

TABLE OF CONTENTS

I.	Introduction.	1
II.	Pre-hearing Preparation.	1
	A. Reviewing the Final Offer Before Certification.	1
	B. Creating a Theme.	2
	C. Selecting an Arbitrator.	2
	D. Creating Exhibits	3
	E. Identifying Potential Witnesses	3
III.	Interest Arbitration Factors for School Districts.	4
	A. Interest Arbitration Factors for School Districts Prior to 2009 Wis. Act 28.	4
	B. Interest Arbitration Factors for School Districts After 2009 Wis. Act 28	6
	C. Impact of the Repeal of Interest Arbitration Factors	6
IV.	Building a Case Under the Various Interest Arbitration Factors.	7
	A. The Lawful Authority of the Municipal Employer.....	7
	B. Stipulations of the Parties.....	8
	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.....	9
	D. Internal Comparability.	10
	E. External Comparability.	12
	F. Private Employment Comparables.	15

G.	Cost of Living - Consumer Price Index (CPI).....	16
H.	Total Package.....	17
I.	Changes in Circumstances During the Pendency of the Arbitration Proceedings.....	19
J.	Other Factors— <i>Quid Pro Quo</i> as a Requirement for Change in Status Quo.....	20
V.	Conducting the Hearing	22
A.	Opening Arguments.	22
B.	Entering the Exhibits and Testimony Into the Record.....	22
C.	Direct and Cross Examination.....	22
D.	Closing of Record and Setting a Timeline for Briefs.	23
VI.	Post-Hearing Issues.....	23
A.	Initial Brief.....	23
B.	Reply Brief.....	23
C.	Getting the Award.....	24

I. Introduction.

School districts that are unable to reach a voluntary settlement with represented employees must be prepared to proceed to interest arbitration. Presumably, before making its final offer to the represented employees, the district has carefully considered the interest arbitration factors and formulated a final offer supported by those factors. Once the investigator has certified the final offers, the district must then begin preparing for the interest arbitration hearing. This preparation will require the compilation of numerous exhibits in support of the interest arbitration factors and will often necessitate preparation of witnesses to provide testimony in support of many of the exhibits. This presentation will briefly discuss the relevant interest arbitration factors, will identify various exhibits that will need to be compiled in support of these factors, and will discuss the process for presenting a winning argument in interest arbitration.

II. Pre-Hearing Preparation.

A. Reviewing the Final Offer Before Certification.

1. Prior to the close of the investigation, each party must submit in writing its single final offer containing its final proposals on all issues in dispute that are subject to interest arbitration. *See* Wis. Stat. § 111.70(4)(cm)6.am.
2. For school districts in the interest arbitration process, an arbitrator is required to select one party's complete final offer. The arbitrator will choose the offer that is more relatively reasonable. He/she cannot select parts from each final offer in an award. Therefore, it is very important that the final offer is comprehensive and clear.
3. Final offers cannot be modified after certification except "with the consent of the other party." *See* Wis. Stat. § 111.70(4)(cm)6.b.
4. If a party has a critical error in its certified final offer, the other party can sometimes use that error as a basis to negotiate a settlement on a voluntary basis.
5. Remember, until the date the arbitration award is issued, the parties can continue to negotiate a voluntary settlement.

B. Creating a Theme.

1. “Our district can only afford a small total package increase because it has declining enrollment (and/or low fund balance, inability to pass a referendum, reduced revenues, higher than expected increases in costs) and dire economic circumstances.”
2. “We are seeking to change health insurance plans (or early retirement benefits, etc.) because the current plan is too costly (and/or is not comparable).”
3. “We are seeking changes from this unit based on similar changes that were voluntarily agreed to by other represented units in the district.”
4. “We are seeking a change in status quo to address a particular problem, our proposal best addresses the problem, and we have offered a *quid pro quo* in exchange for the change.”

C. Selecting an Arbitrator.

1. The WERC will provide a panel of seven arbitrators for the parties to review.
2. It is important to research each arbitrator provided to you on the WERC panel to attempt to predict the ones that will support your arguments, giving careful consideration to burden of proof inclinations of certain arbitrators. Prior decisions, related fees, and personal biographies for each arbitrator are available at <http://werc.wi.gov>.
3. The parties should review the bargaining agreement to see whether the method of selecting an arbitrator is covered. Agreements may describe the process by which an arbitrator is to be selected (i.e., flipping a coin to decide who goes first, or specifically identifying the party that strikes first).
4. Once an arbitrator has been selected, the parties should notify the WERC of the selection and schedule a mutually agreeable hearing date.
5. Once the hearing date has been scheduled, the WERC will issue a notice of the hearing to the public. The school district must publish the notice.
6. The parties should determine if a court reporter will be requested by either party.

7. Bargaining agreements usually address which party is responsible for costs associated with arbitration. Typically, these costs are split by the parties.

D. Creating Exhibits.

1. School districts must consider what exhibits will best support their argument to show that their offer is most reasonable (and that the union's offer is unreasonable).
2. Exhibits must be easily understandable to the arbitrator, with key components clearly identified and with the source documented.
3. The district must be prepared to answer any questions posed by the union and the arbitrator about the exhibits. The district should highlight during the hearing or in the brief how certain comparisons should carry more/less weight.
4. Failing to provide a sufficient number of exhibits to adequately respond to each of the statutory factors can be detrimental.

E. Identifying Potential Witnesses.

1. School districts should identify individuals to provide credible testimony to support the interest arbitration factors. Subpoena and witnesses fees, when necessary, are paid by the requesting party.
2. School district administrators and business managers can be very helpful in identifying the steps that a district has already taken to reduce overall expenditures, describe the various aspects of the budget, and outline the future negative impacts involved in the selection of the union's offer.
3. School board members can be good witnesses to discuss the overall make-up of the local community. They can explain the interests and concerns of the community, review prior attempts at change, and discuss referendum history.
4. If either party is attempting to make significant changes to insurance carriers or plans, the district may need to bring in an insurance representative to discuss the impact, if any, on employees.
5. A financial actuary and or business manager may be helpful in identifying risks associated with various proposals, projecting future costs of post-retirement benefits, explaining enrollment projections, and explaining the overall financial health of a district.

III. Interest Arbitration Factors for School Districts.

A. Interest Arbitration Factors for School Districts Prior to 2009 Wis. Act 28.

1. 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 Wis. Stat. § 111.70(4)(cm)7.(a.-j) (1993-94).

- 2. 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. through j. same as above]

See Wis. Stat. § 111.70(4)(cm)7r (a.-j) (1995-96).

3. 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. Arbitrators must give “greater weight” to local economic conditions, which can benefit either the school district or the union, depending on the health of the local economy. The pre-1995 criteria remained post-1995; however, they were considered by arbitrators after the greater and greatest weight factors.

B. Interest Arbitration Factors for School Districts After 2009 Wis. Act 28.

1. 2009 Wisconsin Act 28 modifies the statutory factors an arbitrator may consider. These changes first apply “to collective bargaining agreements entered into, extended, modified, or renewed, whichever occurs first, on the effective date of this subsection.” Specifically, under 2009 Wisconsin Act 28, the weight-factor approach is maintained for interest arbitration proceedings relating to all general municipal employees, except school district employees. Thus, Act 28 exempts decisions involving a collective bargaining unit consisting of school district employees from the greatest-weight or greater-weight factors. Only the remaining “other factors” are required as considerations by the arbitrator for interest arbitration proceedings relating to school district employees.
2. Although Act 28 eliminates the requirement that arbitrators give greatest and greater weight to certain factors, it does not necessarily prevent arbitrators from considering such factors as revenue and expenditure limitations and the economic conditions of the community. *See* LFB Paper #331 (May 26, 2009).

C. Impact of the Repeal of Interest Arbitration Factors.

1. The elimination of the greatest and greater weight criteria for school district employees means that the remaining factors will be considered by each arbitrator. 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.

2. Arbitrators may place a greater emphasis on comparability. As a result, school districts should:
 - a. Compare its final offer to offers made and settlements reached in the district with both professional and non-professional staff, including non-represented employees, to evaluate the strength of the district's position.
 - b. Identify traditionally comparable districts and compare the current and historical wages and benefits to evaluate whether an offer maintains the relative historical comparison to these traditionally comparable districts before commencing negotiations.
 - c. 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.
 - d. Coordinate and participate in sharing information across districts and amongst comparables in order to develop a coordinated and consistent strategy to control costs.
 - e. Anticipate that unions may fear school districts will look to make changes based on comparables.

IV. Building a Case Under the Various Interest Arbitration Factors.

A. 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. Specifically, this factor 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. 25579-A (Nielsen, 3/89). However, that limitation is not express and the criterion certainly is capable of sustaining a broader interpretation.

2. Arbitrator Malamud described his view of this factor in *Menomonee Falls School District*, Dec. No. 22333-A (11/85), when he reviewed an alleged illegal early retirement proposal:

There may be an instance where through oversight or by tactical design a proposal slips through the various mechanisms of the Med/Arb. statutory procedures and the issue of the legality percolates up at the hearing In this Arbitrator's view, he/she should find a proposal illegal, if and only if, there is a clear demonstration that the proposal is in fact illegal. The party arguing that a proposal is illegal should have the decision of an agency or a court which had found a similar proposal . . . to be illegal.

3. The district may consider a number of different exhibits to support this factor, including:
 - a. Exhibits that set forth and describe the outside legal authority that is being violated.
 - b. Exhibits that carefully describe the specific violation and the impact on the district.
 - c. Decisions by the proper legal authority involving nearly identical issues determined to be illegal.
 - d. Exhibits and testimony that detail legislative history and intent, where necessary.

B. Stipulations of the Parties.

1. 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 either (1) the tentative agreements represent significant language concessions on behalf of one party or the other or (2) the tentative agreements contain fiscal implications with respect to concessions made by either party in the final offer.
2. The district may consider a number of different exhibits to support this factor, including:
 - a. Exhibits that outline the cost of each economic tentative agreement.

- b. Initial final offers from both sides to identify the initiating party for each tentative agreement.
- c. Exhibits that explain discrepancies, if any, in the tentative agreements submitted.
- d. Testimony or exhibits that demonstrate concessions that have already made during the current or prior negotiations.

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.

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.*
4. The district may consider a number of different exhibits to support this factor, including:
 - a. Costings showing the total cumulative economic difference between the two offers.
 - b. An explanation of the revenue limit formula along with comparable documents showing declining enrollment, mill rates, per pupil expenditures, equalization aid, etc.
 - c. Itemization and testimony regarding budgets including recent and future projected cuts.
 - d. Referendum and fund balance histories, including newspaper accounts regarding the community response, and DPI and Board policies regarding fund balance, if any.
 - e. Newspaper articles and other reports identifying other matters that impact the community (unemployment, declining population, area businesses shutting down, lay offs, low agriculture prices, higher energy costs, high taxes, etc.)
 - f. Information concerning the average number of applicants and/or seniority list to a show lack of employee turnover highlighting the value the local labor market puts on these school district positions.

D. 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 (Yaeger, 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).
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).
 - c. Arbitrators may provide different weight to different internal comparisons providing the greatest weight to the most similar employees (non-represented / represented; administrative / professional / support; school year / full year, etc.).
3. The district may consider a number of different exhibits to support this factor, including:
- a. Clear summaries of the other internal settlements that were reached along with any *quid pro quo* that was provided for voluntary settlement.

- b. The bargaining agreement for each unit.
- c. Historic comparisons for each unit regarding settlements, total package cost, wage increases, fringe benefit increases and other contract modifications.
- d. Detailed summaries for each employee group health insurance plan if plan modification is at issue.
- e. Prior arbitration awards for the unit in arbitration and other internally comparable units that explain how this factor has been utilized by arbitrators in the past.

E. 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.*

5. The district may consider a number of different exhibits to support this factor.
 - a. Maps of the geographic area including distance between your district and the others. Identification of all relevant athletic conferences.
 - b. Information regarding the enrollments at each district as well as whether the various support staff employees are represented or not.
 - c. Benchmark summaries showing the wage/salary rank of employees at each district. Provide enough information regarding extra compensation like longevity benefits, shift premiums, and unique salary schedule structures so that arguments can be made, as necessary, to give variable weight to different comparables.
 - d. Bargaining agreements for each comparable (including wage schedules) and job descriptions for support staff units as supporting documentation in case there is a need to argue during briefing that one or more comparison is non-comparable.
 - e. Total package settlement data identifying the basic costing method for each comparable settlement.
 - f. Summary of each proposal and how it compares to comparable districts (i.e., health plan summaries, drug card co-pay information, retirement plans).
 - g. Highlight changes in the athletic conference or changes in the comparable districts if you are going to argue a comparable pool that has not been utilized before. Describe why certain districts may no longer be considered similar (labor market changed, no longer rural, more suburban, significantly larger, etc.)
 - h. Wage and benefit levels and settlement information for other public employers in the area with similar employee groups (County, hospitals, Votech, etc.).

F. 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 (Brotslaw, 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.*
3. The district may consider a number of different exhibits to support this factor.
 - a. Benefit handbooks and/or affidavits from large private employers in the area summarizing the average wage increase and benefit contributions for employees.
 - b. Board member testimony regarding their own experience especially regarding benefit contributions at their place of employment
 - c. Newspaper articles describing area layoffs and business closings.
 - d. Various general wage increase information for the County, State, or the U.S. Dept. of Labor Bureau of Labor Statistics.

G. Cost of Living - Consumer Price Index (CPI).

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.
- 5. The district may consider a number of different exhibits to support this factor.
 - a. Historical increases to CPI from the U.S. Department of Labor. (See, www.bls.gov/cpi).
 - b. Exhibits that compare the increase in each offer (wage only and total package) to CPI.
 - c. Explanations regarding the use of CPI and Cost of Living calculations.

H. 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.*
- 4. The district may consider a number of different exhibits to support this factor.
 - a. Bargaining unit agreements from each comparable district to review total package issues.
 - b. Summaries of the main fringe benefits if that data was not utilized in the other comparison sections to provide a complete picture of the economic and other benefits provided by employers.
 - c. Actual and cast forward costings, to the extent possible.

I. 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).
3. The district may consider a number of different exhibits to support this factor.
 - a. Laws or proposed laws that have been considered during the pendency of the case. Describe the potential impact on the school district.
 - b. Information concerning the status of negotiations between the parties or the comparables if things changed between the time the exhibits were created and the hearing.

J. 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*. 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). 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. Arbitrators have found that the *quid pro quo* concept does not prevail where comparables support change. See *Pierce County (Sheriff's Department)*, Dec. No. 28187-A (Friess, 4/95); *Cornell School District*, Dec. No. 27292-B (Zeidler, 11/92). 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 County Handicapped Children's Education Board*, Dec. No. 27422-A (Rice, 5/93).
7. The district may consider a number of different exhibits to support this factor.
 - a. Bargaining history of any prior *quid pro quo* for similar changes.
 - b. Exhibits that clearly identify the problem and how the district's offer addresses that problem (or how the union's offer does not address the problem).
 - c. Costings that show the value of the *quid pro quo*.
 - d. Comparable exhibits showing a *quid pro quo* is unnecessary, sufficient, or insufficient depending on the theme.

V. Conducting the Hearing.

A. Opening Arguments.

1. Each party will have an opportunity to provide an opening statement at the very beginning of the hearing. The party that initially filed the petition for arbitration is typically the party that goes first. It is beneficial to put your case in second.
2. An appropriate opening statement will provide a clear picture in the arbitrator's mind as to the theme of the district's case.

B. Entering the Exhibits and Testimony Into the Record.

1. After each party has presented its opening argument, the representative from each side will identify the exhibits that it will enter into the record to support its case.
2. Unlike grievance arbitration proceedings, it is not necessary for each party to have witnesses testify to the authenticity of each exhibit.
3. The responding party should ask questions during the exhibit introduction. The arbitrator may also ask questions during this time. Typically, these questions relate to identifying the source of a particular exhibit, clarifying the data, questioning inconsistent data, verifying timeframes and exhibit headings.
4. The party entering the exhibit will need to respond accordingly as the exhibits are being entered. If there is need to amend an exhibit, a request can be made at the end of the hearing to allow it.
5. Once the party who initiated the petition has presented all of its exhibits and testimony, the other party will present its exhibits and testimony.

C. Direct and Cross Examination.

1. Typically, exhibits and testimony are organized based on the order of the statutory factors.
2. Under direct examination, the witness should explain the exhibit to assist arbitrators in understanding the importance of the exhibit as it relates to the statutory factors.

3. Immediately following the testimony of each witness, the other party has the opportunity to cross examine the witness. After cross examination, there is an opportunity to ask additional questions of the witness (which is termed “redirect examination”). If “redirect” occurs, there will be an opportunity for additional questions (termed “recross examination”).

D. Closing the Record and Setting a Timeline for Briefs.

1. After both parties have had an opportunity to present evidence and witnesses in support of their cases, the arbitrator will then typically close the record. However, there may be circumstances where the arbitrator will hold the record open for a period of time to allow the parties to introduce additional exhibits, clarify or verify exhibits, or provide source documentation for exhibits.
2. At the conclusion of the hearing, the arbitrator will also typically establish the timelines for each party to submit their initial and reply briefs.

VI. Post-Hearing Issues.

A. Initial Brief.

1. The initial brief is intended to set forth the parties arguments with respect to each interest arbitration factor.
2. The initial brief should also contain citations to the exhibits and testimony transcript as well as citations to any relevant cases that support the district’s case.

B. Reply Brief.

1. After both parties have submitted their initial briefs, the parties will then have an opportunity to present reply briefs.
2. The reply brief is intended to respond to any arguments presented by the opposing party in his or her initial brief; it is not intended to present arguments that could have been presented in the initial brief.
3. The reply brief should address the case law presented by the union and, to the extent possible, distinguish that case from the current issues.

C. Getting the Award.

1. Awards will typically be received within 60-days of the hearing. “The arbitrator shall issue the arbitration award in writing as expeditiously as possible following the receipt of final arguments or briefs, if any. . . Arbitrators who repeatedly or egregiously fail to issue their decision within 60 days following receipt of final arguments or briefs, if any, shall be subject to removal from the commission’s roster of arbitrators” ERC § 32.15(12)(a)-(c).
2. The arbitrator will issue an invoice for services. “Fees and expenses of the arbitrator . . . shall be shared equally by the parties.” These fees cannot be more than those in the arbitrator’s WERC biography at the time of selection. ERC § 32.15(13).