pro quo* for the Village's offer is reflected in the following: the parties have agreed upon appropriate wage increases over the term of the two year renewal agreement; the independent contract would be required to comply with the economic terms and conditions of

the collective agreement; no employee would lose his job as a result of the contract for services; all affected Village employees were transferred to employment with RUST E&I on February 18, 1994, and were all performing the same work in the same location as they were before the contract for services became effective; compensation for all employees who elected not to accept employment with the contractor; and guaranteed reemployment with the Village in the event of discontinuation of the contract for services. That the various assurances contained in the Village's final offer are also contained in the contract between the Village and RUST E&I.

(e) In addition to the above, that RUST E&I employees are eligible to participate in its *benefit cafeteria plan*, which provides for certain benefits not previously provided for Village employees, including a generous 401K savings/retirement plan.

(11) That no disruption of the bargaining unit would occur, in that it contains classifications which are unaffected by the contract, and the contractor is required to recognize the Union as the representative of its employees.

In its reply brief, the Village emphasized the following principal considerations.

(1) That the Union attack on the Village's *"value added"* cost savings misstates the evidence.

(a) That the Union claims that $15,000 in annual support services is not detailed with specificity, and it further confuses this area with the clerical assistance required of the Village.

(b) At the hearing, that Director of Public Works Leo Prusi outlined some of the value added projects, and the 1994 annual report provided by RUST E&I analyzed such projects performed in the first year of its contract.

(c) That the Union has provided no evidence to indicate that the services outlines in RUST's presentations to the Village and in its annual report, were either inaccurate or did not exist.

(2) That the Union's *"need" argument* is misplaced.

(a) That it cites the Village's tax levy in relation to the comparable communities in support of an argument that it need not cut costs to get in line with the comparables.

(b) That a municipality's tax levy reflects many things in addition to the cost of running government and providing

municipal services, including the *equalized value of property*, the *rate at which the levy is set*, and the *nature of services provided*.

(c) That the Union's argument would illogically require the Village to forego $50,000 to $60,000 in cost savings because it had a tax levy which was equal to or below surrounding communities.

(d) Given the nature of the issue and the position of the parties, can anyone believe that a voluntary agreement to allow the Village to contract for services would ever occur?

(e) That the Union's position is just one way of depriving the citizens of Saukville of the legitimate cost savings that can be achieved from contracting for services; in effect it says maintain the status quo and forget about the $50,000 to $60,000 annual savings.

(3) That the Union's *staff complement* argument is unsupported by evidence.

(a) That the Union argues that the bulk of the $50,000 to $60,000 annual savings are attributable to the elimination of one position.

(b) That while it can be expected that savings can occur from a reduction in the work force, many other sources of savings are identified in the record.[10]

(c) That reductions in the work force are a legitimate method of reducing costs, that there is no evidence that any employee lost a job due to the contract for services, and the Union has not alleged that the Village referenced cost savings were either untrue or did not actually occur.

(4) That the Union's *information complaint* is irrelevant to the resolution of this dispute.

(a) That while the Union faults the Village for its failure to provide requested economic information in a timely manner, there is no evidence in the record to support this charge.

(b) That the Village in its final offer indicated a cost saving of $50,000[11] which figure was not then challenged by the Union.

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[10] Citing the contents of Village Exhibits #16, #17 and #18, which identify various savings in the Wastewater Utility, the Water Utility and the Public Works operations.

[11] Village Exhibit #2

(c) As reflected in the prohibited practice decision, the Union was involved in every phase of the activity which led to the dispute.

(d) That all requested economic data has been provided to the Union and, other than in its brief, there has been no indication of Union dissatisfaction.

(e) While certain materials were prepared for the hearing, there is no indication that the Village ever intentionally withheld economic data from the Union.

(f) There is no indication that the bargaining position of the Union would have been any different had all of the data presented by the Village at the hearing been presented prior to that time.

In summary and conclusion, that the final offer of the Village is more reasonable in light of the statutory criteria and the evidence of record, and, accordingly, it should be selected and ordered implemented by the Arbitrator.

FINDINGS AND CONCLUSIONS

Prior to reaching a decision and rendering an award in these proceedings, the undersigned will offer certain preliminary observations relating to the *nature of the interest arbitration process*, including the *normal application of the statutory arbitral criteria in Wisconsin*, and the *significance of the status quo ante in the final offer selection process*. Thereafter the positions of the parties will be considered in light of various arbitral criteria, and the more appropriate of the two final offers will be selected and ordered implemented by the Arbitrator.

The Nature of the Interest Arbitration Process

As has been emphasized by the undersigned in many prior proceedings in Wisconsin and elsewhere, an interest arbitrator operates as an extension of the parties' normal collective negotiations process, and his or her normal role is to attempt to put the parties into the same position they would have occupied but for their inability to reach complete agreement at the bargaining table. This principle is well discussed and described in the following

excerpt from the widely respected and authoritative book by Elkouri and Elkouri:

> "In a similar sense, the function of the interest arbitrator is to supplement the collective bargaining process by doing the bargaining for both parties after they have failed to reach agreement through their own bargaining efforts. Possibly the responsibility of the arbitrator is best understood when viewed in that light. This responsibility and the attitude of humility that appropriately accompanies it have been described by one arbitration board speaking through its chairman, Whitley P. McCoy:
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> > 'Arbitration of contract terms differs radically from arbitration of grievances. The latter calls for a judicial determination of existing contract rights; the former calls for a determination, upon consideration of policy, fairness, and expediency, of what the contract rights ought to be. In submitting their case to arbitration, the parties have merely extended their negotiations - they have left to this Board to determine what they should in negotiations, have agreed upon. We take that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men have agreed to? ... To repeat, our endeavor will be to decide the issues, as upon their evidence, we think reasonable negotiators, regardless of their social or economic theories might have decided them in the give and take of bargaining..."[12]

In applying the above considerations, Wisconsin interest arbitrators closely examine and utilize the *various specific statutory arbitral criteria*, in addition to examining such additional factors as the parties' *past agreements* and their *bargaining history*, each of which fall well within the general scope of Section 111.70(4)(cm)(7)(j) of the Wisconsin Statutes. Accordingly, these factors will be separately addressed and considered by the undersigned, and they are entitled to appropriate weight in the final offer selection process in these proceedings.

The Normal Application of the Statutory Criteria

While statutory interest arbitrators in cases governed by Section 111.70(4)(cm)(7) of the Wisconsin Statutes are directed to consider the

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[12] Elkouri, Frank and Edna Asper Elkouri, How Arbitration Works, Bureau of National Affairs, Fourth Edition - 1985, pp. 104-105. (footnotes omitted)

various arbitral criteria described therein, these criteria have been neither ranked in terms of relative importance nor otherwise prioritized by the Legislature. It is widely recognized by interest arbitrators in Wisconsin and elsewhere, however, that while the relative importance of the various arbitral criteria will vary greatly from case to case, *comparisons* are normally the most frequently cited, the most important, and the most persuasive of the various criteria, and the most persuasive of these are normally the so-called *intraindustry comparisons*. These considerations are addressed as follows in the respected book by Irving Bernstein:

> "Comparisons are preeminent in wage determination because all parties at interest derive benefit from them. To the worker they permit a decision on the adequacy of his income. He feels no discrimination if he stays abreast of other workers in his industry, his locality, his neighborhood. They are vital to the Union because they provide guidance to its officials upon what must be insisted upon and a yardstick for measuring their bargaining skill... Arbitrators benefit no less from comparisons. They have the appeal of precedent and ... awards, based thereon are apt to satisfy the normal expectations of the parties and to appear just to the public.
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> * * * * *
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> a. *Intraindustry comparisons*. The intraindustry comparison is more commonly cited than any other form of comparison, or, for that matter, any other criterion. More important, the weight it receives is clearly preeminent; it leads by a wide margin in the first rankings of arbitrators. Hence there is no risk in concluding that it is of paramount importance in the wage-determining standards.
>
> * * * * *
>
> A corollary of the preeminence of the intraindustry comparison is the superior weight it receives when found in conflict with another standard of wage determination. The balancing of opposing factors, of course, is central in the arbitration process, and most commonly arises in the present context over an employer argument of financial adversity."[13]

The weight normally placed upon the comparison criteria is also reflected in the following additional excerpts from the Elkouris' book:

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[13] Bernstein, Irving, The Arbitration of Wages, University of California Press - 1954, pages 54-56, 57. (footnotes omitted)

> "Without question the most extensively used standard in interest arbitration is 'prevailing practice'. This standard is applied with varying degrees of emphasis, in most interest cases. In a sense when this standard is applied the result is that disputants indirectly adopt the end results of the successful collective bargaining of other parties similarly situated. The arbitrator is the agent through whom the outside bargain is indirectly adopted by the parties."[14]

What, however, of the Employer's recognition that Wisconsin's municipal interest arbitration process had historically been "*comparability driven,*" its attempt to distinguish the case at hand from such precedents, and its argument that the comparison criterion is not relevant in this dispute?[15] In this connection, the undersigned notes that the Village is seeking arbitral recognition of a principle which is not provided for in the statutes, and one which clearly flies in the face of interest arbitration precedent in Wisconsin and elsewhere; more importantly, the Arbitrator simply finds no logical or persuasive basis for abandoning the normal use of the comparison criterion in this case.

On the above bases it is clear to the undersigned that comparisons are normally the most frequently used and the most persuasive of the various arbitral criteria, that the most persuasive of these normally consists of so-called intraindustry comparisons[16], and that the comparison criteria should be accorded its normal weight in these proceedings.

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[14] How Arbitration Works, pages 104-105.

[15] At page 9 of its Post-Hearing Brief, the Village emphasized that the dispute at hand did not involve the typical *wages, hours and other benefits* and urged that "Given the nature of this dispute, the Village contends that how other communities provide for municipal services is not relevant to the resolution of this dispute."

[16] While the *intraindustry comparisons* terminology obviously derives from the private sector, the same underlying principles of comparison are used in public sector interest impasses; in this connection, the so-called *intraindustry comparison* groups normally consist of other similar units of employees employed by comparable governmental units.

The Significance of a Proposed Change in the Negotiated Status Quo Ante

The Employer proposed freedom to sub-contract work previously performed within the bargaining unit would represent a significant change in the negotiated status quo ante and would also eliminate the prospective impact of the ongoing litigation between the parties relating to the degree to which the right to subcontract existed under the expired agreement. Accordingly, the dispute involves questions relating to *the propriety of arbitral selection of final offers containing changes in the negotiated status quo ante.*

(1) The Union urges that the Employer, as the proponent of significant change, has the burden of establishing a very persuasive case for such change, including an appropriate quid pro quo.

(2) The Village urges that it had been placed in a complex dilemma by the Wisconsin Supreme Court's decision in Beloit Education Association v. WERC, 73 Wis. 2d 43 (1976y), wherein it had "...rejected the private sector standard which held mandatory bargaining was not required over subjects which involved a 'change of direction' of the employer's operation or if the employer's 'essential enterprise' was to be altered. *Libby McNeill & Libby v. Wisconsin Employment Relations Commission*, 48 Wis. 2d 271 (1970)", and that "...the nature of this case requires the Arbitrator to depart from the traditional methods utilized in the resolution of interest arbitration cases and look with favor on a rational change rather than support the *status quo.*"[17]

The underlying principles governing arbitral approval of changes in the negotiated status quo ante, including certain distinctions between the public and the private sectors, have previously been addressed as follows by the undersigned:

> "Certain important considerations must be kept in mind in addressing status quo questions in the interest arbitration process. It must be recognized that there is a significant distinction between private sector interest impasses, where the parties have the future right to strike or to lock out in support of their bargaining goals, versus public sector impasses, where the parties lack the right to undertake strikes or lockouts. A complete refusal to allow innovations or to consider changes in the status quo in the latter context, would operate to prevent unions from gaining the progressive and innovative changes achieved by their private sector counterparts in across the table

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[17] See Village's Post-Hearing Brief at pages 7-9.

bargaining, and such a refusal would also operate to prevent public sector employers from gaining important changes through the collective bargaining process, which changes have already been enjoyed by certain private and/or public sector counterparts.

The distinction between the public and the private sector interest arbitration processes, and the need for greater arbitral flexibility in consideration of proposed innovation or changes in the status quo in public sector disputes, where the parties lack the ability to strike or to lock out, has been addressed as follows by Arbitrator Howard S. Block:

> 'One of the most compelling reasons which makes it necessary for neutrals in public sector disputes to strike out on their own is the dearth of public bargaining history. The main citadels of unionism in private industry have a continuity of bargaining history going back to the 1930s. Public sector collective bargaining, on the other hand, is still a fledgling growth. In many instances its existence is the result of an unspectacular transition of unaffiliated career organizations responding to competition from AFL-CIO affiliates. As we know, a principal guideline for resolving interest disputes in the private sector is prevailing industry practice -- a guideline expressed with exceptional clarity by one arbitrator as follows:
>
> > 'The role of interest arbitration in such a situation must be clearly understood. Arbitration in essence, is a quasi-judicial, not a legislative process. This implies the essentiality of objectivity -- the reliance on a set of tested and established guidelines.
> >
> > In this contract making process, the arbitrator must resist any temptation to innovate, to plow new ground of his own choosing. He is committed to producing a contract which the parties themselves might have reached in the absence of the extraordinary pressures which led to the exhaustion of their traditional remedies.
> >
> > The arbitrator attempts to accomplish this objective by first understanding the nature and character of past agreements reached in a comparable area of the industry and in the firm. He must then carry forward the spirit and framework of past accommodations into the dispute before him. It is not necessary or even desirable that he approve what has taken place in the past but only that he understand the character of established practices and rigorously avoid giving to <u>either party</u> that which they could not have secured at the bargaining table.'

Viewed in the light of the foregoing principles, the public sector neutral, I submit, does not wander in an unchartered field even though he must at times adopt an approach diametrically opposite to that used in the private sector. More often than in the private sector, he must be innovative; he must plow new

> ground. He cannot function as a lifeless mirror reflecting precollective negotiation practice which management may yearn to perpetuate but which are the target of multitudes of public employees in revolt.'

Although Arbitrator Block was principally addressing employer resistance to union requested change or innovation in a context in which the union lacked the ability to strike, the principle has equal application to the situation where an employer is proposing innovation or change, which is being resisted by a union. If public neutrals were precluded from recognizing change or innovation, the matter could not be rectified by the parties in their next negotiations, at which time they had the power to undertake economic action in support of their demands! A union dedicated to avoidance of change in a context where all impasses moved to binding interest arbitration, rather than being open to strikes and lockouts, could forever preclude an employer from achieving change, even where it was desirable or necessary, and/or where the change had achieved substantial acceptance elsewhere." [18]

* * * * *

"...it is clear that Wisconsin interest arbitrators attempt to operate as *extensions* of the bargaining processes, they normally attempt to put parties into the same position they would have occupied but for their inability to reach agreement at the table, they normally closely consider the status quo ante, either past practice or negotiated, and they normally attempt to avoid *substituting* themselves for the bargaining process by giving either party what they would not have been able to achieve at the bargaining table. In public sector interest disputes, however, where the parties lack the ability to strike or to lock-out in support of the bargaining objectives, neither party should be able to frustrate the bargaining process by intransigence, and interest neutrals must be somewhat more flexible in considering demands for change from *either party*; to completely reject innovation or change, would be to doom the frustrated proponent of change from ever gaining such goal(s) in either the negotiations or the statutory interest arbitration processes, even though such change was fully justified by other considerations. Even in dealing with public sector disputes, however, interest neutrals normally require *a very persuasive basis* to be established in support of any demand to add new language and/or new or innovative benefits, and some form of *quid pro quo* may also be required in support of the selection of an offer containing significant changes or innovations; in addressing the *quid pro quo element*, interest neutrals should consider the type of give and take bargaining which might have enabled the parties to have voluntarily

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[18] Mukwonago School District, WERC Case 39, No. 39879, INT/ARB-4705, December 15, 1988, pp. 24-26. (Included quotation from Block, Howard S., Criteria in Public Sector Interest Disputes, Reprint No. 230, Institute of Industrial Relations, University of California, Los Angeles, California, 1972, pp. 164-165; and from Des Moines Transit, 38 LA 666.)

reached agreement on the disputed item(s)."[19]

As is clear from the above, therefore, Wisconsin public sector interest arbitrators, functioning as extensions of the contract negotiations process and attempting to put the parties into the same position they would have reached but for their inability to achieve complete agreement, are prepared to recognize the need for innovation or for change in the status quo ante.[20] As urged by the Union, however, such recognition is normally conditioned upon the proponent of such innovation or change establishing that a legitimate problem exists which requires attention and that the disputed proposal reasonably addresses the problem, and frequently advancing an *appropriate* quid pro quo in support of the proposed change or innovation. In the latter connection, the appropriateness of any quid pro quo would depend upon the interest arbitrator's determination of what would reasonably have been required for the parties to have reached agreement at the bargaining table?

What, however, of the Employer's argument that the peculiar nature of the case at hand, including the criteria adopted and utilized by the Wisconsin Courts and the WERC in determining whether an item is a *mandatory* or a *permissive* item of bargaining, requires a departure from the traditional arbitral handling of proposed changes in the status quo ante? In this connection it principally emphasized the following summarized Wisconsin case law:

(1) In Libby, McNeill & Libby v. WERC, 48 Wis. 2d 272 (1970), the Wisconsin Supreme Court was faced with the matter of whether a private sector Employer's economically motivated *decision* to

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[19] See the decision of the undersigned in Shiocton School District, Case 10, No. 47058, INT/ARB-6389, December 31, 1993, at page 19.

[20] In this connection, see the November 10, 1992 decision of the undersigned in Algoma School District, Case 18 No. 46716 INT/ARB-6278.

mechanize its harvesting of cucumbers was a *mandatory bargaining item* under Wisconsin law. In determining that the decision itself was not a mandatory bargaining item and that the Employer was required only to *effect bargain,* the Court indicated in material part as follows:

> "From Fibreboard...we can conclude that most management decisions which change the direction of the corporate enterprise, involving a change in capital investment, are not bargainable.[21]
>
> * * * * *
>
> We conclude that the management decision in the instant case was not a mandatory subject of collective bargaining within the meaning of sec. 111.02 (5), Stats.
>
> * * * * *
>
> This is not to hold that the employer is absolved of all duty to bargaining with a union when he makes such a managerial decision. Once such a decision is made the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision...Such bargaining over the 'effects' of the decision on the displaced employees may cover such subjects as severance pay, vacation pay, seniority, and pensions, among others, which are necessarily of particular importance and relevance to the employees...
>
> * * * * *
>
> We conclude that 'effects' of the decision were bargainable."

(2) In Beloit Education Association v. WERC, 73 Wis.2d 43 (1976), the Wisconsin Supreme Court was called upon to review several determinations of bargaining status by the WERC and the lower court on various items involving a public school system. In its decision it addressed and considered each item separately, and indicated in material part as follows:

> "...Here we deal with collective bargaining between a local school board and a teachers' association. Both board and association are involved, not only in the collective bargaining process as statutorily defined, but also in the

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[21] In Fibreboard Paper Products Corporation v. NLRB, 379 U.S. 203 (1964)The U.S. Supreme Court determined that the contracting out of certain maintenance work, which resulted in the replacement of employees in a bargaining unit with those of an independent contractor to do the same work under similar employment conditions, was a *mandatory bargaining subject.* It concluded that the employer was required to ***decision*** bargain with the union even if its unilateral decision to subcontract had been undertaken for economic or nondiscriminatory reasons.

political process as constitutionally assured. The school board is an employer under the statute, and it is also a public body of elected officials, with powers and duties for the operation of the school system in the public interest. As such employer it must bilaterally 'meet and confer' and may agree in a 'written signed document' as to matters involving 'wages, hours and conditions of employment.' As such public body and as to matters of school management educational policy, it cannot be required to collectively bargain with the collective bargaining agent for its employees. The teachers' association here is a collective bargaining agent under the statute, and also a professional association of teachers concerned with matters of school system management and educational policy. As such bargaining agent the association can collectively bargain with the board as to matter of 'wages, hours and conditions of employment.' As a professional association it may also be heard as to matters of school and educational policies, but it makes such contribution or input along with other groups and individuals similarly concerned.

* * * * *

...What is fundamentally or basically or essentially a matter involving 'wages, hours and conditions of employment' is, under the statute, a matter that is required to be bargained. The commission construed the statute to require mandatory bargaining as to (1) matters which are primarily related to 'wages, hours and conditions of employment,' and (2) the impact of the 'establishment of educational policy' affecting the 'wages, hours and conditions of employment.' We agree with that construction."

(3) In Unified School District No. 1 of Racine County v. WERC, 81 Wis 2d 89 (1977), the Wisconsin Supreme Court was faced with the District's refusal to bargain with a Union over a *decision* to subcontract its food service program, which the WERC had determined to have violated the District's statutory duty to bargain. In denying the appeal, the Court indicated in part as follows:

"...the legislature intended, and in fact declared, that the rights and responsibilities of all parties in the area of collective bargaining in private employment relations were to be distinguished from those in the area of municipal employment relations.

* * * * *

...moreover, fundamental differences between private and public employment make the Libby 'change of direction' or 'essential enterprise' test inappropriate...

* * * * *

The applicable standard is...the 'primary relationship' standard established in Beloit. The question is whether a particular decision is primarily related to the wages, hours and conditions of employment of the employees, or whether it is primarily related to the formulation or management of

> public policy. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people..."

In applying the above test to the case before it the Court added in part as follows:

> "...The decision to subcontract the district's food service program did not represent a choice among alternative social or political goals or values.
>
> The policies and functions of the district are unaffected by the decision. The decision merely substituted private employees for public employees. The same work will be performed in the same places and in the same manner. The services provided by the district will not be affected. The decision would presumably be felt in only two ways; it is argued that it would result in a financial saving to the district, and the district's food service personnel will have to bargain with AFA for benefits which they enjoyed before the decision, including the loss of some 2,304 accumulated sick leave days and participation in the Wisconsin Retirement Fund.
>
> The primary impact of this decision is on the 'conditions of employment'; the decision is essentially concerned with wages and benefits, and this aspect dominates any element of policy formulation. The Commission and the circuit court were therefore correct in holding that bargaining was mandatory with respect to the decision."

In consideration of the above, the Village urges that the Wisconsin Supreme Court's rejection in *Beloit Education Association* and in *Unified School District of Racine County*, of the *Libby, McNeill & Libby* enunciated private sector standard that mandatory bargaining was not required over subjects which involved a "*change of direction*" of an employer's operation or of the employer's "*essential enterprise*," had placed it in the following described dilemma: if it took the risk that its decision to contract out was *permissive* and refused to bargain, the contract would be "out the window" if this decision was later determined to be a *mandatory* bargaining item; alternatively, if it initially regarded its decision as a *mandatory* bargaining subject, it could ultimately be required to submit what is basically a *political* decision to an interest arbitration process which substantially favors the status quo. On these bases, argues the Employer, the Arbitrator

should depart from traditional interest arbitration methods, and should favor a *rational change* rather than support the *status quo*.

Despite its perceived dilemma, the undersigned finds the Employer's arguments unpersuasive for the following principal reasons: *first*, it seems clear to the undersigned that the sub-contracting in question would normally have been regarded as a mandatory bargaining item under *either* the private sector or the public sector tests described in the referenced cases; *second*, and regardless of the Arbitrator's opinion relative to the bargaining status of the disputed subcontracting decision, the undersigned lacks authority to unilaterally disregard the arbitral criteria contained in Section 111.70(4)(cm)(7) of the Wisconsin Statutes; and, *third*, as discussed above, public sector interest arbitrators are more inclined to select final offers which reflect innovations and/or departures from the status quo ante than are private sector interest neutrals.

On the above bases, the undersigned has preliminarily concluded that no appropriate basis has been established for disregarding the normal standards utilized in evaluating the relative merits of final offers which are innovative and/or which propose change in the status quo ante.

With the above as background the undersigned will next consider the various arbitral criteria which bear upon the final offer selection process in these proceedings.

The Comparison Criteria.

In applying this criterion *the primary intraindustry comparison group* used by the parties in their prior negotiations or established in prior arbitrations, will rarely be disturbed in subsequent interest arbitrations. In his decision and award issued on February 26, 1994, Arbitrator Zeidler determined that this group consisted of the municipalities of Jackson,

Kewaskum, Plymouth, Saukville, Sheboygan Falls, Slinger, Port Washington and Thiensville.[22] Accordingly, these municipalities comprise the primary intraindustry comparison group for use in these proceedings.

An examination of the subcontracting practices of the above group indicates that *Jackson and Slinger* apparently allow for some subcontracting subject to the requirement that no bargaining unit employees are laid off or have their hours reduced, *Kewaskum* apparently allows for some subcontracting provided no regular, full time employees are laid off, *Plymouth* apparently allows for some subcontracting subject to the obligation to effect bargain with the Union, and *Port Washington and Sheboygan Falls* have no specific subcontracting limitations in their agreement (which silence would not normally constitute a waiver of bargaining on a mandatory item). By way of comparison, the final offer of the Union would allow subcontracting, provided that it would not be used to displace full-time bargaining unit employees, while the Employer's final offer, including the documents incorporated by reference into its proposed new Section 3.01, would reserve to it relatively broad subcontracting rights.

Since the final offer of the Union is close to various of the referenced intraindstry comparables, and since the final offer of the Employer differs from all of the comparables in various signficant respects, the undersigned has preliminarily concluded that consideration of the intraindustry comparison criterion clearly favors the selection of the final offer of the Union in these proceedings.

The Past Agreements and the Bargaining History of the Parties

As referenced earlier, both the *contents of parties' past agreements* and their *bargaining history* are important criteria in the interest arbitration

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[22] Employer Exhibit #5 at page 30.

process, and the undersigned will next consider the weight that these considerations should carry in the final offer selection process in these proceedings.

Contrary to the thrust of various of the arguments advanced by the Employer relating to the practicality of decision bargaining relative to contracting out, the law and the public policy of both the United States and the State of Wisconsin recognize the efficacy of and require such bargaining. This principle is very well expressed in the following excerpts from the seminal decision of the United States Supreme Court in Fibreboard Paper Products Corporation v. NLRB, which decision was cited by the Wisconsin Supreme Court in 1970 in Libby, McNeill & Libby v. WERC, 48 Wis. 2d 272.

> "The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.
>
> The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiations has been highly successful in achieving peaceful accommodation of the conflicting interests. Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.
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> * * * * *
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> ...While 'the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of

> his position,' *Labor Board v. American Nat'l Ins. Co.*, 343 U.S. 395, 404, it at least demands that the issue be submitted to the mediatory influence of collective negotiations. As the Court of Appeals pointed out,
>
> > 'it is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly.'
>
> We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of 'contracting out' involved in this case - the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment - is a statutory subject of collective bargaining under §8(d)."[23]

In applying the above described principles to the dispute at hand, the Arbitrator emphasizes two major considerations: *first*, that a *negotiated* provision of the prior labor agreements limited the Employer's right to subcontract work to situations *where the action was not used to displace full-time bargaining unit employees*[24], which limitation clearly precluded its unilateral removal from the bargaining unit of the five employees who were affected by its February 14, 1994 contract with RUST E&I[25]; and, *second*, that the Village, due to its ongoing subsequent appeals, never complied with the WERC's October 31, 1994 order which directed it to restore the status quo ante by returning the subcontracted work to the bargaining unit and reinstating the affected employees. Despite the Employer's argument that if it had not bargained before, it had done so in the negotiations leading to these

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[23] Fibreboard Paper Products Corporation v. NLRB, 379 U.S. 203 (1964), 50 LC ¶19,384, pg. 32762.

[24] See Article III, Section K of Village Exhibit 1.

[25] In this connection note the similar conclusion of Examiner Lionel Crowley at page 20 of Village Exhibit #6, wherein he indicated, in part, as follows: "The Village breached the status quo when it subcontracted its Water, Wastewater and DPW operations to RUST because five employees of the Village were displaced contrary to the plant language of Article III, Section 301,K as part of the dynamic status quo."

proceedings, it is apparent to the undersigned that any such *bargaining*, under the circumstances then present, fell short of reasonably and realistically *submitting the issue to the mediatory influence of collective negotiations.*

On the above bases, the Impartial Arbitrator has preliminarily concluded that the requisite arbitral attempt to put the parties into the same position they would have reached if their preliminary negotiations had been successful, is significantly complicated in these proceedings by the obvious fact that the parties were precluded from engaging in full, meaningful and effective face to face bargaining by virtue of the Village's unilateral violation of a negotiated provision contained in the prior agreement, and its ongoing appeals of the disposition of the pending prohibited practice charges which evolved therefrom. Accordingly, the undersigned has concluded that arbitral consideration of the past agreements and the recent bargaining history of the parties, clearly favors selection of the final offer of the Union in these proceedings.

Status Quo Considerations

In this area, the undersigned is faced with two principal considerations. Should a quid pro quo be required in the case at hand and, if so, does the record indicate that this requirement has been met?

In the above connections, it is clear that the Employer is proposing a very significant change in the status quo ante. Not only is the unilateral right of an employer to sub contract bargaining unit work always of major importance to the parties, but two other considerations enhance its importance in the case at hand: *first*, the Employer's contract with RUST E&I has resulted in the elimination of five out of a total of seven bargaining unit jobs and, in effect, it threatens the continued viability of the original bargaining unit; and, *second*, it entails the proposed reversal of the pending

WERC decision which rejected the Employer's previous unilateral sub contracting, the exercise of the same right sought by it in these proceedings. On these bases, it is clear to the undersigned that the case at hand falls well within that category of cases which would normally require an adequate and appropriate quid pro quo.

What next of the Employer's contention that it had provided an approrpriate quid pro quo, principally citing the following considerations: the agreed upon wage increases; the fact that the economic terms and conditions of the agreement would apply to the contractor; the fact that no affected employee would lose his job; the provision for compensation for those who elected not to accept employment with the contractor; and guaranteed reemployment in the event of discontinuation of the contract for services. While these items address the affected employees' major short term interests, the protection of their long term interests are certainly not as clear. Further, the cited items principally provide for retention of otherwise agreed upon benefits and conditions of employment, rather than providing any additional quid pro quo for their removal from the original bargaining unit and the loss of their Village employment.

On the above bases, the undersigned has preliminarily concluded that arbitral consideration of the normal criteria governing proposed changes in the negotiated status quo ante, supports the selection of the final offer of the Union in these proceedings.

The Interest and Welfare of the Public Criterion

In this connection, the Employer basically relies upon the significant levels of alleged monetary savings to the Village, urges that such savings are in the public interest, and submits that this criterion should be given substantial weight in these proceedings. The Union challenges the amounts of

the alleged savings, and urges that they do not justify determinative weight for the interest and welfare of the public in these proceedings.

The weight placed upon the interest and welfare of the public criterion varies greatly from case to case. While it normally commands determinative weight in situations involving an absolute inability to pay on the part of a municipality, the reverse is not true, in that the ability to save money does not alone require a decision favoring an employer in a subcontracting dispute. If monetary savings were the determining criterion in such disputes, employers could have virtual free rein in opting out of bargaining relationships, through the mere expedient of demonstrating at least some level of monetary savings resulting therefrom.

The Arbitrator also notes that when an employer subcontracts employee services and evaluates the economic results evolving therefrom, only those portions of the savings directly attributable to the movement of the affected employees from one employer to another are normally material and relevant in subsequent rights or interest arbitration proceedings which either directly or indirectly challenge such action.[26] The record in the case at hand is unclear as to specifically how much money, if any, was actually saved by the disputed subcontracting.

In accordance with the above, the undersigned notes that the situation

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[26] In this connection see also the October 31, 1994 decision of the Hearing Examiner at page 20 of Village Exhibit #6, wherein he indicated in part as follows relative to an Employer proferred *business necessity* defense to the charges then under consideration:

> "As to business necessity, the record fails to show any. The Village could have contracted out the supervisory duties and saved money. How could the Village save money when the employes stayed in their jobs at the same rate of pay with similar benefits? This defense is not proven by the evidence."

at hand involves no claim of inability to pay, the record does not clearly establish the amount of any savings attributable to the disputed sub-contracting, and there is no other evidence establishing that the Village should be economically shielded from being bound by an otherwise justified settlement. Accordingly, the Impartial Arbitrator has preliminarily determined that the interest and welfare of the public criterion cannot be assigned significant or determinative weight in the final offer selection process in these proceedings.

Miscellaneous Remaining Considerations

The undersigned has carefully considered all of the remaining arbitral criteria contained in Section 111.70(4)(cm)(7) of the Wisconsin statutes. Due to the nature of the single impasse item in these proceedings, however, the Arbitrator has determined that no significant additional weight in the final offer selection process should be assigned to the *lawful authority of the employer*, the *stipulations of the parties*, *comparisons other than those addressed above*, *cost of living considerations*, *overall level of compensation considerations*, and/or *changes during the pendency of the arbitration hearing*.

Summary of Preliminary Conclusions and Selection of Final Offer

As addressed in greater detail above, the Impartial Arbitrator has preliminarily considered the *nature of the interest arbitration process*, the *normal application of the statutory arbitral criteria in Wisconsin*, and the *significance of the status quo ante in the final offer selection process*, and has reached the following summarized, principal preliminary conclusions.

(1) The primary role of a Wisconsin interest arbitrator is to operate as an *extension of the parties' contract negotiations*, and he or she will normally attempt to *place the parties into the same position they would have occupied, but for their inability to reach full agreement at the bargaining table.* In applying these considerations, Wisconsin interest arbitrators closely examine and utilize the various *specific statutory arbitral criteria*, in addition to examining such additional factors as the parties' *past*

agreements and their *bargaining history*, each of which fall well within the general scope of Section 111.70(4)(cm)(7)(j) of the Wisconsin Statutes.

(2) Although the Wisconsin Legislature has not prioritized the various statutory arbitral criteria, the *comparison criterion* is normally the most important and persuasive of the various criteria, and the so-called *intraindustry comparison* is normally regarded as the most important of the various comparisons.

There is nothing in the record in the case at hand which would justify arbitral departure from these principles, and the comparison criteria should be accorded its normal weight in these proceedings.

(3) The *proponent of innovation or change in the status quo ante* must normally establish that *a legitimate problem exists* which requires attention and that *the disputed proposal reasonably addresses such problem*, and must frequently advance *an appropriate quid pro quo* in support of such proposal.

There is nothing in the record in the case at hand which would justify arbitral disregard of the normal standards utilized in evaluating the relative merits of final offers which are innovative and/or which propose change in the status quo ante.

(4) Arbitral consideration of the *intraindustry comparison criterion*, clearly favors the selection of the final offer of the Union in these proceedings.

(5) Arbitral consideration of the *past agreements* and the *recent bargaining history* of the parties, clearly favors selection of the final offer of the Union in these proceedings.

(6) Arbitral consideration of the *normal criteria governing proposed changes in the status quo ante*, support selection of the final offer of the Union in these proceedings.

(7) Arbitral consideration of the *interest and welfare of the public criterion* indicates that it should not be accorded significant or determinative weight weight in the final offer selection process in these proceedings.

(8) Due to the nature of the single impasse item in these proceedings, no significant additional weight in the final offer selection process should be assigned to the remaining arbitral criteria contained in Section 111.70(4)(cm)(7) of the Wisconsin Statutes.

Based upon a careful consideration of the entire record, including a review of all of the statutory criteria, the Impartial Arbitrator has preliminarily concluded, for the reasons described above, that the final offer of the Union is the more appropriate of the two final offers.

AWARD

Based upon a careful consideration of all of the evidence and arguments, and a review of all of the various arbitral criteria provided in Section 111.70(4)(cm)(7) of the Wisconsin Statutes, it is the decision of the Impartial Arbitrator that:

(1) The final offer of the Union is the more appropriate of the two final offers before the Arbitrator.

(2) Accordingly, the final offer of the Village of Saukville Employees Union, hereby incorporated by reference into this award, is ordered implemented by the parties.

William W. Petrie

WILLIAM W. PETRIE
Impartial Arbitrator

February 24, 1996