

# **Wisconsin Association of School District Administrators**

2009 Annual Educational Conference

## **Interest Arbitration in Transition: Preparing for Legislative Change**

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## **I. History of Mediation-Arbitration**

- A. The current public employee mediation-arbitration framework for municipal employees, including school district employees, began in 1978.
- B. Since that time, the framework has been revamped and revised a number of times, including the adoption of the Qualified Economic Offer (QEO) in 1993. One significant proposed revision is currently pending before the Wisconsin legislature as part of Governor Doyle's 2009-2011 Biennial Budget Bill. Some of the significant changes presently under consideration include the elimination of the QEO and the abolition of the greatest and greater weight statutory factors as they apply to interest arbitration proceedings involving school district personnel.
- C. These proposed changes, if enacted, could dramatically alter the bargaining landscape in school districts, particularly with respect to teachers. As such, this outline examines the scope of the proposed changes, but also takes a historical view of the mediation-arbitration framework in order to provide a glimpse at what to expect if the QEO, and greatest and greater weight factors are abolished.

## **II. Mediation-Arbitration Framework**

- A. The mediation-arbitration framework is identical for support staff and teachers, with the exception of the QEO.
  - 1. Before the initial exchange of proposals, the parties must prepare and submit a Notice of Commencement of Contract Negotiations form to the Wisconsin Employment Relations Commission (WERC).
  - 2. The initial exchange of proposals must be held in open session. Wis. Stat. § 111.70.4(cm)2. Therefore, school districts must prepare and post Notice of Initial Exchange, pursuant to the requirements set forth in Wis. Stat. § 19.82(1).
  - 3. After the initial exchange, all future bargaining sessions may be held in closed session.
  - 4. With respect to teachers, the mediation-arbitration framework requires the employer to complete and provide QEO costing Forms A and B to the teacher's union 60 days prior to contract expiration, or whenever the qualified economic offer is made, whichever is earlier.
  - 5. Either party may petition the WERC for mediation or arbitration if the parties fail to reach agreement after a reasonable period of negotiation. Wis. Stat. § 111.70(4)(cm)6.
  - 6. The filing fee for each petition requires each party to pay \$400.

## B. Mediation

1. If a party petitions for mediation, the WERC will assign a mediator who acts as a neutral third party.
2. The role of the mediator is to facilitate a voluntary settlement. The mediator may employ a variety of tactics to achieve this objective, including:
  - a. Separating the parties into different rooms to diffuse tension, encourage open and candid discussion regarding the issues and the motivations of the parties, and control communications and the flow of information.
  - b. Clarifying the positions of the parties in order to identify positions of common agreement and narrow the scope of settlement discussions to only those the matters in dispute.
  - c. Establishing the agenda in order to focus discussions on most significant issues.
  - d. Persuading parties to make concessions in order to keep the bargaining process on track and moving towards a voluntary settlement.
3. It is important to remember that the mediator is not an advocate for either party. The mediator should NOT be expected to:
  - a. Protect either party's interest.
  - b. Provide advice or guidance as to the potential impact of a proposal.
  - c. Understand the political or economic challenges confronting the district.
4. It is up to both parties to clearly articulate the rationale underlying a particular proposal and explain any relevant bargaining history and/or external factors influencing the proposal.
5. The mediator has no authority to call for final offers from the parties. However, if the mediation fails, either party may petition for arbitration. There is no additional filing fee related to interest arbitration.

## C. Arbitration

1. If the parties petition for arbitration, the WERC assigns a staff investigator. If the parties previously participated in WERC mediation the same staff member will continue through the investigation.
2. The WERC staff investigator meets with the parties to determine whether the parties can reach a voluntary settlement.
3. An investigator will also serve as a mediator by clarifying positions, focusing discussion, and keeping the process moving forward in a constructive manner in an attempt to reach a voluntary settlement. However, investigators have the authority to direct the parties to proceed to interest arbitration if the parties do not reach voluntary settlement.
4. Arbitration uses a process of written final offers to focus the issues and assist the parties in reaching voluntary agreement.
  - a. The petition for arbitration must include a preliminary final offer from the petitioning party containing its latest offer on all issues in dispute.
  - b. The responding party must submit its responsive preliminary final offer within 14 calendar days of the date of submission of the petition for arbitration.
  - c. Once the petition is filed, the investigator works with the parties to set a date for investigation.
5. The investigation involves meetings during which the parties exchange revised final offers on the issues in dispute.
  - a. The exchange of revised final offers generally occurs at a meeting in which the parties remain in separate rooms. The investigator controls the exchange of information by conveying information between the parties.
  - b. The investigator's goal is to assist the parties in reaching agreement on as many issues in dispute as possible. Sometimes this results in a voluntary settlement. However, even if a voluntary settlement is not reached, the investigator will attempt to persuade the parties to narrow the scope of issues that will be submitted to final and binding arbitration.
6. If the parties fail to reach a voluntary settlement, and the investigator determines that the parties are deadlocked, the investigator will declare

impasse and ask the parties to submit their final offers to final and binding arbitration. Wis. Stat. § 111.70(4)(cm)6.

7. Prior to closing the investigation, each party is required to submit a written final offer containing its final proposals on all issues in dispute that are subject to interest arbitration. Wis. Stat. § 111.70(4)(cm)6.am.
  - a. Final offers may include only mandatory subjects of bargaining. However, if neither party objects, a party may include a permissive subject of bargaining in the final offer.
  - b. If the parties agree to submit a permissive subject of bargaining to final and binding arbitration, the permissive subject of bargaining shall be treated as a mandatory subject of bargaining.
8. The parties must also submit to the WERC a comprehensive list of tentative agreements. Tentative agreements are the proposals which have been agreed upon for inclusion in a new or amended collective bargaining agreement.
9. After closing the investigation, the investigator is required to submit a report to the WERC on the investigation. The WERC will certify impasse and issue an order requiring interest arbitration.
10. The certification of impasse does not preclude the parties from reaching a voluntary settlement. However, no further modifications to the final offer may occur, absent the consent of both parties. Wis. Stat. § 111.70(4)(cm)6.b.
  - a. Several arbitrators have agreed and disallowed the modification of final offers. *River Falls School District*, Dec. No. 26995-A (Rice, 2/92); *Belmont Community School District*, Dec. No. 27200-A (Malamud, 10/92); and *Madison Area Technical College*, Dec. No. 29695-B (Petrie, 1/01).
  - b. Arbitrator Bellman, when confronted with a situation involving a union's request to "correct" its final offer to reflect its intent, brought the issue to the WERC for review. The WERC permitted the union to "correct" its final offer language to reflect its intent. *City of Fennimore*, Dec. No. 30454-B, (WERC, 9/03). The WERC concluded that it would allow a party to modify its offer to conform to its intent, but noted that the statutes do not permit a party to modify its intent. *Id.*
11. Once impasse is certified, the WERC submits a panel of seven ad-hoc arbitrators to the parties for their review.

- a. Upon receipt of the list, the parties will typically research the decisions of each arbitrator (based on the issues of the particular negotiation to gauge each arbitrator's predictability).
  - b. At a mutually agreed upon time, the parties will confer to alternately strike names from the arbitrator panel until a single name is left.
  - c. The last arbitrator on the list not struck by either party is appointed by the WERC as the arbitrator.
12. Once the arbitrator is appointed, a public hearing may be requested by the petition of five citizens, so long as the petition is made within 10 days of the arbitrator's appointment. If such a petition is made, the arbitrator will conduct a public hearing during which both parties have the opportunity to explain their offers. The public is allowed to offer comments.
14. Additionally, at any time prior to the actual arbitration hearing, the parties have a limited right to go on strike if both parties withdraw final offers. The union may go on strike with 10 days advanced notice.
15. The arbitrator will consult with the parties to establish a mutually acceptable date on which to conduct the hearing. At the hearing, the parties present all relevant evidence in the form of exhibits and testimony to support that their offer is more reasonable than that of the opposing party.
16. Once the hearing is completed, the parties typically synthesize the evidence and argue their positions through post-hearing briefs.
17. The arbitrator will examine statutory factors and select whichever one of the final offers that the arbitrator determines to be the more reasonable.
  - a. While it is frequently stated that interest arbitration attempts to determine what the parties would have settled on had they reached a voluntary settlement, it is manifest that the parties are at an impasse because neither party found the other's final offer acceptable. *Buffalo County*, Dec. No. 31340-A (Grenig, 2/06)
  - b. Realistically, if the parties reached a negotiated settlement, the final resolution would probably be the result of compromise and the outcome would be contract provisions somewhere between the two final offers here. The arbitrator must determine which of the parties' final offers is more reasonable, regardless of whether the parties would have agreed to that offer, by applying the statutory criteria. *Id.*

18. Generally speaking, the arbitrator will issue the award within 60 days of the submission of the post-hearing briefs. The selected offer is incorporated into the new collective bargaining agreement between the parties.

### **III. Introduction of the Qualified Economic Offer to Mediation-Arbitration**

- A. The primary difference between support staff arbitration and teacher arbitration is the Qualified Economic Offer (QEO). In 1993, the legislature introduced Wisconsin Act 16, which limited the ability of school districts to increase revenues, and simultaneously established penalties for school districts that exceed revenue limitations. Furthermore, in an effort to control increasing property taxes, the Legislature created the QEO, which modified the interest arbitration procedure for school district professional employees. The QEO was again modified in 1997 and 1999.
- B. The QEO offers an advantage to school districts by allowing them to settle all “economic issues” without going to interest arbitration. “Economic issues” are defined by statute and include, but are not limited to, salaries, health insurance, overtime, sick leave, vacation, holiday pay, workers compensation, etc. *See Wis. Stat. §111.70(1)(dm)*.
- C. Arbitration is still available for noneconomic issues that qualify as mandatory subjects of bargaining. However, permissive subjects of bargaining do not need to be continued as part of a QEO in order to ensure the QEO’s validity. *Dodgeland Education Association v. WERC*, 240 Wis.2d 287 (2002).
- D. Qualified Economic Offer Defined
  1. A QEO is an offer to the professional employees of a school district that amounts to a 3.8% total package increase in wages and benefits in each year of the bargaining agreement. Wis. Stat. § 111.70(1)(nc)1.
  2. Generally speaking, a valid QEO will:
    - a. Preserve fringe benefits as they existed on the 90th day prior to the expiration of the previous bargaining agreement between the parties;
    - b. Preserve the percentage contribution toward fringe benefits as they existed on the 90th day prior to the expiration of the previous agreement; and
    - c. Provide for a total package increase of at least, but not more than, 3.8%. Wis. Stat. § 111.70(1)(nc)1.a and 1.b.

E. Making a Qualified Economic Offer

1. In order to make a valid QEO proposal, the district must submit, as part of its final offer prior to the close of the investigation, the following unmodified language from the WERC regulations as a proposal:

QUALIFIED ECONOMIC OFFER

For any period of time covered by the proposed collective bargaining agreement, the municipal employer shall maintain all fringe benefits and its percentage contribution toward the cost thereof as required by § 111.70(1)(nc), Stats.

For each 12 month period or portion which is covered by this agreement, the municipal employer shall provide the minimum increase in salary which § 111.70(1)(nc)1., Stats., requires for the purposes of a qualified economic offer, or may provide the decrease in salary which § 111.70(1)(nc)2., Stats., allows for the purposes of a qualified economic offer.

2. In addition, at the time of final offers, the district will need to review the tentative agreements to determine whether they impact the ability to implement a QEO.
  - a. If a tentative agreement impacts the implementation of a valid QEO, the school board must either drop the tentative agreement or draft a waiver with the union such that the QEO implementation is not affected by the tentative agreement.
  - b. The parties must also decide which, if any, of the tentative agreements which do not impact the ability to implement a QEO will be implemented with the QEO.

F. Implementing a Qualified Economic Offer

1. After a valid QEO offer has been made and deadlock is declared, the board can unilaterally implement its QEO after giving fifteen days' written notice to the union.
2. The WERC investigator's declaration of impasse, and the subsequent implementation of the QEO, does not immediately settle the contract. However, on the 90th day prior to the expiration of the current collective bargaining agreement, if no agreement exists, the parties are deemed to have stipulated to the inclusion in the new or revised collective bargaining agreement of all of the provisions of the predecessor collective bargaining agreement concerning economic issues as modified by the terms of the

QEO and as otherwise modified by the parties; i.e., any tentative agreements reached. Wis. Stat. § 111.70(4)(cm)5s.

3. The school board has a duty to bargain with the union until the 90th day prior to the expiration of the term of that contract. In addition, the board continues to have a duty to update the QEO as fringe benefit costs become known.

G. Although the option is available, the school board is under no obligation to implement a QEO.

1. A school board bargaining with its teachers' union may choose not to include a QEO in its proposal and proceed to final and binding interest arbitration. Wis. Stat. § 111.70(4)(cm).
2. There may be many reasons a board may want to proceed to interest arbitration instead of implementing a QEO. For example:
  - a. The board may proceed to arbitration in order to effectuate changes in fringe benefits such as health insurance, dental insurance, and retirement.
  - b. The board may proceed to arbitration to make changes in extra-curricular pay, or change union security provisions, such as extending the probationary period for teachers.
  - c. The board may elect to take economic issues to interest arbitration rather than implementing a QEO if the statutory factors are such that the board can prevail by offering a more fiscally conservative offer than that afforded by the QEO.

H. Other QEO Considerations.

1. Any memoranda of understanding with a sunset date should terminate before the 90<sup>th</sup> day prior to the expiration of the collective bargaining agreement.
2. Any interim ratified/implemented bargaining agreement changes should include a union waiver of any QEO implementation challenge. The option for QEO may be lost if such waivers are not obtained, and a change in benefits occurs.
  - a. "Fringe benefits" may include benefits not traditionally costed by the parties, such as personal days, vacation, sick leave, and holidays, and may even include benefits provided that are not contained in the written bargaining agreement.

- i. Post-service medical benefits, non-compensated leave, and urgent personal leave were found to be fringe benefits that must be maintained in a valid QEO.
    - ii. Moreover, the benefits must be administered in the same manner as they were administered on the 90th day before contract expiration. For example, where the granting of urgent personal leave was left to the discretion of the administration, but traditionally the administration had leniently granted requests for such leave, it must continue to grant requests for leave with the same amount of leniency. *Markesan Sch. Dist.*, Dec. No. 31379 (WERC, 6/05).
  - b. If a benefit provided in an existing contract is illegal, and the district wishes to implement a QEO, then the district must replace the illegal benefit with a legal benefit of equal value. The district may not simply remove the benefit. *Port Edwards Sch. Dist.*, Dec. No. 32049 (WERC, 3/07).
    - i. In *Port Edwards*, the contract contained an early retirement fringe benefit. The district believed the benefit to be illegal, and did not include such a benefit in its proposed QEO. The union responded that the District’s offer was not a QEO, because it did not maintain the early retirement fringe benefit. *Id.*
    - ii. The WERC agreed with the union, holding that if a fringe benefit is illegal, it must be replaced with a legal benefit of equal value in order for the employer’s offer to be considered a valid QEO. *Id.*
- I. In certain circumstances, the QEO may not be a viable option for school districts. For example:
  - 1. The QEO may not be a realistic option when it serves as a “safe haven,” for the union, because it:
    - a. Preserves the salary schedule configuration.
    - b. Preserves benefits.
    - c. Preserves the percentage of district contribution toward benefits.
    - d. Preserves step movement.
    - e. Preserves the status quo with respect to all district policies and practices affecting fringe benefits.

2. The QEO may not be a viable option when the district is unable to fund it. Circumstances that may contribute to the district's inability to fund the QEO include:
  - a. Maintaining mandatory subjects of bargaining during a contract hiatus may prove too costly;
  - b. Industry-wide fringe benefit increases;
  - c. Increasing pressure of revenue caps/fiscal limitations;
  - d. Unfunded mandates (No Child Left Behind Act, PI 34, special ed., etc.);
  - e. Rising cost of post-employment benefits, and their accounting (Governmental Accounting Standards Board (GASB));
  - f. Continued steady increase in Wisconsin Retirement System (WRS) rates.
3. The QEO is less effective as a long-term solution to fundamental problems. Moreover, possible QEO challenges by unions are costly and not subject to the statute of limitations.

J. The role of the WERC investigator in the context of the QEO:

1. The role of the WERC investigator does not change when a QEO is offered.
  - a. The WERC investigator will attempt to bring the parties to a voluntary resolution of the agreement.
  - b. The investigator will likely focus the parties on measuring their proposals against the statutory criteria required to be considered by arbitrators in selecting one of the offers to be included in the successor agreement.
2. However, the applicability of the QEO to teacher bargaining provides school boards with additional leverage. It permits the board to hold strong to the proposals to be included in a successor teacher agreement, particularly with respect to its economic proposals. Accordingly, school boards can be resolute in their decision to offer no more than a minimum QEO unless the union agrees to make concessions in exchange for exceeding the minimum QEO.
3. It is important to note that job actions are the only real tool teacher unions have to protest the implementation of a QEO. Job actions can take the

form of working to a contract and/or not volunteering for school-related activities.

#### IV. Statutory Factors An Arbitrator Considers When Issuing an Award.

- A. The statutory factors that an arbitrator may consider when choosing the most reasonable final offer in an interest arbitration proceeding have undergone two significant revisions since their adoption. The pre-1995 statutory factors were as follows:

**‘Factors considered.’** In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall 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. Comparison 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. Comparison of the 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. Comparison of the 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 pensions, medical and hospitalization benefits, the

continuity and stability of employment, and all other benefits received.

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

*See, 1993-94 Wis. Stat. § 111.70(4)(cm)7.(a.-j).*

- B. In 1995 the Legislature revised the statutory factors considered by arbitrators. The Legislature broke the factors into three categories: (1) factors given greatest weight; (2) factors given greater weight; and (3) factors to be given weight under the old interest arbitration law.

**‘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 legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator’s or panel’s decision. *See, Wis. Stat. § 111.70(4)(cm)7.*

**‘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. *See, Wis. Stat. § 111.70(4)(cm)7g.*

**‘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. Comparison 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. Comparison of the 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. Comparison of the 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 pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- 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.

*See, Wis. Stat. § 111.70(4)(cm)7r (a.-j).*

- D. Under the post-1995 arbitration framework, arbitrators are required to give the “greatest weight” to revenue limits. This means that school boards must present economic data establishing the impact that the revenue limits have on the district.

- E. Arbitrators must give “greater weight” to local economic conditions, which can be of benefit to either the school district or the union, depending on the health of the local economy. School districts must be prepared to gather and introduce evidence on local economic conditions. Examples of such evidence might include:
1. Changes in the local income, including per capita income.
  2. Changes in employment levels.
  3. Changes property values, equalized valuation and the mill rate.
  4. Changes in the wages paid by local businesses.
- F. The pre-1995 traditionally considered criteria remain post-1995 however they are now considered by arbitrators after the greater and greatest weight factors.
- G. Under these traditional criteria, comparability continues to play a significant role. For example, in situations in which the final offer of a school board meets QEO provisions but contains changes to the contributions made to teachers’ health insurance premiums, the board’s offer has a likelihood of success if the health insurance premiums in the district are extremely high relative to comparable districts.
- H. The 2009-2011 Biennial Budget Bill proposed additional modifications to the statutory factors an arbitrator may consider. The modifications include:

**‘Factor given greatest weight.’** In making any decision under the arbitration procedures authorized by this paragraph, except for any decision involving a collective bargaining unit consisting of school district employees, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator’s or panel’s decision. *See*, Wis. Stat. § 111.70(4)(cm)7., as modified by the budget bill.

**‘Factor given greater weight.’** In making any decision under the arbitration procedures authorized by this paragraph, except for any decision involving a collective bargaining unit consisting of school district employees, 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. *See*, Wis. Stat. § 111.70(4)(cm)7g., as modified by the budget bill.

**‘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:

[The remainder of this section is unchanged.]

*See*, Wis. Stat. § 111.70(4)(cm)7r (a.-j), as modified by the budget bill.

V. **Impact of Proposed Change in Statutory Factors and Repeal of QEO on Interest Arbitration.**

- A. The proposed elimination of the greatest and greater weight criteria for school district employees means that the remaining factors will be considered by each arbitrator. However, the particular weight the arbitrator gives to any factor will not be decided by statute, but rather by the arbitrator in light of the evidence presented by the parties.
- B. However, the proposed elimination of the greatest and greater weight factors DOES NOT prohibit employers from making those arguments. School districts may still argue that state imposed limitations and adverse economic conditions should be considered by the arbitrator. However if the factors are eliminated, the arguments must be made, much as they were in the past, under different statutory factors. Two such statutory factors under which such arguments may be made include:
  - 1. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement (also known as ability to pay). Wis. Stat. § 111.70(4)(cm)7r.(c).
  - 2. 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. Wis. Stat. § 111.70(4)(cm)7r.(j).
- C. State laws or directives that place limitations on expenditures or revenues will continue, as they did under the pre-1995 factors, to be an important factor in arbitration cases due to the impact on the District’s financial ability to pay, as well the interests and welfare of the public.
- D. Additionally, the economic conditions in the jurisdiction of the municipal employer will continue, as they did under the pre-1995 factors, to be an important factor in arbitration cases. Economic conditions are inextricably linked to the

interests and welfare of the public and financial ability of the employer to pay the costs of a settlement or arbitration award.

- E. How will the bargaining process change for school districts if the QEO and greatest and greater weight factors are eliminated?
1. Arbitrators will place a greater emphasis on comparability. This emphasis on comparability will come in two steps:
    - a. First, arbitrators will establish a list of externally comparable school districts. To do so, the arbitrator will examine:
      - i. Traditional comparables (i.e., the athletic conference for teachers)
      - ii. Budget factors
      - iii. Revenue limits
      - iv. Enrollment numbers and enrollment trends
      - v. Geographic proximity (typically used for support staff )
    - b. Second, the arbitrators will examine the wages and benefits of school district employees against the wages and benefits of similarly situated employees in the identified comparable school districts.
    - c. Because of the greater emphasis on comparability, school districts should:
      - i. Identify traditionally comparable districts and compare wages and benefits of both professional and non-professional staff in order to evaluate the strength of the district's leverage before commencing negotiations.
      - ii. Identify other comparables that the district may wish to propose including on the list of external comparables for the purpose of improving the district's ranking with respect to wages and benefits.
      - iii. Coordinate and participate in sharing information across districts and amongst comparables in order to develop a coordinated and consistent strategy to control costs.
  2. Internal discussions will change. If the QEO is removed from the equation, school districts will lose the leverage afforded by the QEO and be forced to think in terms of interest arbitration, which requires knowing

and understanding the statutory factors and how they are applied by arbitrators.

3. The elimination of the QEO puts a premium on research and information. Each arbitrator has certain predilections and tendencies that make his or her decision unique. Some arbitrators subscribe to the theory that a change in insurance carrier does not require a quid pro quo in the face of rapidly escalating costs of insurance, while other arbitrators hold firmly to the belief that any change in status quo requires a quid pro quo. In short, school districts must research and understand the decision-making patterns of the arbitrators on the panel before striking arbitrators, because once the arbitrator is selected, he or she has the ultimate authority to select one final offer.
4. The elimination of the QEO will also result in the elimination of settlement reporting requirements to the WERC.

## **VI. Application of the Statutory Factors by Arbitrators**

- A. Greatest Weight - State Law or Directive Placing Limitations on Expenditures
  1. The greatest weight factor, while historically accounted for by arbitrators, has not often been deemed controlling of the outcome of an arbitration hearing, even though the arbitrator is required to give it the “Greatest Weight.” *Tomahawk School District*, Dec. No. 30024-A (Vernon, 9/01). In fact, greatest weight arguments generally fail when districts do not present sufficient evidence regarding the negative impact on operations that would result by selecting one offer over another. *Black River Falls School District*, Dec. No. 29002-A (Vernon, 11/97). *See also, Oregon School District (Educational Assistants)*, Dec. No. 28724-A (Levine, 3/97); and *Tomahawk School District*, Dec. No. 30024-A (Vernon, 9/01).
    - a. In order for this factor to come into play, employers must show that selection of a final offer would significantly effect the employer’s ability to meet state-imposed restrictions. *Milwaukee Board of School Directors*, Dec. No. 31105 (Grenig, 8/05).
    - b. Evidence is often non-existent or negligible that revenue limitations have had, in a particular case, any meaningful impact on an employer’s operation and/or the salary requests of its employees. *See also, Black River Falls School District*, Dec. No. 29002-A, (Vernon, 11/97), *Oregon School District (Educational Assistants)*, Dec. No. 28724-A, (Levine, 3/97) and *Waupaca County (Highway Unit)*, Dec. No. 28850-A, (Petrie, 7/97).
    - c. However, according to Arbitrator Weisberger: “State imposed school district cost controls are applicable to all school districts. There is no specific state law or directive which limits

implementation of the Union's final offer by the District. While state revenue controls must be considered in this proceeding, the undersigned concludes that their existence is insufficient by itself to mandate adoption of the Employer's final offer at this stage in her analysis of MERA's statutory factor." *Manitowoc Public School District, Decision*, No. 29481 (Weisberger, 5/99).

2. Greatest weight arguments win when districts are able to demonstrate a budget gap between revenues and the cost of continuing current programs. This argument is augmented when districts are able to show that program or personnel cuts are required in order to maintain status quo levels of service. *Madison Metropolitan School District*, Dec. No. 32195-A (Malamud, 6/08). *See also Oconto Unified School District*, Dec. No. 30958-A (Knudson, 5/05); and *Florence School District (Support Staff)*, Dec. No. 31023-A (Greco, 4/05).

B. Greater Weight – Economic Conditions within the Jurisdiction

1. The statute requires the interest arbitrator to give 'greater weight' to the economic conditions existing within the employer's boundaries. *City of Oshkosh*, Dec. No. 32148-A (Dichter, 3/08).
  - a. If an economic slowdown around the country were the only consideration, then that would apply everywhere, not just in the locality involved in the dispute. All communities would thus be justified in making a smaller wage or benefit proposal. That is not the key consideration, however. There must be more than a showing that nationally the economy is down. *Id.*
  - b. Instead, the key to determining whether this factor is applicable in a particular proceeding is to determine how this locality is faring when compared to other surrounding localities. Is its economy more depressed than others? If it is, this factor applies. On the other hand, if the economy in the locality involved is faring better than its comparable neighbors, than this factor cannot be used to justify an offer that would on balance be lower than what was given by its comparable neighbors. *Id.*
2. In particularly difficult economic times, arbitrators have been willing to give more weight to the gravity of the economic situation.
  - a. It has been demonstrated that the economic environment is one in which restraint in wage and benefit improvements is justified. In this regard, it is un-refuted in the record that tax delinquencies have significantly increased, that unemployment in the area exceeds the very high rate that exists across the state, and that layoffs in the county and the department are contemplated.

*Milwaukee County*, Dec. No. 32241-A (Engmann, 7/08) citing *Racine County (Sheriff's Department)*, Dec. No. 19709-B (Yaffe, 4/83).

- b. Under such circumstances, though the county has not demonstrated that it cannot afford to provide its law enforcement officers with comparable benefits, it has persuasively demonstrated that it cannot afford to be a wage and benefit leader at this time. *Id.*

C. The Lawful Authority of the Municipal Employer.

1. The statutory criteria requiring arbitrators to examine the lawful authority of the municipal employer “logically and necessarily” authorizes the arbitrator to look to external law to determine the extent of the lawful authority of the municipal employer. While questions relating to an employer’s lawful authority more typically arise in connection with state rather than federal law, there is nothing in the statute to suggest that the legislature intended to restrict that authority. *City of Watertown (Fire)*, Dec. No. 23156-A (Petrie, 6/86) (holding that arbitrators have the authority to hear and decide questions concerning the non-discrimination provisions of the Fair Labor Standards Act).
2. Nevertheless, the factor requiring the arbitrator to consider the lawful authority of the employer has generally been interpreted as referring to the authority of the employer to levy taxes necessary to implement an offer when levy limits are in effect *Village of Greendale*, Dec. No. 25578-A (Nielsen, 2/89).
3. However, that limitation is not express and the criterion certainly is capable of sustaining a broader interpretation. The mere fact that the arbitrator is able to consider the employer’s lawful authority does not inevitably lead to the conclusion that the arbitrator is the appropriate agent for determining the scope of that authority. *Id.*
  - a. Where the legality of a particular offer is plain on its faces, or can be calculated with some certainties, the arbitrator may proceed on the basis of that evident legality or illegality. *Id.*
  - b. Where the issue involves an initial determination of legality or illegality on an arguable point of prohibited practices under MERA, the more appropriate forum for such determination is the WERC. The declaratory ruling process is specifically intended to resolve such questions arising during the bargaining process, and the agency has an expertise in interpreting MERA’s provisions which an individual arbitrator cannot claim. As such, interest arbitration is not the appropriate forum for litigating arguable questions of illegality under MERA. *Id.*

D. Stipulations of the parties

1. Arbitrators are precluded from modifying the tentative agreements reached by the parties. Stipulations are individual agreements between the parties over which the Arbitrator has no jurisdiction. *Lakeshore Vocational Technical and Adult Education District*, Dec. No. 19085-A (Rothstein, 7/82).
2. However, arbitrators may take into consideration the tentative agreements reached by the parties when evaluating which offer is more reasonable under the statutory criteria. This is particularly true when:
  - a. The tentative agreements represent significant language or benefit concessions on behalf on one party or the other.
  - b. The tentative agreements contain fiscal implications with respect to concessions made by either party in the final offer.

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

1. This criterion requires an arbitrator to consider both the employer's ability to pay either of the offers and the interests and welfare of the public. *Wisconsin Indianhead Technical College*, Dec. No. 32460-A (Grenig, 12/08).
2. The interests and welfare of the public include both the financial burden on the taxpayers and the provision of appropriate municipal services. *Id.*
  - a. The public has an interest in keeping the employer in a competitive position to recruit new employees, to attract competent experienced employees, and to retain valuable employees now serving the employer. *Id.*
  - b. Presumably the public is interested in having employees who by objective standards and by their own evaluation are treated fairly. What constitutes fair treatment is reflected in the other statutory criteria. *Id.*
3. However, arbitrators are also cognizant of the welfare of the public as it relates to the ability of the taxpayer to fund governmental operations.
  - a. The ultimate factor is the weight of the comparability criteria juxtaposed with the weight of the interest and welfare of the public standard. Recognizing the recessionary condition of the state and nation carries added weight in determining which of these offers is more reasonable, the arbitrator reviewed the final offers of the

parties, keeping in mind the ability of the public to continue financing the costs of government. *Milwaukee County*, Dec. No. 32241-A (Engmann, 7/08) *citing Cochrane-Fountain City Community School District*, Dec. No. 19771-A (Imes, 1/83).

- b. When unemployment is high and the general economic conditions are tenuous, moderation in pay increases is demanded. *Id.*

#### F. Internal Comparability

1. The mainstream of arbitral opinion is that internal comparables of voluntary settlements should carry heavy weight in arbitration proceedings. *City of New Berlin*, No. 27293-B (Krinsky 2/93).
  - a. An employer's ability to negotiate to a successful voluntary agreement with other unions, the same terms that it proposes in interest arbitration is a factor to be accorded significant weight, if not controlling weight. *City of Tomah*, No. 31083-A (Yeager 2/05).
  - b. Internal comparability is very important in interest arbitrations. If you can show similar proposals to multiple units it is more likely that an arbitrator will select your final offer. *City of Marshfield*, Dec. Nos. 30638-A (Dichter, 5/04).
  - c. Interest arbitrators usually find that internal comparables rather than external comparables determine the outcome of fringe benefit disputes. *Walworth County Handicapped Children's Board*, Dec. No. 27422-A (Rice 5/93); *Monroe County*, Dec. No. 29593-A (Dichter, 9/99).
  - d. Arbitrators will provide different weight to different comparisons providing the greatest weight to the most similar employees (non-represented / represented; administrative / professional /support; school year / full year, etc.)
2. However, internal comparability is not always controlling when there is a compelling justification to support the departure from a settlement pattern.
  - a. Normally, arbitrators give internal patterns of settlement great weight and follow the pattern unless there is good reason to deviate. This provides stability to the bargaining process and promotes the morale of employees by treating employees equitably. This, however, is not a hard and fast rule. *Polk County*, Dec. No. 32364-A (Torosian, 9/08).
  - b. Generally, internal comparability is entitled to significant if not controlling weight when an employer has successfully negotiated

the same wage/salary increases with its other units. However, even if one concludes that an internal settlement pattern has been established, it cannot be the case that, therefore, the arbitrator is precluded from considering the Union's claim that a catch-up adjustment is warranted. *Milwaukee County (Airport Fire Department)*, Dec. No. 31600-A (Yaeger, 6/07).

G. External Comparability

1. The purpose behind comparing wages, hours, and other conditions of employment in comparable employers is to obtain guidance in determining the pattern of settlements among the comparables, as well as the wage rates paid by these comparable employers for similar work by persons with similar education and experience. *Wisconsin Indianhead Technical College*, Dec. No. 32460-A (Grenig, 12/08).
  - a. External comparables are essential to demonstrate the need for proposed changes. *Trempealeau County*, Dec. No. 30595-A (Honeyman, 11/03).
  - b. In addition, the strength of that comparable support diminishes the extent to which a quid pro quo for a particular change is necessary. *Sauk County*, Dec. No. 29584-A (Vernon, 2/00).
2. Arbitrators will look at the local labor markets when determining an appropriate external comparable group. Typically the athletic conference has been shown to be an appropriate comparable pool for teachers. However, geographic proximity can play a larger role than athletic conference in support staff comparisons.
3. Arbitrators generally accord significant weight to the ranking of a school district's wages and benefits relative the wages and benefits achieved in comparable school districts. However, rankings are not always determinative.
  - a. Even when the parties' offers result in some change in the benchmark ranking of the district amongst its comparables, such ranking changes should not be given significant weight, particularly, where, the district remains in the mainstream of the comparable benchmarks. *Wittenberg-Birnamwood School District (Teachers)*, Dec. No. 27299-A (Yaffe, 1/93).
  - b. If such changes were not allowed to occur, catch-ups and other legitimate salary schedule adjustments would never be allowed to occur without a spillover effect on comparable district schedules. Such an effect would be both illogical and inequitable. *Id.*
4. In fact, there is substantial arbitral authority for the proposition that even in situations where bargaining units have historically been paid at a low

level in relation to similar employees in comparable jurisdictions, where that pattern has been the result of voluntary bargaining, departures from that pattern should not be ordered “absent compelling evidence.” *Jefferson School District*, Dec. No. 27468-A (Briggs, 7/93).

- a. Each school district bargains agreements with its teachers that reflect the local interests of each party. As a result, some school districts are higher or lower or average. There will be employees who are paid above the average and there will be employees who are paid below the average and there will be employees paid the average. When certain teachers achieve rankings above the average or below the average because of voluntary agreements, they do exactly what free collective bargaining was intended to do. *Slinger School District*, Dec. No. 26757-A (Rice, 7/91).
- b. Some units fall below the average with respect to salaries as a result of trade-offs they make on insurance or other issues that are important to them and may or may not have an economic impact. The mere fact that the Employer’s teachers at some benchmarks are paid less than other teachers with similar experience and training, does not necessarily mean that there is an inequity. When those differentials are the result of voluntary agreements, the arbitrator who did not participate in any of the negotiations should not disrupt the relationships. *Id.*

#### H. Private Employment Comparables

1. Private sector comparability under this statute requires the arbitrator to note trends, particularly in the payment of benefits. *City of Monona (Fire Department)*, Dec. No. 32036-A (Malamud, 4/08).
2. However, most arbitrators do not accord significant weight to private employment comparables for a variety of reasons, including:
  - a. The duties and responsibilities of similarly situated employees in the private sector differ from those in the public sector. *See Monroe County*, Dec. No. 31374-A (Brotzlaw, 12/05).
  - b. The pattern of better health insurance benefits for municipal workers versus similarly situated workers in the private sector is general, and not specific to a particular bargaining unit. Therefore, this discrepancy in benefits is presumably reflected in the general bargaining among external and internal municipal comparables as well. *Village of Germantown*, Dec. No. 31006-A (Honeyman, 3/05).
  - c. Because difficulty in surveying private sector employers in the particular jurisdiction of the municipal employer results in data of poor quality, the veracity of this data is easily attacked. *Id.*

## I. CPI – Cost of Living

1. The weight placed on cost of living varies with the state of the economy and the rate of inflation. Generally, in times of high inflation public sector employees lag the private sector in their economic achievement. Likewise, in periods of time such as we are currently experiencing, public sector employees generally do somewhat better not only with respect to the cost of living rate, but also vis-à-vis the private sector. *Clark County*, Dec. No. 32092-A (McAlpin, 1/08).
2. In addition, the movement in the consumer price index is generally not a true measure of an individual family's cost of living due to the rather rigid nature of the market basket upon which cost of living changes are measured. Therefore, cost of living considerations are best measured by the external comparables and wage increases and wage rates among those external comparables. *Id.*
3. Generally speaking, arbitrators examine the cost of living increases or decreases that occur during the years preceding the effective date of the contract, or in other words, from the period during which the parties were formulating their bargaining proposals. Thus, if the contract duration is for the calendar years of 2007-2008, the arbitrator will examine the cost of living from the calendar years 2006-2007. *See Buffalo County (Highway)*, Dec. No. 32180-A (Krinsky, 3/08).
4. There are two theories employed by arbitrators when it comes to evaluating the cost of living factor in the context of the mediation-arbitration framework. *Buffalo County*, Dec. No. 32181-A (Dichter, 2/08).
  - a. One theory requires the arbitrator to use the total package increases as the basis for measuring the increases provided under the parties' final offers by the consumer price index. *Id.*
    - i. This is because the consumer price index is based on a market basket approach in which a number of items are identified, and the increase in the cost of those items is tracked. *Necedah Area School District*, Dec. No. 28259-A (Malamud, 8/95).
    - ii. Therefore, because the increase in medical care and housing as well as food, apparel and transportation are all identified in the increase in the cost of living assessment, a total package comparison is more appropriate. *Id.*
  - b. The countervailing theory requires the arbitrator to evaluate the cost of living against only the wage increases offered by both parties in their final offer. *Buffalo County*, supra.

- i. The theory is premised on the belief that the wage increase insulates the employees against the erosion of the dollar caused by inflation, while the costs to the employer do not. *Vernon County*, Dec. No. 26360-A (Friess, 9/90).
- ii. Therefore, this theory does not take into account the rising cost of health care, or any non-wage economic issues contained in either final offer, even if the employee is receiving a financial benefit.

J. Total Package

1. A number of arbitrators have concluded that the total package cost must be given weight, even when it includes increases in the health insurance premiums.
  - a. It is valid to consider total cost, including the cost of insurance premiums, because it is the cost experienced by the employer as a direct result of a benefit negotiated by the union. *Marion School District*, Dec. No. 19418-A, (Vernon, 7/83).
  - b. This cost, like the cost of any other benefit that can be expressed in dollar terms, should be considered when comparing the costs of the final offers of the parties to comparable districts. *Id.*
2. Additionally, arbitrators have held that changes in the size of the workforce are not relevant to costing determinations, absent the employer arguing the ability to pay, because the most significant consideration is the “value” of the improvements actually received by affected employees. *Kenosha Service Employees*, Dec. No. 19882-A, (Yaffe, 5/83).
3. When examining the total package costs, arbitrators generally require different costing mechanisms for professional employees than non-professional employees.
  - a. Most arbitrators have excluded the cost of step increases and the cast forward costing method when comparing wage levels and wage increases of non-professional employees. *Waunakee Community School District*, Dec. No. 30305-A (Stern, 9/02).
  - b. However, arbitrators permit the inclusion of step increases and the use of the cast forward method when examining the total package increase of a final offer involving a teacher or other professional employee. Arbitrator Malamud explains the different treatment:
    - i. A teacher salary schedule may have 6 salary lanes and 15 steps on each lane. The result is 90 steps or increments

which generate additional income over and above the increase in the base which is to be paid "across the board" to all teacher on the schedule. However, the schedules employed for blue collar workers may contain only four or five steps. The maximum may be achievable in two or three years and the majority of the unit may already be at the maximum rate. *City of Beloit*, Dec. No. 22374-A (Malamud, 11/85).

- ii. Philosophically, the maximum rate for a non-professional employee is labeled as the rate for the job. Anything which is paid below that rate is considered to be payment less than the rate for the job. Such consideration is given to an employer in light of the time and expense expended in training and orienting a new employee to the tasks of the job. Such considerations do not enter into the establishment of a teacher salary schedule. *Id.*

K. Changes in circumstances during the pendency of the arbitration proceedings.

1. This factor requires the arbitrator to examine changes in circumstances that occurred during the arbitration proceedings. These changes may include:
  - a. Changes in the law governing the arbitrator process or the legality of the provisions contained in either party's final offer;
  - b. Changes in economic data or the cost of living represented by the consumer price index;
  - c. Voluntary settlements within the district affecting internal comparability; and
  - d. Arbitration awards affecting other units within the district that affect internal comparability.
2. Nevertheless, typically the economic data available at the time the parties should have reached voluntary settlement is given more weight than any changes that occur during the pendency of the arbitration proceedings. *Forest County*, Dec. No. 22061-B (Imes, 8/85).

L. Other factors -- Quid Pro Quo as a Requirement for Change in Status Quo.

1. Most arbitrators will require less of a quid pro quo for changes that are overwhelming supported by comparables.
2. Some arbitrators believe that the party proposing a change in status quo is required to justify the change and offer a quid pro quo for the change.

*See, e.g., Middleton-Cross Plains School District*, Dec. No. 28489-A (Malamud, 4/96). Arbitrator Malamud explained that where arbitrators are presented with proposals for a significant change to the status quo, they apply the following factors to determine whether the proposed change should be adopted:

- a. Has the party proposing the change demonstrated a need for the change?
  - b. If there has been a demonstration of need, has the party proposing the change provided a quid pro quo for the proposed change?
3. Arbitrators require the proponent for a change in the status quo to present clear and convincing evidence to establish that there is a demonstrated need for the change, and the offer includes a quid pro quo for the change.
  4. However, if there is a problem that necessitates change the more the proposal directly addresses and remedies a problem, the less likely an arbitrator is going to require a quid pro quo. *See, Waukesha County (master unit)*, Dec. No. 30468-A (Dichter, 5/03).
  5. Moreover, with respect to changes in health insurance, a number of arbitrators have concluded that the undisputed economic impact of rising health insurance costs has reduced the employers' burden of establishing a traditional quid pro quo.
    - a. Arbitrators have recognized that the spiraling costs of providing health care insurance for its current employees is a mutual problem for the employer and the association. *Village of Fox Point*, Dec. No. 30337-A (Petrie, 11/02),
    - b. As such, in light of the mutuality of the underlying problem, the requisite quid pro quo is somewhat less than would be required to justify a traditional arms-length proposal to eliminate or modify negotiated benefits or advantageous contract language. *Id.*
  6. In fact, some arbitrators do not require a quid pro quo for health insurance benefit changes at all.
    - a. Arbitrators have found that the quid pro quo concept does not prevail where comparables support change. *See Pierce County (Sheriff's Dept.)*, Dec. No. 28187-A (Friess, 4/95); *Cornell School Dist.*, Dec. No. 27292-B (Zeidler, 11/92).
    - b. Other arbitrators have concluded that increasing health insurance premiums alone alter the status quo and negate any presumption

that the prior contract arrangements for contributions should carry over. *Walworth Co. Handicapped Children's Educ. Bd.*, Dec. No. 27422-A (Rice, 5/93).

## VIII. Sample Arbitration Decisions

- A. *Oneida County*, Dec. No. 32365-A (Brotslaw, 1/09).

Issues Examined: Health Insurance; retiree health benefits; external comparability

Who won? Union

Final Offers: The parties agreed to 3% across-the-board wage increases in each year of the two-year agreement. The Union proposed to maintain the status quo with respect to health insurance, and add a call-in provision governing pay for employees called into work outside their normal working hours. The County proposed to increase the health insurance deductible to \$1000 for the single plan, to \$1500 for the single plus one plan, and \$2000 for the family plan. It offered to establish a Health Reimbursement Account (hereinafter referred to as "an HRA"), to which it would allot \$750 (single plan); \$1000 (single plus one); and \$1500 (family plan). The County also proposed to terminate its post-retirement health insurance plan and to replace it with an HRA funded plan with varying levels of contribution depending on the date of retirement.

Arbitrator's Analysis: The employer's contribution to the HRA was roughly commensurate with the proposed deductible, thus the cost of the change to the employee was essentially a wash. Additionally, with respect to the retirement benefit, none of the external comparables enjoyed county paid retiree health insurance benefits and the projected 19 million dollar cost over 30 years of the status quo retiree plan was concerning. Nevertheless, interest arbitrators are reluctant to significantly alter the terms of a bargaining agreement. As such, because the absence of a retiree health benefit in comparable counties is not a precondition to its elimination, and because the change from the status quo retirement benefit was a significant change better accomplished at the bargaining table, the union's final offer was selected.

- B. *City of Monroe*, Dec. No. 32267-A (Bellman, 7/08)

Issues examined: Wages; insurance; compensatory time; and external and internal comparability

Who won? Union

Final Offers: The City proposed to increase clothing allowance by \$25. The Union proposed to maintain the status quo. The parties agreed to a 2% - 1% split in year one. The City proposed a 3% increase in year 2. The Union proposed a split. The City proposed a 5% health insurance premium share. The Union proposed to maintain

100% premium payment by the City. The City also sought to require employees to cash out compensatory time annually, at the wage rate effective at the time the work was performed.

Arbitrator's Analysis: External comparables involving similar employees are a very persuasive factor when it comes to examining premium contributions. Additionally, minor employee contributions to health insurance premiums were quite common amongst comparables. However, the employer had not effectuated the proposed change in premium with any other unit in the City or the non-represented employees. As such, it would be inequitable to permit the City to establish the internal pattern by virtue of an arbitration award with the smallest bargaining unit in the City in order to gain leverage over other units, despite the fact that the City had not yet commenced negotiations with other units. Therefore, the Union's offer was more reasonable than the City's, especially since none of the other matters in dispute were of sufficient practical consequence to justify an award to the contrary.

C. *Rock County, Dec. 32137-A, (McGilligan, 12/07)*

Issues examined: Wages; quid pro quo for insurance change; lone holdout analysis; internal voluntary settlements

Who won? Employer

Final Offers: Union 3% and 3% timed with insurance change; Board 1.5% and 1.5% timed with insurance change.

Arbitrator's Analysis: Internal comparables wages are 1.5% and 1.5% for this round of bargaining. Most internal comparables changed their insurance plan during the last round of bargaining and did receive a quid pro quo at that time for the change. This unit failed to change insurance benefits during the last round of bargaining and the employer agreed to extend the benefit with a 1% reduction in wages. Internal comparability is key in this case. The Arbitrator placed no weight on the external comparables. This employer has a long history of uniformity in the general wage increases among internal comparables which helped its case. The County argues that no quid pro quo is necessary because of the prior failure of the Union to agree to the benefit change when the other groups agreed. This delay cost the employer \$83,000 (the Arbitrator discounts this by the 1% in wages the employer saved which was probably substantial given the size of the unit). The Arbitrator believes the Union deserves a quid pro quo but it has asked for too much. The employer's offer without the quid pro quo wins.

D. *Middleton-Cross Plains School District, Dec. 32021-A, (Malamud, 10/07)*

Issues examined: Health insurance; eligibility threshold and pro-ration; comparability

Who won? Union

Final Offers: Both parties ask part-time employees to contribute more toward insurance. The employer bases its pro-ration on an eight hour day. The Union allows 7 hour employees 100% benefit (status quo is 6 hour employees)

Arbitrator's Analysis: The current eligibility structure allowing those with 6 hours 100% of the benefit has been in effect for over 20 years. This benefit structure is similar to the other internal comparables in that it pro-rates part-time employees but the Arbitrator could find no consistency in the pro-ration calculation internally. The fact that the District is proposing to pro-rate based on an 8 hour day when no Aide is assigned to work an 8 hour day was construed against the District's offer. Internal comparability slightly favored the District but was not a determinative factor.

The Arbitrator reviewed the external comparability and was overwhelmed by the fact that the District pays less toward its benefit than other comparables. Even though the percents offered by the District toward premiums were comparable, the District has negotiated lower insurance premiums than the external comparables, and the Arbitrator felt the District could afford to fund a higher percent toward benefits. The District's offer by far affects more people than the Union's offer.

The fact that the Union's offer had little effect (and therefore did not address the problem) was a concern for the Arbitrator. However, both offers are flawed and neither sustains a quid pro quo for the changes sought. The Arbitrator recognized the need for a change and awarded the Union's offer, suggesting that even more change would be needed but that the District's offer was too much too fast.

E. *Nicolet Area Technical College Board, Dec. 32064-A, (Krinsky, 8/07)*

Issues examined: Wages; insurance

Who won? Employer

Final Offers: Employer: 1% wage increase at end of 2005-06 and 2006-07 with 7/1/2007 insurance change; if insurance change takes place after 7/1/2007 then increase wages 1% 7/1/07 and 1% 6/20/08. 93% of lowest cost plan funded by employer (choice of two Security plans with \$0/\$5/\$20 drug cards). Board funds 100% of premium while employee on LTD. Dental plan improvements.

Association. 93% of the lowest plan funded by employer (choice of two WEA plans with \$5/\$10/\$25 drug cards).

Arbitrator's Analysis: The total premium paid by the employer is significantly higher than most of the comparables. Under these circumstances, it is reasonable that the employer would like to address this problem. The Security plan is still larger but not as large as the WEAIT plans offered by the Association. The employees' own premium costs will also be reduced by the Security plan.

F. *Oshkosh Area School District*, Dec. 31626-A, (Vernon, 11/06)

Issues examined: Wages; insurance contributions based on the recently negotiated flat dollar contribution; pay periods and duration

Who won? Union

Final Offers:

Employer: 2% and 3% wage increases

Union: 1% and 2% wage increases

Arbitrator's Analysis: The total package analysis is important; particularly given the last negotiation where the District provided two 10% wage increases in exchange for an insurance contribution expressed as a flat dollar amount. The Union herein recognizes that, if it wants to move the flat dollar amount up to maintain a similar percent contribution, it must lower the amount it is requesting for wages as part of its proposal. The employer tries to provide an adequate wage increase while at the same time only increasing slightly the District's contribution toward health insurance. The total package cost of both offers are very close (\$21,000 apart). Internal comparisons to the total package increase of both offers are equally split. The Arbitrator believes the District's offer is closer to the average and addresses the health insurance problem, but he believes it addresses the problem in the wrong way. The Arbitrator does not believe cost shifting of the premiums alone will address the problem. These are the low wage earners in the District. For a full-time cook, \$183 more dollars per month for insurance represents a large portion of their gross pay. The Employer's offer is not internally comparable. The Employer does too much too fast.

## IX. Retirement Benefits

### A. Mandatory Subject of Bargaining

1. Generally speaking, a collective bargaining provision which provides for compensation or continued insurance benefits after retirement is a mandatory subject of bargaining.
2. Retirees are not municipal employees under the Municipal Employment Relations Act (MERA). *City of Milwaukee*, Dec. No. 19091 (WERC, 10/81) (“proposals that have a primary impact on non-bargaining unit members and only indirect impact on unit members are permissive subjects of bargaining.”). However, the Wisconsin Employment Relations Commission has concluded that labor organizations representing municipal employers have the right to bargain over post-employment benefits because they represent active employees who expect to receive such benefits in the future. *Racine County*, Dec. 31378-B (WERC, 2006).
3. If a deferred compensation proposal applies only to current employees who retire during the term of the agreement, then the proposal is a mandatory subject of bargaining even though the employer’s obligation to such individuals would begin only at the time of the individuals’ retirement. *Random Lake School District*, Dec. No. 29998-B, -C (WERC 2001). A “deferred compensation proposal” includes a proposal that would provide for employer-paid health insurance benefits upon retirement. *Id.*

### B. Changing Retirement Benefits through Plan Modification, Individual Bargaining or Limiting the Definition of Retiree

1. It is presumed that retirement benefits vest at the time of the employees’ retirement and that such benefits cannot be reduced, modified or eliminated through subsequent bargaining. However, if the language of the collective bargaining agreement under which the employee retires expressly reserves unto the school district the right to reduce, modify or eliminate retirement benefits, then the school district will be able to do so. Where the contract language does not address this issue, the parties will be forced to rely upon extrinsic evidence, such as bargaining history or past practice in order to justify the reduction, modification, or elimination of retirement benefits. *Roth v. City of Glendale*, 2000 WI 100, 237 Wis. 2d 173, 614 N.W.2d 467.
2. However, employers may modify their existing retirement benefit policies for current employees that have not yet retired. The Wisconsin Supreme Court recently held that an employee did not have a contractual right to free health insurance under the City’s collective bargaining agreement,

despite completing the requisite years of service required by the agreement before the agreement was modified to include a retiree premium contribution. The Court held that, in addition to the requirement that the employee complete fifteen years of service, the agreement required the employee to be between sixty and sixty-five years of age and have retired. Therefore, because the agreement was modified to include a shared premium before the employee retired and before the employee reached the age of sixty, the employee was not entitled to free health insurance, despite completing the requisite years of service. *Loth v. City of Milwaukee*, 2008 WI 129, 758 N.W.2d 766.

3. Individual bargaining is defined as negotiations that occur between an employer and an employee. *St. Croix County*, Dec. No. 28791-A (Crowley, 5/97). Under Wis. Stat. § 111.70 (1)(a), an employer is obligated to bargain wages, hours and conditions of employment with the representatives of the collective bargaining unit. Pursuant to Wis. Stat. § 111.70(3)(a)4, it is a violation of law for a municipal employer to find a way around the representatives in order to obtain or negotiate a contract directly with individual employees. However, once an employee has retired, an employer may bargain freely with retirees; unions are not the exclusive bargaining representative for retirees. *Rossetto v. Pabst Brewing Co., Inc.*, 128 F.3d 538 (7<sup>th</sup> Cir. 1997).
4. The Wisconsin Supreme Court has agreed that the term “retirement” implies that one will stop working and not trade a present position for a similar one elsewhere. *Chapman v. Board of Education of the School District of the Menomonie Area*, Unpub. Court of Appeals Decision (August 10, 2004). When an individual leaves the employ of the school district, it is important to know whether the individual is *resigning* or *retiring*, especially when benefits are at stake.
5. Generally, health insurance benefits provided to retirees, which are reduced solely on age, violate the age discrimination statutes. The U.S. Supreme Court expanded the scope of the ADA, holding that plaintiffs could establish age discrimination by showing that a practice had a “disparate impact” on older workers. *Smith v. City of Jackson*, No. 03-1160 (March 30, 2005). The Court limited disparate impact claims to cases in which a specific employment practice (1) has a disparate, adverse impact on older workers as a group and (2) is not supported or based on a reasonable factor other than age. For example, a retirement provision providing retirement benefits for five years to the age of 65, whichever comes first has a disparate impact on older workers because employees who retire at age 63 get less benefit than those retiring at age 60.
6. The Equal Employment Opportunity Commission (EEOC) published a rule that formally authorizes employers to take Medicare into account

when structuring the health benefit packages voluntarily provided to retired workers. The new rule makes clear that employers can spend more on retirees under 65 years of age than those over age 65 without running afoul of age discrimination laws. In practice, this allows employers to reduce their health insurance expenses for retired workers over the age of 65 by allowing Medicare to pick up much of the expense. The EEOC noted that employers who provide retiree health benefits generally “coordinate” those benefits with Medicare by supplementing the government health care or by offering retirees a “bridge” benefit to cover health expenses, after employees retire until they become Medicare-eligible. The EEOC proposed the rule in response to a Third Circuit Court of Appeals decision from 2000 that held that the Age Discrimination in Employment Act requires employers to spend the same amount on health insurance benefits provided to Medicare-eligible retirees as spent on younger retirees.

**X. Other Proposed Legislative Changes.**

- A. 2009 Senate Bill 67 attempts to make preparation time a mandatory subject of bargaining. Under the bill, in a school district, the employer is required to bargain collectively with respect to time spent during the school day, separate from pupil contact time, to prepare lessons, labs, or educational materials, to confer or collaborate with other staff, or to complete administrative duties. *See also* 2009 Assembly Bill 95.
- B. 2009 Senate Bill 46 (arbitration and fair-share agreements during collective bargaining negotiations under MERA) seeks to change the District’s legal responsibilities upon the expiration of the agreement by making it a prohibited practice for an employer or an employee during contract hiatus to end any grievance arbitration and/or fair-share agreement. *See also* 2009 Assembly Bill 105.
- C. 2009 Assembly Bill 75 (Budget Bill)
  - 1. 2009 Assembly Bill 75 proposes changes to duration of agreements (final offers are still limited to two years unless both parties agree). In summary, the current language provides as follows:
    - a. Except for the initial collective bargaining agreement between the parties, every collective bargaining agreement covering municipal employees who are school district professional employees shall be for a term of 2 years expiring on June 30 of the odd-numbered year.
    - b. An initial collective bargaining agreement between parties covering municipal employees who are school district professional

employees shall be for a term ending on June 30 following the effective date of the agreement, if that date is in an odd-numbered year, or otherwise on June 30 of the following year.

2. 2009 Assembly Bill 75 modifies the statute such that contracts for school district employees may be for up to four years.
3. The budget proposes changing the make up of bargaining units by allowing all school district employees to vote to combine units.

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