STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of NEKOOSA TEACHERS' ASSOCIATION Involving Certain Employes of NEKOOSA SCHOOL DISTRICT.	Case 43 No. 50997 INT/ARB-7292 Decision No. 28380

Appearances:

Mr. Anthony L. Sheehan, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, on behalf of the Association.

Ruder, Ware, & Michler, S.C., Attorneys at Law, by Mr. Dean R. Dietrich, Suite 700, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the District.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On May 19, 1994, the Nekoosa Teachers' Association filed a petition with the Wisconsin Employment Relations Commission seeking arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., as to a dispute between the Association and the Nekoosa School District regarding a salary reopener in a 1992-1995 collective bargaining agreement. The Association and the District thereafter disagreed as to whether the dispute was governed by the qualified economic offer provisions of 1993 Wisconsin Act 16. The parties entered into a Stipulation of Facts and filed written argument in support of their respective positions, the last of which was received December 22, 1994.

On February 14, 1995, the District advised the Commission of additional authority the District believed was relevant to the issue at hand.

Based upon the parties' Stipulation, the Commission makes and issues the following

FINDINGS OF FACT

1. The School District of Nekoosa, herein the School District, is, and at all times material herein has been, a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has its principal offices located at 600 South Section Street, Nekoosa, Wisconsin 54457.

2. The School District's principal representative for the purpose of these proceedings is Attorney Dean R. Dietrich, Ruder, Ware & Michler, S.C., 500 Third Street, Suite 700, P.O. Box 8050, Wausau, Wisconsin 54402-8050.

3. The Nekoosa Teachers' Association, herein the Association, is, and at all times material herein has been, a labor organization within the meaning of Sec. 111.70(1)(h), Stats.

4. The Association's principal representatives for the purpose of these proceedings are Mr. Thomas S. Ivey, Jr., UniServ Director, Central Wisconsin UniServ Council-North, 2805 Emery Drive, P.O. Box 1606, Wausau, Wisconsin 54402-1606, and Mr. Anthony Sheehan, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003.

5. All times material herein, the Association is and has been the exclusive collective bargaining representative of the employes of the School District included in a collective bargaining unit comprised of all certified teaching personnel including classroom teachers, librarians, guidance counselors, but excluding part-time principals if more than 50 percent of their time is spent in supervision, principals, administrators, school psychologists, substitute teachers, paraprofessionals, office clerical, maintenance, and operating employes. Said bargaining unit is comprised of approximately 110 employes.

6. The School District and the Association are parties to a collective bargaining agreement, the term of which is from August 10, 1992, through August 9, 1995, and which was signed by the parties on August 20, 1992.

7. The 1992-1995 collective bargaining agreement contains a provision which states:

> This Agreement shall be in effect on August 10, 1992 through August 9, 1995, and from year to year thereafter unless reopened in accordance with Provision three (3) of Article IV herein.

Provision (3) of Article IV provides as follows:

> If either party shall desire to change any provision of this Agreement, it shall give written notice of such desire to the other party by the

first school day of February in advance of the anniversary date.

Article XIII - Professional Salary Policy and Procedures, Paragraph A - Base Salary for the Bachelor's Degree, Subparagraph 3 provides as follows:

> The professional salary shall be subject to negotiation for the 1994/95 contract year. This provision is to be reopened in accordance with Article IV of this Agreement and will be the only item subject to negotiation for the contract year.

8. In February, 1994, the Association served notice upon the School District to commence negotiations pursuant to the Article XIII salary reopener provision set forth in the 1992-95 collective bargaining agreement.

9. On March 16, 1994, proposals were exchanged between the parties in an open meeting pursuant to the salary reopener provision.

10. Subsequent to the March 16, 1994 meeting, the parties met on at least three further occasions for purposes of negotiating the salary for the 1994-95 school year pursuant to the salary reopener provision in the 1992-1995 collective bargaining agreement, but did not reach an agreement.

11. During the negotiation meetings referenced above in Finding of Fact 10, School District representatives stated to the Association representative that as a result of the salary reopener provision within the 1992-1995 collective bargaining agreement, the collective bargaining agreement is subject to the collective bargaining and interest arbitration amendments made to the Municipal Employment Relations Act by 1993 Wisconsin Act 16 and, consequently, Wis. Adm. Code Chapter ERC 33.

12. By letter dated May 13, 1994, the Association filed a Petition for Arbitration and a Preliminary Final Offer with the Commission, and that said Preliminary Final Offer was based upon the collective bargaining and interest arbitration amendments to the Municipal Employment Relations Act enacted by 1993 Wisconsin Act 16 and Wis. Adm. Code Chapter ERC 33.

13. During the negotiation meetings, the Association has taken the position that the collective bargaining and interest arbitration amendments to the Municipal Employment Relations Act, as set forth in 1993 Wisconsin Act 16, do not apply to the salary reopener provision in the parties' 1992-95 collective bargaining agreement, or otherwise to the 1992-95 collective bargaining agreement.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

Pursuant to Sec. 9320 of 1993 Wisconsin Act 16, Secs. 111.70(1)(b)(dm), (nc) and (ne), and 111.70(4)(cm)5s,6. (intro.) and a., 8p and 8s, Stats., do not apply to the salary reopener in the parties' existing collective bargaining agreement.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER

The qualified economic offer provisions of 1993 Wisconsin Act 16 do not apply to the interest arbitration petition filed by the Association.

Given under our hands and seal at the City of Madison, Wisconsin, this 21st day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

I dissent.

A. Henry Hempe /s/
A. Henry Hempe, Chairperson

NEKOOSA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF
LAW AND ORDER

POSITIONS OF THE PARTIES

The District

The District contends the parties' bargaining under a salary reopener provision in the parties' 1992-1995 collective bargaining agreement is subject to the provisions of 1993 Wisconsin Act 16.

Citing Section 9320 of Act 16, the District argues the parties are "entering into" a new collective bargaining agreement within the meaning of Section 9320 and thus that Act 16 applies. The District asserts in this regard that because the salary reopener will require the incorporation of a new 1994-1995 salary and extracurricular schedule into the 1992--1995 agreement, the parties will have a "new" agreement for the 1994-1995 school year.

The District alleges its interpretation of Section 9320 is consistent with Act 16's obvious purpose of controlling teacher salary increases.

The District further argues that Section 9120 of Act 16 provides additional support for its position. It contends that Section 9120 mandates compliance with the new contract duration provisions of Act 16 when pre-Act 16 contracts are "modified." The District asserts Section 9120 is indicative of the legislature's clear intent to have all of Act 16's provisions apply to any contract modification which occurs on or after August 12, 1993.

The District acknowledges the absence of any reference to a "contract reopener" in Act 16. However, contrary to the Association, the District asserts that the critical question is whether Act 16 refers to contracts which are "entered into" or "modified" after the effective date of Act 16. The District asserts that these phrases are found in Act 16 and that the absence of the term "contract reopener" only reflects that "contract reopener" is not a technical term of art but rather a convenient phrase used by the parties at the bargaining table.

The District disputes the Association claim that the QEO concept of Act 16 would not make sense when applied to a contract reopener. The District alleges that the wage limitations in the QEO can easily be made applicable to the instant reopener.

Contrary to the Association, the District claims that the Commission's rule found in

ERC 33.10(5) correctly applies the QEO provisions to contract reopeners.

To the extent the Association argues that it would be "unfair" to apply the QEO provisions of Act 16 to the salary reopener, the District contends that the parties had an equal opportunity to frame the reopener as they saw fit and to bargain protection for any concerns that might have existed as to future legislation. If anything, the District contends that a consideration of "fairness" supports the application of the QEO concept to the reopener. In this regard, the District notes that it is subject to the revenue caps created by the legislature for the 1994-1995 school year. The District asserts that because it is allowed only limited revenue increases for the 1994-1995 school year, it would be grossly unfair to allow the Association to arbitrate outside the QEO concept for the same school year.

The District urges the Commission to reject the Association's various arguments based upon principles of statutory construction related to impairment of contract, vested rights, retroactive application, and prior acts. The District asserts that it is only arguing herein that the parties' future conduct be governed by the new law and notes that the parties could have but did not agree that any amendments to the Municipal Employment Relations Act would not apply to their negotiations.

Given all the foregoing, the District asks the Commission to conclude that the QEO provisions of Act 16 are applicable to the parties' salary reopener negotiations.

The Association

The Association argues that the Commission lacks statutory authority to apply Act 16 to collective bargaining agreements executed before August 12, 1993. The Association contends that the language of Section 9320 of 1993 Wisconsin Act 16 clearly states that the Act 16 modifications do not apply to existing contracts. The only exception specifically referenced in the Act applies to contracts resulting from arbitration awards, a circumstance not relevant to the instant case.

To the extent that ERC 33.10(5) references "contract reopeners," the Association contends that it would be contrary to the provisions of Act 16 and thus unlawful for the Commission to apply the administrative rule to the instant situation.

The Association contends that it would be grossly unfair to apply new statutory provisions to a contract bargained one year prior to the passage of Act 16.

The Association argues that the District's interpretation of Act 16 results in an impermissible retroactive application of the law. The Association further asserts that the District's interpretation results in an impermissible impairment of the contract between the Association and the District. The Association contends that a fundamental rule of statutory construction requires

that statutes be construed so as to avoid impairment of contracts.

Contrary to the District, the Association contends that the reopener will not produce a "new" collective bargaining agreement. The negotiations will produce an amendment to an existing collective bargaining agreement, not a new agreement. The Association notes that the balance of the collective bargaining agreement remains in effect no matter how the reopener negotiations are resolved.

Given all the foregoing, the Association asks the Commission to conclude that the provisions of Act 16 do not apply to the instant salary reopener.

DISCUSSION

The parties ask us to determine whether the Association's interest arbitration petition is subject to the qualified economic offer provisions of 1993 Wisconsin Act 16. Section 9320 of Act 16 provides in pertinent part:

> SECTION 9320. Initial applicability; employment relations commission.
> (1x) SCHOOL DISTRICT DISPUTE SETTLEMENT. The treatment of section 111.70(1)(b), (dm)(by Section 2207ahm), (nc)(by SECTION 2207aho) and (ne) and (4)(cm)5s,6. (intro.) and a., 8p and 8s first applies with respect to collective bargaining agreements entered into on the effective date of this subsection, except with respect to collective bargaining agreements for which an arbitration award under s.111.70(4)(cm)6 of the statutes has been issued on the effective date of this subsection but under which no collective bargaining agreement has been entered into by the parties. In such collective bargaining units, that treatment first applies with respect to any modification, renewal or extension of the collective bargaining agreement resulting from that award.

From the language of Section 9320, we think it clear that the Association's interest arbitration petition is not covered by the qualified economic offer provisions of Act 16. This is so because Section 9320 specifically states that the pertinent provisions of the Act first apply to "collective bargaining agreements entered into on the effective date of this subsection" (emphasis added). Given the commonly accepted meaning of the words "entered into" and "collective bargaining agreement," we conclude the legislature was not referring to reopener provisions in contracts bargained prior to August 12, 1993, the effective date of 1993 Wisconsin Act 16. As reflected in Finding of Fact 6, the parties signed the 1992-1995 contract approximately one year before the effective date of Act 16.

Our interpretation is supported by the Section 9320 language used by the legislature when expressing the only exception to the initial applicability language (i.e., arbitration awards issued on the effective date of Act 16). That exception specifically uses the phrase "any modification, renewal or extension." Thus, it is clear to us that the legislature was making a distinction between a "modification" of a contract and the act of "entering into" a contract. Had the legislature wished to cover contract reopeners with the provisions of Act 16, we conclude that they would have used the term "modification" to express that intent. Because they did not, we think it clear that the instant reopener is not subject to the qualified economic offer provisions of Act 16. 1/

1/ The District cites a portion Section 9120(2xg) of 1993 Wisconsin Act 16 as support for its position in this litigation. This nonstatutory provision states in pertinent part:

> (2xg) TERMS OF COLLECTIVE BARGAINING AGREEMENTS.
> (a) Notwithstanding section 111.70(4)(cm)8m. b. of the statutes, as created by this act, if the parties to a collective bargaining agreement covering school district professional employes, as defined in section 111.70(1)(ne) of the statutes, as created by this act, voluntarily enter into or modify a collective bargaining agreement during the period commencing on the effective date of this paragraph and ending on June 30, 1995, or if those parties enter into a collective bargaining agreement pursuant to an arbitration award issued during that period, the agreement shall have an expiration date of June 30, 1995.
>
> (b) Notwithstanding section 111.70(4)(cm)8m. b. of the statutes, as created by this act, if the parties to a collective bargaining agreement covering school district professional employes, as defined in section 111.70(1)(ne) of the statutes, as created by this act, have entered into a collective bargaining agreement not affected by paragraph (a) which terminates or is first modified after June 30, 1995, the next collective bargaining agreement, or the agreement resulting from that modification, between those parties, shall have an expiration date of June 30, 1997.

However, as the language of (2xg) indicates, this provision deals only with the expiration dates which agreements must have depending upon when they are "entered into" or "modified." Thus, Section 9120(2xg) does not relate to the question before us which is whether the qualified economic offer provisions of Act 16 are applicable to the instant reopener. If anything, the legislature's use of "entered into" or "modified" in Section

Further, not only is the language of Section 9320 clear, there is no ambiguity created by other provisions of Act 16. The best measure of legislative intent is not speculation but rather the clear language of Section 9320.

In reaching this conclusion, we should note that our administrative rules have no application to resolution of this dispute. Like Act 16 itself, Chapter ERC 33 is only applicable to "collective bargaining agreements entered into on or after August 12, 1993 ... " See ERC 33.01.

Because we believe this issue is clearly resolved by the initial applicability language of Act 16 itself, we need not respond further to the arguments presented by the parties herein.

Dated at Madison, Wisconsin, this 21st day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

9120(2xg) supports our decision in this case because said usage affirms the distinct meaning the legislature intended those word(s) to have.

DISSENTING OPINION OF CHAIRPERSON A. HENRY HEMPE

I agree with the majority that our administrative rules have no application to the resolution of this dispute. I further believe that when the specific language in question is juxtaposed against Act 16 in its entirety, considerable ambiguity is created as to how the question before us should be answered. Act 16 reflects a clear legislative intent to control access to interest arbitration for contract periods following June 30, 1993. It is inconceivable to me that the legislature intended to allow even a small window of exception to its mandate. For this reason, I would resolve the apparent statutory ambiguity in favor of the District's position in this litigation.

Dated at Madison, Wisconsin, this 21st day of April, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson