ARBITRATION OPINION AND AWARD

In the Matter of Arbitration	)	
Between	)	
WAUPACA COUNTY (Highway Unit)	)	CASE 98 NO. 54140 INT/ARB 7973
And	)	Decision No. 28850-A
WAUPACA COUNTY HIGHWAY DEPARTMENT EMPLOYEES UNION, LOCAL 1756, AFSCME, AFL-CIO	)	

Impartial Arbitrator

William W. Petrie
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Hearing Held

Waupaca, Wisconsin
March 7, 1997

Appearances

For the District

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For the Union

WISCONSIN COUNCIL 40,
AFSCME, AFL-CIO
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BACKGROUND OF THE CASE

This is a statutory interest arbitration proceeding between Waupaca County and the Waupaca County Highway Department Employees Union, Local 1756, AFSCME, AFL-CIO, with the matter in dispute the terms of a renewal labor agreement covering January 1, 1996 through December 31, 1998, with the sole item in dispute the Employer's demand for a contractual 6.5% cap on its payment of the employees' share of the Wisconsin Retirement Fund contributions, versus the Union's demand for no change in this area.

The parties exchanged initial proposals on September 25, 1995 and they met on three occasions thereafter, but were unable to reach full agreement. The Union on May 8, 1996 filed a petition with the Wisconsin Employment Relations Commission seeking final and binding arbitration of the impasse pursuant to Section 111.70(4)(cm)(6) of the Wisconsin Statutes. Following an investigation and determination of the existence of a deadlock by a member of the Commission staff, the County and the Union exchanged final offers on July 30 and August 1, 1996, respectively. The Commission on September 9, 1996 issued certain *findings of fact, conclusions of law, certification of results of investigation and an order requiring arbitration*, and on December 26, 1996 it issued an *order appointing arbitrator* directing the undersigned to hear and decide the matter.

An interest arbitration hearing took place before the undersigned in Waupaca, Wisconsin on March 7, 1997, at which time both parties received full opportunities to present evidence and argument in support of their respective positions, and both thereafter closed with the submission of post hearing briefs and reply briefs, after which the record was closed by the undersigned effective May 23, 1997.

THE FINAL OFFERS OF THE PARTIES

The final offers of both parties, hereby incorporated by reference into this decision, consist of the following:

(1) The *final offer of the Employer* proposes as follows:

"1. Incorporate Tentative Agreements as attached hereto.

2. Article 19 - Retirement - Modify to read:

The County will pay up to 6.5% of the employee's share of the Wisconsin Retirement Fund."

(2) The *final offer of the Union* proposes as follows:

"All provisions of the 1994-1995 Collective Bargaining Agreement, including all side letters and memoranda of understanding, shall remain unchanged for the successor agreement commencing January 1, 1996, except for the attached tentative agreements."

THE ARBITRAL CRITERIA

Section 111.70(4)(cm)(7) of the Wisconsin Statutes directs the Arbitrator to utilize the following criteria in arriving at a decision and rendering an award:

"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 to 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 shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r.

7r. 'Other factors considered.' In making any decision under the arbitration procedures 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 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 and excused time, insurance and pension, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration 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) That the identification of the primary external comparables should not be in dispute, and should consist of the contiguous counties of Marathon, Outagamie, Portage, Shawano, Waushara and Winnebago.

(2) That arbitral consideration of the comparables fails to support the selection of the final offer of the County.

(a) That the bargaining unit in these proceedings is one of five represented units within the County, and the remainder of County employees are covered by its Personnel Policies and Procedures last revised in May of 1995.[1]

(b) That three internal bargaining units have contract language capping the County's employee contribution to WRS at 6.5%, and two bargaining units and the non-represented employees have contract or policy language which requires the payment of the full costs of such contributions.

(c) That the comparables and the bargaining history fail to support the county's final offer for various reasons.

(d) That some of the internal bargaining units in the County may have agreed to a WRS cap in their initial contract negotiations, at which time they may have been in a weaker bargaining position, which situation should be considered by the Arbitrator in these proceedings.[2]

(e) That the lack of complete internal consistency on the WRS benefit, detracts from its position in these proceedings.

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[1] Citing the contents of Union Exhibit #47.

[2] Citing *the decision of Arbitrator Sherwood Malamud* in London School District, Dec. No. 28152-A, April 1995.

(i) That the internal pattern of administration of the WRS payment benefit is inconsistent.[3]

(ii) That the package of fringe benefits available to the Union's members is inferior to those available to the external comparables.

(iii) That the County is reaping a substantial savings in health insurance premium costs in comparison to the external comparables.

(iv) That if the role of an interest arbitrator is to put the parties into the same position that they would have reached had they been willing and able to do so, it is clear that the final offer of the Union should be adopted in these proceedings.

(f) That the County's total benefits package is inferior, in various respects, to that of the external comparables.

(i) That the above conclusion is supported by arbitral consideration of the *paid vacation*, the *paid holidays*, the *paid sick leave*, the *long term disability insurance*, the *life insurance*, the *dental insurance*, and the *health insurance* fringe benefits.[4]

(ii) That the fact that the County's current WRS benefit is superior to the external comparables, does not begin to compensate for its comparatively substandard fringe benefits package.

(g) That the bargaining history supports the position of the Union in these proceedings, in that all prior agreements were the result of voluntary bilateral negotiations, and the disputed language has been in the agreement since at least 1971.

(i) That the interest arbitrator should operate as an extension of the collective negotiations process, should attempt to put the parties into the same position they would have reached at the bargaining table, and, in doing so, should closely examine the parties *past practices* and their *negotiations history*.[5]

(ii) That the Employer never offered a quid pro quo for its proposed change, without which all matters would have been agreed upon had it simply dropped its WRS cap proposal.

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[3] Citing *the decision of Arbitrator June Weisberger* in Ozaukee County (Highway Department), Dec. No. 26100-A, April 1990, in support of the proposition that an employer's treatment of non-represented employees may be of major significance in the final offer selection process for a unit of represented employees.

[4] Principally citing the contents of Union Exhibits 6, 18, 19, 21, 23, 25, 27, 31, 33, 34, 35, 36, 37 and 38.

[5] Citing *the decision of the undersigned* in Iowa County (Courthouse & Social Services), Case 64, No. 52908, INT/ARB 7697, April 1997.

(iii) That the Arbitrator can operate as an extension of the bargaining process, and can put the parties into the position they should have reached in bargaining by selecting the final offer of the Union.

(3) That the Union disputes the County's attempt to improperly change the status quo through the interest arbitration process.

(a) That the final offer of the County represents a *fringe benefit concession* for the Union, for which there is no justification and no quid pro quo.

(b) In the above connection, that the bargaining unit employees have long been protected from fluctuations in the retirement fund contribution rate; if it is capped at 6.5%, as proposed by the County, they may be required in the future to pay for a fringe benefit that has historically been funded in full by the Employer.

(c) That the demand of the County does not address an existing problem, it has not established a need for change, and it is simply reaching for a concession through the interest arbitration process because it has nothing to lose in so doing.

(d) That even if the County's offer was supported by a need for innovation or change, arbitrators have long required the proposing party to provide an appropriate quid pro quo for any such changes.[6]

(4) That the Union's final offer is supported by various statutory criteria.

(a) Under the *factor given greatest weight* criterion, that the County has no ability to pay argument, and its significant additional taxing authority weakens its argument for a WRS benefits concession.

(b) Under the *factor given greater weight* criterion, that the Waupaca County economy is quite healthy, and it will allow it to bear the risk for absorbing future WRS benefit rate increases.

(c) That the *stipulations of the parties* criterion should be considered, in that there is no evidence in the record of any quid pro quo having been agreed upon by the parties.

In its reply brief, the Union emphasized or reemphasized the following principal considerations and arguments.

(1) That the County's description of the positions of the Union and various of its other arguments are inaccurate and misplaced, as discussed below.

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[6] Citing the following arbitral decisions: *Arbitrator Sherwood Malamud* in D.C. Everest Area School District, Dec. No. 24678-A, February 1988, and in Belmont School District, Dec. No. 27200-A, October 1992; *Arbitrator Rose Marie Baron* in Stanley-Boyd School District, Dec. No. 26887-A, August 1991; *Arbitrator Byron Yaffe* in City of Ashland (Water Utilities), Dec. No. 26076-A, December 1989.

(2) Regarding *the concept of internal consistency calling for the* selection of the County's *final offer*, that the following considerations should be determinative.

(a) That various of the cases cited by the Employer are distinguishable from the case at hand.[7]

(i) In the case at hand, that uniform acceptance of the County's WRS language is not achieved by the County's final offer, and there is no cost savings to be achieved by selection of the County's final offer.

(ii) That the Union should prevail on the following principal bases: *first*, the County does not have a consistent set of fringe benefits, and the WRS benefits would remain inconsistent, even with the selection of its final offer; *second*, that the Union does not regard the County's final offer as reflective of the norm; *third*, that it is the County's duty to justify its proposed change in the status quo, not the Union's; *fourth*, that even if the County had demonstrated a need to change the status quo, its offer does not contain any quid pro quo; and, *fifth*, that the Union does not have to justify its current WRS contract language, because it has always had the disputed language.

(b) That the County's final offer is not fully supported by the internal collective bargaining comparables, in that there is no "overwhelming consensus for the County's final offer, in that two of five bargaining units and various non-represented employees have WRS language requiring the County to pay the full cost of this fringe benefit.

(c) That County references to continued internal inequity and dissention are unsupported by evidence in the record.

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[7] Citing consideration of the following cases: *Arbitrator Neil Gundermann* in City of Oshkosh, Dec. No. 26923-D, March 1993, wherein the case involved a change in health insurance language where five of six units had the language sought by the Employer; *Arbitrator Chatman* in City of Oshkosh Dec. No. 27273-A, and Dec. No. 27274-A, June 1993, wherein the Arbitrator opined that when employers seek uniformity for appropriate management reasons, it is not a mandate for all unions to comply; *Arbitrator Zel Rice* in Phillips School District, Dec. No. 28356-A, August 1990, was considering various impasse items within the context of an initial contract; *Arbitrator Daniel Nielsen* in Village of Greendale, Dec. No. 25579-A, March 1989, opined that uniformity of benefits was not so important in the face of mixed internal comparables; *Arbitrator Sharon Imes* in Barron County Highway Department, Dec. No. 18597-A, February 1982, dealt with the Union as the moving party in the context of the employer's consistent efforts to maintain uniform benefits for all internal bargaining units; *Arbitrator Zel Rice* in Manitowoc School District, Dec. No. 27226-A, October 1992, did not find either proposal to be more acceptable on the matter of WRS contributions, and he did not endorse the employer's theory of fringe benefits consistency; *Arbitrator Richard Bilder* in Outagamie County Sheriff's Department, Dec. No. 27849-A, June 1994, determined that the Union had failed to show good reason to change the status quo, where the County had the advantage of internal consistency on the fringe benefit in question; *Arbitrator Friess* in Pierce County Sheriff's Department, Dec. No. 28187-A, April 1995, determined that the Employer had demonstrated a need for a change and had offered a quid pro quo.

(3) Regarding *the concept of the external comparables overwhelmingly supporting the County's final offer*, that the following considerations should be determinative.

(a) That various cases cited by the Employer are distinguishable from the case at hand.[8]

(b) That the WRS payment fringe benefit is only one of many benefits available within the bargaining unit and among the external comparables.

(c) That the County is asking the Arbitrator to award it a fringe benefit concession that it failed to negotiate with the Union, and for which it never offered a quid pro quo in negotiations.

(4) Regarding *the concept that the County had satisfied the need for a quid pro quo by setting the WRS percentage higher than required by law*, that the following considerations should be determinative.

(a) That the Company's assertion that its proposal incorporates a quid pro quo is false; that the fact that employees would not hit the proposed cap in WRS payments during the contract term is simply not an appropriate quid pro quo for moving from an uncapped to capped status on this fringe benefit.

(b) That there is no *quid pro quo* to be found in the changes contained in the tentative agreements, in that one involves the minor concession of the Union relinquishing its right to arbitrate certain discrimination complaints, and a second merely affirmed a procedure for the Union to secure time off to attend to Union business.

POSITION OF THE COUNTY

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

(1) That the concept of *internal consistency* calls for the selection of the final offer of the County.

(a) That *internal consistency* among bargaining units of a single employer prevents potential *whipsawing* and/or *holding out* by one unit in an attempt to secure greater wages in the interest arbitration process.

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[8] Citing the following arbitral decisions: *Arbitrator Gil Vernon* in Fall Creek School District, Dec. No. 26756-A, July 1991, wherein the external comparables supported the Union, and the arbitrator discounted the need for a quid pro quo partially because the Union was in a catch-up position on the WRS benefit; *Arbitrator June Weisberger* in Pierce County Human Services, Dec. No. 28186-A, wherein she opined that a quid pro quo might not be necessary in the face of a demonstrated need; *Arbitrator Edward Krinsky* in Whitefish Bay School District, Dec. No. 27513-A, July 1993, wherein he noted that the Employer had provided a quid pro quo in the form of a Section 125 tax shelter to moderate the impact of a change in health insurance; *Arbitrator Gil Vernon* in Rhinelander School District, Dec. No. 27136, September 1992, wherein the County had never offered a quid pro quo for the requested concession.

(b) That internal consistency is particularly important in the area of fringe benefits.[9]

(c) In the case at hand that a majority of the County's bargaining unit employees are governed by contract language similar to that proposed by the County in these proceedings, and the Union has shown no reason why it should be allowed to continue as a departure from the norm.

(d) That a review of the contracts among all of the County's internal bargaining units show overwhelming consensus for the County's final offer; in this connection, that the language in the Lakeview Manor, the Professionals and the Non-Professionals units all contain percentage caps on the County's payment of employee WRS contributions, and only the 1995 Law Enforcement agreement provides for "full" coverage of the employee's share.[10]

(e) That various arbitral decisions support the importance of consistency in fringe benefits among internal bargaining units.[11]

(f) That the Union has not provided any compelling evidence to justify why the County should continue to deviate from its internal pattern, within the Highway unit.

(2) That consideration of the external comparables overwhelmingly supports the selection of the final offer of the County.

(a) That the parties appear to be in agreement that the primary external comparison pool should include *Marathon, Outagamie, Portage, Shawano, Waushara* and *Winnebago Counties*, the six counties immediately contiguous to *Waupaca County*.

(b) That three of the counties have contracts running through December 31, 1998, and the remaining three have contracts running through December 31, 1997; that all six of the comparable counties have contract language which identifies a specific percentage cap toward payment of the employee's share for WRS benefits, and none provides for the unrestricted "full" payment language demanded by the Union in the case at hand.[12]

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[9] Citing the following arbitral decisions: *Arbitrator Neil Gundermann* in City of Oshkosh, Dec. No. 26923-D, March 1993; *Arbitrator Zel Rice* in Phillips School District, Dec. No. 28356-A, August 1995; *Arbitrator Daniel Nielsen* in Village of Greendale, Dec. No. 25579-A, March 1989; *Arbitrator Sharon Imes* in Barron County Highway Department, Dec. No. 18597-A, February 1982.

[10] Citing the contents of Employer Exhibit #7.

[11] Citing the following arbitral decisions: *Arbitrator Zel Rice* in Manitowoc School District, Dec. No. 27226-A, October 1992; *Arbitrator Richard Bilder* in Outagamie County Sheriff's Department, Dec. No. 27849-A, June 1994; *Arbitrator Friess* in Pierce County Sheriff's Department, Dec. No. 28187-A, April 1995.

[12] Citing the contents of Employer Exhibit #19.

(c) Clearly, that arbitral consideration of the external comparables supports the need for change in the County's WRS contract language.

(3) That consideration of both *internal and external comparables* mandate the necessity for a change in the status quo, as urged by the County.

(a) Contrary to the arguments of the Union, that no quid pro quo should be required to justify arbitral selection of the final offer of the County.

(b) That various arbitral decisions have held that in the face of overwhelming internal and/or external support, the need for a *quid pro quo* either diminishes or disappears.[13]

(4) In the alternative, and to the extent that a *quid pro quo* is necessary, the County has satisfied such need by setting the WRS percentage higher than that which is required by law.

(a) That the very nature of the County's final offer contains a *quid pro quo*, in that it has proposed threshold protection to 6.5%, in the face of a current contribution level of 6.1%.

(b) That the County's agreement to provide extended Union leave would also operate as a *quid pro quo* in support of the modest language change in dispute in these proceedings.

In its *reply brief*, the Employer emphasized or reemphasized the following principal considerations and arguments.

(1) That it agrees that there is no dispute concerning the appropriate external comparables.

(2) That the Union's insistence that the internal comparables and their bargaining histories fail to support the County's final offer is incorrect.

(a) That there are five recognized bargaining units within the County, four of which are represented by AFSCME and one represented by the Law Enforcement Officer's Association; that all other AFSCME units have the County's WRS contributions capped at 6.5%, that the expired Law Enforcement contract provided for a 100% County contribution, but this issue is on the table in the renewal agreement.

(b) That in connection with all its represented employees who have 100% County WRS contributions, the County is seeking to secure a 6.5% cap.

(c) That the Arbitrator should not credit Union arguments relating to the relative bargaining power of the parties in

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[13] Citing the following arbitral decisions: *Arbitrator Gil Vernon* in Fall Creek School District, Dec. No. 26756, June 1991; *Arbitrator June Weisberger* in Pierce County Human Services, Dec. No. 28186-A, April 1995; *Arbitrator Edward Krinsky* in Whitefish Bay School District, Dec. no. 27513-A, July 1993; *Arbitrator Gil Vernon* in Rhinelander School District, Dec. No. 27136, September 1992.

other bargaining units, where the parties have agreed to capped WRS payments.

(3) That the Arbitrator should not credit certain Union arguments relating to the external comparables.

(a) That all six of the primary external comparables provide WRS payments which are capped at either 6.2% or 6.5%.

(b) That the Union's arguments urging comparisons based upon consideration of the totality of wages and benefits is flawed, and it fails to recognize that many of its cited fringes are either equivalent to or better than those in comparable counties.[14]

(4) Contrary to the Union's assertions, that the County's proposal to change the status quo is justified.

(a) That the arguments that it "...is not addressing a problem in its final offer" and it has not "established a need for a change" are incorrect, in that *the overwhelming consensus among the internal and external comparables* call for a cap on the WRS payment.

(b) That two prior decisions of the undersigned support the position of the Employer in these proceedings.[15]

(5) That a *quid pro quo* exists in support of the County proposal.

(a) That case law establishes that if overwhelming comparable support points to the contrary, no quid pro quo should be necessary.

(b) In the alternative, that the County's acceptance of the new Union Leave clause as part of the tentative agreements should serve as the requisite quid pro quo.[16]

(c) Further, that a 6.5% cap is more than what the employees need in terms of threshold for "full" WRS payments.

FINDINGS AND CONCLUSIONS

The underlying dispute relates to only a single impasse item, the County's proposal to cap at 6.5% its payment of the employee shares of Wisconsin Retirement Fund contributions. Prior to reaching a decision and rendering an award, the undersigned will offer certain observations relating

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[14] In this connection, it emphasizes *paid vacations, paid holidays, paid sick leave, long term disability insurance, dental insurance, health insurance* and *health insurance premium costs.*

[15] Citing the following decisions: Iowa County (Courthouse & Social Services), Case 84, No. 52908, INT/ARB 7697, April 2, 1997; and Mayville School District, Case 19, No. 46267, INT/ARB 6141, September 2, 1992.

[16] Citing the contents of Employer Exhibit #3, and urging that only the Outagamie Highway Department Contract, of the primary external comparables, has comparable language.

to the *nature of the interest arbitration process*, including the *significance of the status quo ante in the final offer selection process*, and the *normal application of the statutory arbitral criteria in Wisconsin*.[17] Thereafter, the final offers will be evaluated in light of the evidence and arguments of the parties, and the more appropriate will be selected and ordered implemented by the parties.

The Nature of the Interest Arbitration Process, Including Status Quo Considerations

In this connection, it is noted that interest arbitrators operate as extensions of the contract negotiations process, and their 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. In filling this role, the interest neutral will normally closely examine and consider the parties' *past practices* and their *negotiations history*, which criteria fall well within the scope of Section 111.70(4)(cm)(7r)(j) of the Wisconsin Statutes, and which must be arbitrally applied in conjunction with all other statutory criteria in the final offer selection process. These principles are addressed in the following excerpt from the authoritative book by Elkouri and Elkouri:

> "In a similar case, 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 it 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

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[17] Similar observations have been offered by the undersigned in many prior statutory interest arbitration decisions in Wisconsin.

> economic theories might have decided them in the give and take of bargaining..."[18]

In attempting to place the parties into the same position they might have reached at the bargaining table, it is obvious that interest arbitrators should not lightly modify or set aside the contract language or the benefits previously negotiated and agreed upon by the parties. Indeed, interest neutrals in *private sector disputes* are normally very reluctant to overturn or to significantly modify previously negotiated contract provisions, but such a reluctance is far less pronounced in the public sector. These factors have been discussed by the undersigned in many prior decisions, including the following:

> "When an interest arbitrator is faced with the demand to significantly modify past practices, or to add new language or new or innovative benefits, he will normally tread carefully. This factor is very well described in the following, frequently referenced excerpt from an interest arbitration decision by Professor John Flagler:
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> > '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 or rejection 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 either party that which they could not have secured at the bargaining table.'
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> Over sixty years ago, John R. Commons and John B. Andrews urged the application of the same principle, in an interest mediation context.
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> > 'He acts purely as a go-between, seeking to ascertain, in confidence, the most that one party will give and the least that the other will take without entering on either a lockout or a strike. If he succeeds in this, he is really discovering the bargaining power of both sides and bringing them to the point where they would be if they made an agreement without him.'
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> The reluctance of interest neutrals to innovate or to plow new ground is much less pronounced in public sector disputes than in the private sector. In his treatise on public sector interest arbitration, Arbitrator Howard S. Block distinguishes between the above referenced view in the private sector, and the perceived need for greater innovation in public sector disputes.

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[18] Volz, Marlin M. and Edward P. Goggin, Co-Editors, *Elkouri & Elkouri How Arbitration Works*, Bureau of National Affairs, Fifth Edition - 1997, page 135. (footnotes omitted)

> '... As we know, a principal guideline for resolving interest disputes in the private sector is prevailing industry practice -- ...
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> * * * * *
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> ... the public sector neutral, I submit, does not wander in an uncharted 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 pre-collective negotiation practices which management may yearn to perpetuate but which are the target of multitudes of public employees in revolt.'[19]

When faced with demands for *significant change in the negotiated status quo ante*, therefore, Wisconsin Interest Arbitrators in public sector impasses normally require the proponent to establish a *very persuasive basis for such changes*, typically by showing that *a legitimate problem exists* which requires attention, that the disputed proposal *reasonably addresses the problem*, and that the *proposed change is accompanied by an appropriate quid pro quo.* They thus frequently assign *determinative weight* to the above described *past practice and negotiations history statutory criteria* in the final offer selection process in contract renewal disputes, where one party is proposing significant change in the negotiated status quo ante!

While the Employer has proposed a change in the negotiated status quo ante which it would like to achieve at this time, it has *failed to show the existence of any bona fide problem* which requires attention, and it has also

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[19] See the June 6, 1982 decision of the undersigned in Elkhorn Area School District, Case XI No. 28262, MED/ARB 1266, page 14. [Included citations are as follows: Des Moines Transit, 38 LA 666; Principles of Labor Legislation, New York, Harper & Bros., 1916, page 125; Criteria in Public Sector Interest Disputes, Reprint No. 230, pages 164-165, Institute of Industrial Relations, UCLA, 1972.]

See also the February 8, 1990 decision of the undersigned in City of Kaukauna, Case 47, No. 41745, MIA-1402, at page 8:

> "In connection with greater public sector interest arbitrator flexibility toward change, it will again be noted that neither party has the real right in Wisconsin to enforce its bargaining demands at the table through economic force. A decision that changes could not be achieved in arbitration would mean that either party could arbitrarily and permanently block such change, and that the parties could, accordingly, be doomed to perpetuation of the status quo ante in many areas of collective bargaining. Such a conclusion would defeat the principle that interest arbitrators are intended to operate as an effective extension of the bargaining process, and should attempt to put the parties into the same position they should have reached at the bargaining table."

failed to show that its proposed change reasonably addresses such non-existent problem.

(1) Contrary to the arguments advanced by the Employer, the mere fact that other comparables have either failed to follow a wage, a benefits or a language leader, does not alone constitute the requisite *very persuasive basis* normally required to justify the moderation or elimination of such higher wages or benefits, or more desirable contract language.

(2) While the County obviously wishes to insulate itself against future increases in the level of required WRS contributions, and/or to at least gain credit over the bargaining table for any future negotiated increases in its contributions above the level of 6.5%, such considerations fall far short of establishing the requisite *very persuasive basis* for its proposed change in the agreement.

(3) In light of the above preliminary conclusion, it is unnecessary for the Arbitrator to consider the arguments of the parties relating to the need for an appropriate *quid pro quo*.

On the above described bases, the undersigned has preliminarily concluded that the Employer has failed to establish the requisite *very persuasive basis for its proposed change in the negotiated status quo ante*, and, accordingly, that *arbitral consideration of the past practice and the negotiations history arbitral criteria clearly favors selection of the final offer of the Union in these proceedings.*[20]

The Application of the Remaining Statutory Criteria

The Wisconsin Legislature has recently mandated that statutory interest arbitrators place the ***greatest weight*** upon "*...any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which place limitations on expenditures that may be made or revenues that may be collected by a municipal employer.*" It has also provided for ***greater weight*** to be placed upon "...economic conditions in the jurisdiction

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[20] What, however, of Mayville School District, Case 19, No. 46267, INT/ARB 6141, September 2, 1992, which was emphasized in the Employer's brief? In this decision, the undersigned determined that, when viewed within the context of the parties' negotiations history and their prior agreements, the Union had **not** proposed a *significant change* in the status quo ante, sufficient to trigger the requirements of independent justification and/or a separate quid pro quo. The Union merely proposed to continue a long standing and periodically updated practice of the Employer having paid such costs in their entirety; by way of contrast with the facts at hand, the Union had not proposed language mandating 100% payment of any future increases, and the Employer had not proposed a retreat from such 100% language and the adoption of caps, either of which hypothetical offers would have proposed a *significant change* and triggered the normal *quid pro quo* prerequisite for such change.

of the municipal employer", than to the remaining arbitral criteria contained in Section 111.70(4)(cm)(7r) of the Statutes.[21] Accordingly, if either or both of the above factors apply to a particular dispute, they must be accorded the appropriate statutory weight. There are, however, no limitations on expenditures or revenues sufficient to trigger the application of the *greatest weight criterion* in these proceedings, and insufficient economic differences between the two final offers to justify significant weight being placed upon the *greater weight* criterion. On these bases, the undersigned has preliminarily concluded that the remaining arbitral criteria must be accorded their *normal weight* in the final offer selection process.

In considering the remaining arbitral criteria, the undersigned notes that in the great majority of interest arbitrations, particularly those in which the principal impasse items relate directly to wages and benefits, *comparisons* are normally the most frequently cited, the most important, and the most persuasive of the various conventional arbitral criteria, and the most persuasive of these are normally the so-called *intraindustry comparisons*.[22] 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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> "a. *Intraindustry Comparisons*. The intraindustry comparison is more commonly cited than any other form of comparison, or, for that matter, any other criterion. Most important, the weight that it receives is "

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[21] These priorities were adopted by the Legislature in 1995 Wisconsin Act 27, made applicable to Section 111.70(4)(cm)(6) *interest arbitration petitions* filed on or after July 29, 1995.

[22] While the terms *intraindustry comparisons* derive from their long use in the private sector, the same principles of comparison are used in public sector interest impasses; in such situations, the so-called *intraindustry comparison groups* normally consist of other similar units of employees employed by comparable governmental units.

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 among the wage-determining standards.

* * * * *

A corollary of the preeminence of the intraindustry comparison is the superior weight it wins when found in conflict with another standard of wage determination. The balancing of opposing factors, of course, is central in the arbitration function, and most commonly arises in the present context over an employer argument of financial adversity."[23]

In consideration of the above, the Employer emphasized both external and internal comparisons in urging arbitral selection of its final offer in these proceedings.

(1) The evidentiary record shows that in three of five internal bargaining units, the Employer's commitment to pay 100% of employees' WRS contributions is capped at 6.5%, and that in the remaining two units, the Employer's commitment to pay 100% is not capped.[24] Arbitral consideration of the *internal comparables*, therefore, favors the selection of the final offer of the Employer.

(2) The parties are in full agreement that the primary intraindustry comparison pool in these proceedings should include *Marathon, Outagamie, Portage, Shawano, Waushara and Winnebago Counties*, and the record shows that all six of these comparable counties have their commitments to pay 100% of their employees' WRS contributions capped at either 6.2% or 6.5%.[25] Arbitral consideration of the *primary intraindustry comparables*, therefore, favors the selection of the final offer of the Employer.

On the above described bases, the Employer would have succeeded in establishing a very strong foundation for arbitral selection of its final offer in these proceedings, if the undersigned were faced with an impasse in the parties negotiation of their *initial labor agreement*. In accordance with the earlier described role of Wisconsin statutory interest arbitrators, however, the comparison criteria are normally not accorded determinative weight in a *contract renewal bargaining impasse*, where one of the parties is

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[23] Bernstein, Irving, The Arbitration of Wages, University of California Press (Berkeley and Los Angeles), 1954, pg. 54, 56, and 57. (footnotes omitted)

[24] See the contents of Employer Exhibit #7, which shows 6.5% caps in the Lakeview Manor, the Professionals and the Non-Professionals bargaining units, and no caps in the Law Enforcement Officers and the Highway Department bargaining units.

[25] See the contents of Employer Exhibit #19, which shows Marathon County capped at 6.2%, Outagamie, Portage, Shawano, and Waushara Counties capped at 6.5%, and Winnebago County moving from a 6.2% to a 6.5% cap effective 1/1/96.

proposing a change in the *negotiated status quo ante*, and where such party has either *failed to establish the requisite very persuasive basis for its proposal* or, alternatively, has *failed to provide an appropriate quid pro quo*.

The remainder of the various statutory criteria will normally vary in their individual applications and importance, depending upon the nature of the impasse and the individual surrounding circumstances peculiar to each negotiations impasse. In the case at hand, neither the *lawful authority of the municipal employer*, the *stipulations of the parties*, the *interests and welfare of the public*, *cost of living considerations*, *changes in circumstances during the pendency of the proceedings*, nor any other *unnamed traditional arbitral criteria* were comprehensively emphasized by the parties, and none can appropriately be assigned significant or determinative weight in the final offer selection process in these proceedings.[26]

Summary of Preliminary Conclusions

As addressed in greater detail above, the Impartial Arbitrator has reached the following summarized, principal preliminary conclusions.

(1) The *single impasse item in dispute in these proceedings is the County's proposal to cap at 6.5% its payment of the employee shares of Wisconsin Retirement System contributions*, thus modifying its commitment in the prior agreement "...to pay all the employee's share of the Wisconsin Retirement Fund."[27]

(2) The primary focus of a Wisconsin interest arbitrator is *to attempt to put the parties into the same position they would have occupied but for their inability to achieve a complete settlement at the bargaining table;* in so doing, the arbitrator will closely examine and consider the *past practice* and the *negotiations history* criteria, both of which fall well within the scope of Section 111.70(4)(cm)(7r)(j) of the Wisconsin Statutes.

(a) - When faced with demands for *significant change in the negotiated status quo ante*, Wisconsin Interest Arbitrators normally require the proponent of change to establish a *very persuasive basis for such change*, typically by showing that *a legitimate problem exists which requires attention*, that *the disputed proposal reasonably addresses the problem*, and

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[26] Although the Union argued in its reply brief that there were certain historic fringe benefit deficiencies in the benefits package of those in the bargaining unit, relative to those in the primary intraindustry comparison group, the undersigned found this argument less than persuasive. In effect, the Arbitrator is being invited not only to re-examine and litigate all of the parties' preceding agreements, but to do so without a complete and comprehensive history of how and when the various complete benefits packages of the comparable employers had evolved.

[27] See Article XVIII, Section 18.01 of Union Exhibit #6.

that *the proposed change is accompanied by an appropriate quid pro quo*. They thus frequently assign *determinative weight* to the above referenced *past practice* and *negotiations history statutory criteria* in the final offer selection process in contract renewal disputes, where one party is proposing significant change in the negotiated status quo ante!

(b) The Employer has failed to establish the requisite *very persuasive basis* for its *proposed change in the negotiated status quo ante*, and, accordingly, *arbitral consideration of the past practice and the negotiations history arbitral criteria clearly favors selection of the final offer of the Union in these proceedings*.

(3) The remaining statutory criteria apply in these proceedings as described below.

(a) The Wisconsin Legislature has recently mandated that interest arbitrators are conditionally required to apply a *greatest weight* and/or a *greater weight criterion*, and if either or both apply to a particular dispute they must be accorded the appropriate statutory weight; neither the *greatest weight* nor the *greater weight* criteria are entitled to significant weight in the final offer selection process in these proceedings.

(b) Although the remaining statutory criteria are not prioritized, the *comparison criterion* is normally the most important and persuasive, and the so-called *primary intraindustry comparisons* are normally regarded as the most important of the various comparisons.

(c) Both the *internal comparisons* and the *primary intraindustry comparisons* favor the selection of the final offer of the Employer in these proceedings.

(d) The comparison criteria are not normally accorded determinative weight in a *contract renewal bargaining impasse*, where *one of the parties is proposing a change in the negotiated status quo ante, and where such party has either failed to establish the requisite very persuasive basis for its proposal or, alternatively, has failed to provide an appropriate quid pro quo*.

(e) Neither the *lawful authority of the employer*, the *stipulations of the parties*, the *interests and welfare of the public, cost of living considerations, changes in circumstances during the pendency of the proceedings*, nor *any other unnamed traditional arbitral criteria* can be assigned significant or determinative weight in the final offer selection process in these proceedings.

Selection of Final Offer

Based upon a careful consideration of the entire record in these proceedings, including arbitral consideration of all of the statutory criteria contained in Section 111.70(4)(cm)(7) of the Wisconsin Statutes including those elaborated upon above, the Impartial Arbitrator has preliminarily

concluded that the final offer of the Union is the more appropriate of the two final offers, and it will be ordered implemented by the parties.

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 Union, hereby incorporated by reference into this award, is ordered implemented by the parties.

William W. Petrie

WILLIAM W. PETRIE
Impartial Arbitrator

July 24, 1997