

Faculty Scholarship

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1990

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## Publication Information

16 William Mitchell Law Review 1223 (1990)

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## Repository Citation

Ver Ploeg, Christine D., "Comparable Worth in Arbitration" (1990). *Faculty Scholarship*. Paper 134.  
<http://open.mitchellhamline.edu/facsch/134>

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# Comparable Worth in Arbitration

## **Abstract**

In 1992 Minnesota became a pioneer in the arena of equal pay for equal work by enacting the Minnesota Local Government Pay Equity Act/Comparable Worth Law (“CWL”), which allocated nearly \$22 million to remedy wage disparities between female dominated and male dominated classes at the state level. Each local government had to determine a new pay level for public employees taking into account whether it was a male or female dominated field. Many of these determinations were challenged by unions basing their challenges on two primary themes: (1) the methodologies used were flawed; (2) the determinations were invalid because the collective bargaining process was not utilized. These claims and challenges are working their way through arbitration, and arbitrators have little guidance from the legislature on how to analyze them. This article seeks to identify the arguments advanced in support of each school of thought and how each is dealt with at the arbitration level. The article concludes that the debate between each school of thought continues and the parties and arbitrators are left to define the parameters of the debate between the two, despite the fact that the legislature attempted, in 1990, to provide clearer direction on arbitration of issues arising under the Pay Equity Act.

## **Keywords**

Minnesota, pay equity act, comparable worth act, wage discrimination, equal pay for equal work, employment arbitration, labor arbitration

## **Disciplines**

Dispute Resolution and Arbitration | Labor and Employment Law | Legislation | State and Local Government Law

## **Comments**

This article is co-authored by Phyllis Castle Marion.

# COMPARABLE WORTH IN ARBITRATION

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## INTRODUCTION

Over twenty-five years ago Congress passed the Equal Pay Act<sup>1</sup> and Title VII of the Civil Rights Act.<sup>2</sup> For the first time Congress sought to address the formidable issue of eliminating wage discrimination based upon sex. Unfortunately, despite the initial promise of these statutes, the disparities between men's and women's wages have remained relatively unchanged. When a correction is made for differences in hours worked, women are still paid about eighty-three percent of what men are paid.

One reason for this disparity has been the high concentration of women—and the relative dearth of men—in a number of lower paying, unskilled jobs. Seventy-three percent of working women are employed in female-dominated jobs such as clerical work, the food industry, the garment trades, and retailing, virtually all of which have been relatively low paying.

Absent clear evidence of sex discrimination in job assignments, neither Title VII nor the Equal Pay Act have been useful tools to close the gap between wages paid for “men's work” and those paid for “women's work.” This has been true even though many of the traditionally “female jobs” have objectively been proven comparable to, or even more valuable, than “men's jobs” in terms of responsibility, training, job conditions, and importance to the employer.

Given the courts' reluctance to extend the Equal Pay Act and Title VII to address disparities that stem from social notions of

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1. 29 U.S.C. § 206(d) (1988).

2. 42 U.S.C. §§ 2000e-2000e-17 (1982).

different values of women's and men's work,<sup>3</sup> many persons have come to see legislative enactment of the concept of comparable worth—equal pay for equal *worth*—as an answer to this dilemma.

In the early 1980s comparable worth became, and remains, a prominent and controversial issue in the area of wage and sex discrimination. Supporters have argued it will help eradicate job segregation and improve the circumstances of working women, sixty percent of whom provide the sole or vital support for themselves and their families. Opponents have argued that moving from the Equal Pay Act's requirement of equal pay for equal work to a comparable worth system is too difficult and costly; that it will destroy the free market system; that existing law is adequate to prevent sex discrimination; and that Congress has expressly rejected the notion of comparable worth.

In 1982 Minnesota became a pioneer in this area when it enacted the state Employees Equitable Compensation Statute<sup>4</sup> and appropriated nearly \$22 million to remedy wage disparities between female dominated and male dominated classes at the state level. In 1984 the Minnesota legislature further affirmed its support for the principle of pay equity by requiring that the state's local governments also implement it.

The Minnesota Local Government Pay Equity Act,<sup>5</sup> commonly referred to as the Minnesota Comparable Worth Law (CWL), has been amended several times since its enactment. It provides that each of the state's 1,600 jurisdictions must determine which staff members are employed in sex-segregated "women's work" classifications. The public employer must then rate those classifications against jobs performed by other employees and, if there is a discrepancy between the rating and the employee's pay, the political subdivision (e.g. county, city, school, or library) must create a plan to bridge that gap.<sup>6</sup> Fail-

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3. See *County of Washington v. Gunther*, 452 U.S. 161, 168 (1981).

4. MINN. STAT. §§ 43A.01–.47 (1990) (publication forthcoming).

5. MINN. STAT. §§ 471.991–.999 (1990).

6. The Local Pay Equity Act was originally passed in 1984 and has been amended several times since that date with the most significant amendments taking place in 1986. MINN. STAT. § 471.992, subd. 1 (1990) provides that: "Subject to sections 179A.01 to 179A.25 and sections 177.41 to 177.44 but notwithstanding any other law to the contrary, every political subdivision of this state shall establish equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees . . . ."

It defines an equitable compensation relationship to mean "that the compensa-

ure to implement a completed plan by December 31, 1991 can result in reduced state aid to a local political subdivision.<sup>7</sup>

Now that most public employers have completed the necessary job evaluations and have adopted a plan that presumably satisfies the law, the focus has turned to implementation of the plan through the collective bargaining process.

Reconciling the mandates of the Pay Equity Act with conflicting collective bargaining agreements and the constraints of limited financial resources has not been easy. Unlike the state, the local legislatures gave no additional money to the political subdivisions to achieve pay equity. Thus, local governments have been obliged to find these additional resources in existing funds, funds which in many cases have already been stretched too thin.

Some subdivisions have resolved the dilemma of limited resources by granting little or no wage increases to classes found to be "over-compensated." Police officers and firefighters are two male-dominated classes that have traditionally been found to be "over-compensated"<sup>8</sup> in relationship to other classes of

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tion for female-dominated classes is not consistently below the compensation for male-dominated classes of comparable work value, as determined under section 471.994, within the political subdivision." MINN. STAT. § 471.991, subd. 5 (1990). Comparable work value is the "value of work measured by the skill, effort, responsibility, and working conditions normally required in the performance of the work." MINN. STAT. § 471.991, subd. 3 (1990). The comparable work value is determined by the use of a job evaluation system. When selecting or developing a job evaluation system "[e]ach political subdivision shall meet and confer with the exclusive representatives of their employees . . . ." MINN. STAT. § 471.994 (1990).

When preparing management negotiation positions for collective bargaining in regard to compensation, the employer shall assure that:

- (1) compensation for positions in the classified civil service, unclassified civil service, and management bear reasonable relationship to one another;
- (2) compensation for positions bear reasonable relationship to similar positions outside of that particular political subdivision's employment; and
- (3) compensation for positions within the employer's work force bear reasonable relationship among related job classes and among various levels within the same occupational group.

MINN. STAT. § 471.993, subd. 1 (1990).

7. MINN. STAT. § 477.9981, subs. 2-6 (1990).

8. The concept of over-compensated and under-compensated classes comes from the job evaluation studies done by the local subdivisions. In these studies each class of positions is evaluated and given a point value. Classes are also defined as male-dominated, female-dominated or balanced according to the statute. A graph is then constructed using salary on the vertical axis and job evaluation point value on the horizontal axis.

Each male-dominated class is then placed in its correct point on the graph making a scattergram. A line is then drawn through the positions in a manner that ap-

employees in any given jurisdiction. They have been particularly aggrieved.

In order to provide public employers with breathing space to conduct their studies and implement their pay equity plans, the Act provided that employees and unions could not challenge those plans until August 1, 1987. With the passage of that deadline a number of unions have, in fact, challenged studies and plans which they claim are flawed and unfair. Most of those challenges have been brought before labor arbitrators rather than in the courts, and most have been brought by unions which represent law enforcement personnel. Challenges have been based on two primary themes:

#### *A. Challenges to Study Methodologies*

First, a union may claim that the study upon which an employer's pay equity plan was based was flawed, either because the approach taken (e.g. point system, decision band method) was unsound, or because the mechanics of conducting the study were faulty.

A review of the arbitration decisions which address these challenges shows that arbitrators are increasingly reluctant to second guess job study results which are the product of an established and recognized methodological approach. Even arbitrators who were initially receptive to such challenges seem to agree with the grudging observation of one arbitrator that "despite their inherent problems and inherent subjectivity, job evaluation studies are in wide use and the use of those studies are in fact legislatively mandated in Minnesota under CWL."<sup>9</sup>

Expanding upon this theme, another arbitrator observed:

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proximately divides the positions. This line is an average wage level at each point level for male-dominated positions and is referred to as an all-male line. Female-dominated and balanced classes are then plotted on the graph.

An alternative to the all-male line is to plot all classes, male-dominated, female-dominated and balanced on the scattergram and then draw the line in a manner that divides the classes. This approach derives an all-employee line. The Local Government Pay Equity Supplements for counties and cities issued by the Minnesota Department of Employee Relations in 1984 use the all-male line. Most employers, however, use the all-employee line in their studies.

Most subdivisions then establish a corridor that is approximately 7 to 10% above and below each line. Positions within this corridor are viewed as equitably compensated. Positions above the corridor are viewed as over-compensated; positions below the corridor are viewed as under-compensated.

9. City of Burnsville & AFSCME, Council No. 14, St. Paul, 88-PN-829 (Jan. 13, 1989) (S. Bard, Arb.).

The only guidance provided to interest arbitrators in state law requires that we consider the public employer's pay equity plan. Nothing in this limited statutory reference can be read as empowering an interest arbitrator to undertake a sweeping review of a public employer's pay equity plan which has been prepared by a competent and widely used professional consulting firm. Neither does the law contemplate action by an interest arbitrator to carve such exceptions as may serve to undermine the essential strategies and mechanisms of the plan.<sup>10</sup>

This does not mean that the validity of the study cannot be questioned. It simply reflects a presumption of validity and arbitrators' unwillingness to undertake "de novo" review. That presumption is reflected in one arbitrator's comment: "Pay equity studies are mandated by law. I am unwilling to second guess the results of a reasonable study in the absence of clearly more credible studies."<sup>11</sup>

### *B. Challenge to Effect on Collective Bargaining*

The second broad challenge to pay equity plans has come from unions, most notably those which represent law enforcement personnel, who challenge the effect of an employer's plan on the collective bargaining process. The scenario is basically the same:

The local subdivision's final wage offer to a male-dominated, over-compensated class is usually couched in terms such as "a wage increase that is consistent with the comparable worth law." This offer is typically lower than would otherwise be suggested by prevailing wage rates for the same job in comparable jurisdictions. However, it is premised on the theory that the only way to meet the legislature's 1991 deadline is to freeze the wages of over-compensated classes to provide the necessary funds to bring the under-compensated classes into an equitable relationship.

The unions argue that the legislature never intended that the pay equity law penalize selected classes of employees. Rather, they submit that the traditional external comparisons, which focus on wages paid to the same classes of employees in

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10. County of Hennepin & AFSCME Council No. 14, St. Paul, 87-PN-552 (Dec. 2, 1987) (Flagler, Arb.).

11. Minnetonka Police Ass'n & City of Minnetonka, 88-PN-724 (Feb. 28, 1989) (Ver Ploeg, Arb.).

comparable jurisdictions, remain the most appropriate benchmark in setting wages.

Thus, there have emerged two schools of thought concerning the pay issue. One school holds that arbitrators deciding wage issues should rely primarily upon the traditional "external" criteria. Under this approach male-dominated groups, most notably police and fire employees, would continue to enjoy their historic wage advantage.

Adherents of the opposing school of thought have placed greater reliance on "internal" criteria which reveal wage disparities within a local workforce. These arbitrators interpret Minnesota's Pay Equity Law to require adjustments to remedy proven inequities, even if that means freezing or slowing down wage increases that would otherwise be justified under historically accepted external comparisons.

This issue of external versus internal standards of comparison in arbitrations involving over-compensated classes has been characterized by the arbitrator in *City of Wayzata and LELS*<sup>12</sup> as:

When an arbitrator has before him a male dominated class that appears to be presently overpaid based on the point value given to its position, is the legislative mandate to bring the wages of the male class down or to suppress wage increases in order to make the establishment of equitable compensation relationships with female classes easier and less expensive for the City to achieve?

The competing arguments advanced in the debate on this question are considered below.

## I. EXTERNAL COMPARISON PROPONENTS

### A. *Legislative History*

Arbitrators who emphasize external comparisons have concluded that the Legislature never intended to minimize or ignore the use of such data. Those arbitrators note that Minnesota Statute section 471.992, subdivision 2 directs that the arbitrator "shall consider" comparable work value "together with other standards appropriate to interest arbitration." This language has been read to support the use of

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12. *City of Wayzata & LELS*, 87-PN-606, slip op. at 33 (Aug. 30, 1988) (S. Bard, Arb.).



external data, including “not only market data but all of the traditional considerations including cost of living data, job load, affordability and all the other various elements which go into comprising either a labor market or external comparables.”<sup>13</sup>

This interpretation is bolstered by the legislative history of the Act. The 1984 Act directed that the arbitrator “shall follow” the equitable compensation plan of the local subdivision when making a wage award. No mention was made of other standards to be applied. In 1986, after considerable debate in the conference committee, the Act was amended to its present form, including its directive to simply “consider” comparable work value.

These arbitrators also note that the bill originally introduced in the House in 1984<sup>14</sup> defined equitable compensation relationships to mean that “the primary” consideration in negotiating total compensation was to be comparable work value in relationship to other employees in the subdivision. However, the Act as it passed that year stated only that comparable work value was “a primary consideration,”<sup>15</sup> not necessarily the only or a controlling consideration. And just this year the legislature eliminated the term “primary consideration” from the definition of “equitable compensation relationship” by defining that term to now mean that “compensation for female-dominated classes is not consistently below the compensation for male-dominated classes of comparable work value.”<sup>16</sup>

One arbitrator has further determined that while the Act may require a local subdivision to give primary consideration to comparable work value, an arbitrator is not similarly bound:

More important, however, this requirement is *imposed upon the City, not the Arbitrator*; it is designed to assist the City in preparing negotiating positions and in eradicating and eliminating wage discrimination for classes of employees who are deemed to be discriminated against as a result of the study. Rather, the law says simply that an arbitrator

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13. City of Brooklyn Center & LELS, 88-PN-773 (Apr. 10, 1989) (J. Bard, Arb.).

14. H.F. 1766, 73rd Minn. Leg., 1984 sess.

15. MINN. STAT. § 471.991, subd. 5 (1984) (emphasis added) (amended in 1990).

16. Note, however, that a subsequent provision does retain that phrase: “A primary consideration in negotiating, establishing, recommending, and approving compensation is comparable work value in relationship to other employee positions within the political subdivision.” MINN. STAT. § 471.992, subd. 1 (1990).

“shall consider equitable compensation relationship standards . . . together with the other standards appropriate to interest arbitrations.”<sup>17</sup>

### B. *Role of Equity Considerations*

Despite their narrower interpretation of the role pay equity should play in collective bargaining, adherents to external comparisons do not dismiss equity considerations entirely. One arbitrator has conceded that external comparisons should be deemed secondary to internal comparisons in two instances. First, an arbitrator “obviously must take the Study into account if he has female-dominated or relatively undercompensated units before him which have been victims of wage discrimination.”<sup>18</sup> In such cases the Act dictates that the arbitrator give a larger raise than the market should otherwise indicate.

Second, when a local subdivision demonstrates that using external comparisons to determine the wages of an already “over-compensated” class would place an extreme burden on its resources, an arbitrator may suppress the indicated raises. However, this is permissible “*if and only if* the Arbitrator became persuaded that the financial constraints on the public employer made the correcting of the imbalance between classes by raising the female classes impossible.”<sup>19</sup> The arbitrator will not presume such financial exigencies; a city must prove such a financial burden.<sup>20</sup>

### C. *The Duty to Bargain in Good Faith*

Minnesota law requires that an employer bargain in good faith with its employees even when it feels constrained by comparable worth considerations. Many arbitrators remain concerned that permitting comparative worth studies to dictate wage increases will adversely affect<sup>21</sup> the collective bargaining

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17. *City of Burnsville & LELS*, 88-PN-891, slip op. at 8 (Mar. 31, 1989) (J. Bard, Arb.) (emphasis added).

18. *Id.* at 9.

19. *City of Wayzata & LELS*, 87-PN-606, slip op. at 34 (Aug. 30, 1988) (S. Bard, Arb.) (emphasis added).

20. The authors have been unable to find an arbitration award where a proponent of external comparisons has found that such a financial burden exists.

21. “The provisions of sections 471.991 to 471.999 do not diminish a political subdivision’s duty to bargain in good faith under chapter 179A or sections 179.35 to 179.39.” MINN. STAT. § 471.9966 (1990).

process. That is: "By blindly insisting that wage increases for these employees [i.e. over-compensated employees] conform to the findings of that study, the City violates its statutory obligation to bargain in good faith . . . ." <sup>22</sup>

There is also concern that because the studies are done on a subdivision-wide basis there could be a loss of unit by unit bargaining if the results of the studies were considered binding.

Such an interpretation in effect would force unions to give up their right to negotiate contracts independent of the pay arrangements made in other segments of the organization. They would be bound hand and foot to the same point/dollar relationship as the first union or employee unit to sign an agreement with the public employer. <sup>23</sup>

This year the legislation appears to have addressed these concerns by adding language that: "This law may not be construed to limit the ability of the parties to collectively bargain in good faith." <sup>24</sup> Additional new language permits the Commissioner of Employee Relations to consider "recent arbitration awards that are inconsistent with equitable compensation relationships" when determining whether a governmental subdivision has failed to establish the required equitable compensation relationship. <sup>25</sup> This provision suggests that an out-of-compliance employer may be excused if the lack of compliance stems from an interest arbitrator's decision.

Also relevant is new language in the Act's penalties section which permits the Commissioner to suspend penalties if "non-compliance results from factors unrelated to the sex of the members dominating the affected classes and that the subdivision is taking substantial steps to achieve compliance to the extent possible." <sup>26</sup>

#### *D. Effect on the Arbitration Process*

Flowing from the concern for the collective bargaining process is concern about the arbitration process. If an employer can structure its wage offers in relation to the single line and

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22. Minnetonka Police Ass'n & City of Minnetonka, 88-PN-724, slip op. at 5 (Feb. 28, 1989) (Ver Ploeg, Arb.).

23. County of Benton & Teamster's 320, 88-PN-512, slip op. at 10 (Mar. 30, 1989) (H. Bard, Arb.).

24. MINN. STAT. § 471.992, subd. 1 (1990).

25. MINN. STAT. § 471.9981, subd. 6 (1990).

26. *Id.*

use that line as a standard to determine all raises, some arbitrators reason that:

[S]ome of an arbitrator's decision making authority is eliminated by the public employer's interpretation of comp worth . . . . It will decide what is required to comply with the statute, and it will decide by arbitrarily negotiating with other units what the Arbitrator can and cannot do in so far as raising the wages of essential employees are concerned.<sup>27</sup>

## II. INTERNAL COMPARISON PROPONENTS

Soon after August 1987, when challenges to pay equity studies and plans were first permitted, the view of the external comparison proponents prevailed. Only a few arbitrators favored giving greater consideration to internal comparisons when pay equity was a consideration. By early 1989, however, the number of internal comparison proponents had increased, giving rise to a distinct split among arbitrators over this question.

### A. *Legislative History*

Arbitrators who place great weight on evidence of internal inequities in rendering decisions tend to emphasize the purpose of the Act: achieve pay equity for classes of employees which are female dominated.

While the law may permit an arbitrator to balance the impact of a particular pay equity formula against other traditional interest arbitration criteria, nothing in the statute can be read as contemplating an award which would undermine the express purpose of the Act which is to bring undercompensated jobs into reasonable alignment with overcompensated jobs.<sup>28</sup>

These arbitrators believe that using market forces to decide wage levels does not accomplish this purpose. "If the Minnesota Comparable Worth Law is to succeed in substantially reducing and eventually eliminating gender-based pay inequities, it must accomplish its legislative purpose through moderating those market forces which have so clearly favored

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27. *City of Burnsville & LELS*, 88-PN-891, slip op. at 10 (Mar. 31, 1989) (J. Bard, Arb.).

28. *Minneapolis Special School Dist. No. 1 & Minneapolis Public Schools Admin. Supervisory Personnel*, 86-PN-652, slip op. at 9 (Nov. 15, 1986) (Flagler, Arb.).

male dominated jobs and as a corollary have so disfavored female dominated jobs.”<sup>29</sup>

While other factors can and should be considered, it is nevertheless evident “[f]rom this background and legislative directive . . . that the Legislature indeed intended that a job evaluation be the ‘*primary* consideration’ when balanced against evidence of market wage rates.”<sup>30</sup>

In this respect, it is noteworthy that this year the legislation affirmed that comparable work value remains a primary consideration: “A primary consideration in negotiating, establishing, recommending, and approving compensation is comparable work value in relationship to other employee positions within the political subdivision.”<sup>31</sup>

Also relevant to these arbitrators is the omission of external market factors from the definition of the “reasonable relationship” which employers are required to achieve.<sup>32</sup> In fact, there is express language that the “plan need not contain a market study” at all.<sup>33</sup>

In addition, it is highly noteworthy that during the 1990 legislative session proponents of market data were unsuccessful in their efforts to have such data control the outcome. Instead, the Act’s only references to consideration of market data appear in the sections concerning arbitration<sup>34</sup> and collective bargaining<sup>35</sup> “for a *balanced* class.” In all other interest arbitrations “involving a class other than a balanced class,” the arbi-

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29. City of Stillwater & Teamster’s 320, 88-PN-926, slip op. at 3 (Apr. 24, 1989) (Flagler, Arb.).

30. LELS & County of Kanabec (Sheriff’s Dept.), 89-PN-274, slip op. at 4 (June 26, 1989) (Ver Ploeg, Arb.). This viewpoint is supported by the information provided to local governments by the State of Minnesota in *A Guide to Implementing Pay Equity in Local Government* (Minnesota Department of Employee Relations, 1984) where the question of the role of prevailing wages is addressed as follows:

The law says that a *primary* consideration in wage-setting is “comparable work value in relationship to other employee positions within the political subdivision.” However, it allows for consideration of other factors, including “reasonable relationship to similar positions outside of that political subdivision’s employment.” At the state level, almost identical language has been interpreted to mean that pay equity is the most important consideration, although exceptions can be made for demonstrated recruitment problems.

31. MINN. STAT. § 471.992, subd. 1 (1990).

32. MINN. STAT. § 471.993, subd. 2 (1990).

33. MINN. STAT. § 471.9981, subd. 1 (1990).

34. MINN. STAT. § 471.992, subd. 2 (1990).

35. MINN. STAT. § 471.992, subd. 3 (1990) (emphasis added).

trator is directed to continue to consider the factors which the Act previously set forth: "the equitable compensation relationship" standards of the Act and "other standards appropriate to interest arbitration."<sup>36</sup> Thus the ambiguities persist.

*B. Application of Pay Equity Standards to Male-Dominated, Over-Compensated Classes*

Arbitrators who favor internal comparisons answer the question posed in *City of Wayzata* much differently than do advocates of external comparisons. They insist that the statute's directive to establish "equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees"<sup>37</sup> to eliminate sex-based wage disparities does not support different pay equity considerations for under-compensated and over-compensated classes. "Nowhere does the law suggest that a pay equity plan is the primary consideration when used to justify an increase in depressed wages, but becomes less relevant when determining wage increases for job classifications found to be over-compensated."<sup>38</sup>

Once an arbitrator accepts that pay equity considerations may be applied to over-compensated classes, he or she must determine how to fairly apply the principle. In *City of Mankato and LELS*<sup>39</sup> the arbitrator outlined four possible ways to accommodate pay equity concerns when setting wages for an over-compensated class. "The first is to reduce wages of the male dominated jobs while increasing those of female dominated jobs of comparable work value. Review of the legislative debate leading to the State of Minnesota's Comparable Worth Law leaves no doubt that the Legislature flatly rejected this approach."<sup>40</sup>

The second approach is to freeze the wages of male-dominated classes while accelerating the wage increases of female-dominated classes. Noting, however, that this would reduce the "real wages" of the over-compensated class, the arbitrator concluded that: "Nothing in the language of the CWL or in

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36. MINN. STAT. § 471.992, subd. 2 (1990).

37. MINN. STAT. § 471.992, subd. 1 (1990).

38. *LELS & County of Kanabec (Sheriff's Dept.)*, 89-PN-274, slip op. at 4 (June 26, 1989) (Ver Ploeg, Arb.).

39. *City of Mankato & LELS*, 88-PN-725, slip op. at 5 (Nov. 8, 1988) (Flagler, Arb.).

40. *Id.*

any of its legislative debate contemplates such an adverse result.”<sup>41</sup>

A third approach would be to raise the wages of male-dominated classes to the market rate for like political subdivisions while at the same time raising the wages of female-dominated classes at an even faster rate.

It should be obvious that this is a very high cost pay equity compliance strategy which few political subdivisions could long sustain. Given the typical disparities between male versus female dominated comparable value wages, catch-up pay equity increases would have to chase a constantly moving and elusive target under this approach.<sup>42</sup>

And finally, the fourth approach involves decelerating the rate of wage increases for over-compensated classes while simultaneously accelerating those increases for under-compensated classes. This is usually achieved by awarding over-compensated classes a smaller increase on the base, often accompanied by a lump sum payment which would bring the total wage increase somewhere close to what market conditions might indicate. For example, a broader market study might suggest a four percent raise while at the same time pay equity might indicate that the class is over-compensated within the workplace and should be kept at its current wage level. Under a deceleration approach, the arbitrator might award a one and one-half percent increase on the base plus a two percent lump sum payment.

Internal comparison proponents have most often adopted the fourth alternative: “[W]hile the comparable worth law should rarely, if ever, be used to freeze otherwise justified wage increases, it is appropriate to utilize that law to decelerate the rates of increases for over-compensated employees while attempting to bring under-compensated employees to a more equitable position.”<sup>43</sup>

There is also a very important shift in the “burden of persuasion” between external and internal proponents. As discussed above, external comparison proponents demand that the employer prove that it cannot afford to pay the market rate for

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41. *Id.* at 6.

42. *Id.*

43. LELS & City of East Grand Forks, 88-PN-584, slip op. at 14 (Jan. 27, 1989) (Ver Ploeg, Arb.).

over-compensated classes and accomplish its pay equity plan. Arbitrators who favor the use of internal comparisons accept that a local subdivision cannot continue accelerating wage rates for over-compensated classes and achieve pay equity:

Were political subdivisions throughout the State to have fairly unlimited sources of revenue, presumably public employers could continue to fully pay the ever rising "free market" rate for male dominated jobs while simultaneously increasing wages for female dominated jobs at an even more rapidly escalating rate in order to eliminate these historical disparities. Clearly this is not the case.<sup>44</sup>

Local subdivisions are still expected to present evidence of inability to pay increases based on the market rate. But labor must demonstrate that the political subdivision can in fact afford both pay equity and market wage rates for over-compensated classes. Interested arbitrators will not presume this to be the case.

### *C. Role of External Comparisons*

Although the proponents of internal comparisons strive to accommodate what they deem to be the law's requirements of pay equity, they do not ignore the traditional deference given to market forces. "[I]t is clear that market data cannot be ignored. Evidence of external comparables has traditionally been heavily weighed in interest arbitration, and the 1986 amendments to Minnesota's comparable worth law make clear that those traditional standards remain relevant."<sup>45</sup>

At least one proponent embraces the value of market data in achieving the goal of pay equity:

I firmly believe that giving appropriate weight to market wages will work to the benefit of the female dominant occupations both in the short and in the long run . . . . Elemental logic dictates that unless a market-driven wage for male-dominant jobs is maintained, there can be no stable benchmark to which female dominant jobs ought to be raised.<sup>46</sup>

However, evidence of market forces is considered subsidi-

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44. *City of Mankato & LELS*, 88-PN-725, slip op. at 7 (Nov. 8, 1988) (Flagler, Arb.).

45. *LELS & City of East Grand Forks*, 88-PN-584, slip op. at 6 (Jan. 27, 1989) (Ver Ploeg, Arb.).

46. *County of Anoka & Teamster's 320*, 88-PN-288, slip op. at 3 (Nov. 1, 1988) (Flagler, Arb.).



ary, when it reinforces the historical devaluation of “women’s work”:

Indeed, the entire purpose of the CWL is to remedy the *devaluation* of female dominated occupations which has resulted from historical reliance on the market mechanism as the primary determinant of wages in our economy. It simply makes no sense to continue placing primary weight on that same flawed mechanism in order to correct the very problem it created.<sup>47</sup>

This view is echoed in *County of Kanabec and LELS*:

[I]t is also true that Minnesota’s comparable worth law was enacted to remedy pay inequities within the public sector, inequities which stem largely from the inequities which pervade the broader marketplace. . . . [T]he legislature intended to eliminate, or at least minimize, the inequities which arise from a market-based wage scale . . . .<sup>48</sup>

It is this reluctance to use the very mechanism that created the pay inequities that persuades these arbitrators to heavily weight the CWL when rendering awards.<sup>49</sup>

#### D. *Effect on Arbitration*

Finally, internal comparison proponents are not concerned that pay equity considerations interfere with the arbitrator’s traditional duty to decide the wages of a single group of employees. Noting that arbitrators have always considered a single group of employees in relation to all employees within the subdivision one arbitrator has concluded: “Because an arbitrator cannot determine wages for a single group of employees in a vacuum, neither can an arbitrator ignore a city’s overall compensation plan, particularly pay equity issues.”<sup>50</sup>

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47. *City of Mankato & LELS*, 88-PN-725, slip op. at 6 (Nov. 8, 1988) (Flagler, Arb.).

48. *LELS & County of Kanabec (Sheriff’s Dept.)*, 89-PN-274, slip op. at 4 (June 26, 1989) (Ver Ploeg, Arb.).

49. This position is further supported by the 1988 amendment to the CWL. Minnesota Statute section 471.9981, subdivision 1 states that the political subdivision’s implementation plan need not contain a market study. The proponents take this “as an inference that market data was never intended to prevail in setting appropriate wage levels.” *Id.*

50. *Minnetonka Police Ass’n & City of Minnetonka*, 88-PN-724, slip op. at 8 (Feb. 28, 1989) (Ver Ploeg, Arb.).

### SUMMARY

In 1982 Minnesota recognized and addressed the inequities inherent in an equal pay for equal work scheme by mandating equal pay for equal worth at the state level. The state's experience was viewed as successful, and two years later the legislature extended the concept to Minnesota's political subdivisions. However, local governments have not enjoyed the same success as did the state. This has been due, in large part, to the legislature's failure to allocate additional money to assist local governments in achieving pay equity. The result has been a recurring impasse in collective bargaining, most notably between public employers and the unions who represent law enforcement personnel.

Where parties have been unable to accommodate the conflicting mandates of the Pay Equity Act with traditional collective bargaining and limited financial resources, they have turned to arbitrators to render a final and binding decision on the wage issue.

In turn, arbitrators have disagreed on the weight to be given different factors in reaching that decision. Does Minnesota law now require that greater reliance be placed on "internal" criteria, so that some historically "over-compensated" classes may be forced to absorb some of the cost of achieving pay equity? Or does the law continue to accord greater weight to the historically accepted benchmarks of "external" data, so that employees may not be penalized in an employer's quest to achieve pay equity?

This article has sought to identify the arguments advanced in support of each school of thought. The debate continues. Although the legislature apparently attempted this year to provide clearer direction on the above questions, many ambiguities remain and disagreement can be expected to continue. It still remains left to the parties and to the arbitrators to define the parameters of the debate.