STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| In the Matter of the Petition of<br><br>DARLINGTON COMMUNITY SCHOOL DISTRICT<br><br>Requesting a Declaratory Ruling<br>Pursuant to Sec. 227.41, Stats.,<br>Involving a Dispute<br>Between Said Petitioner and<br><br>DARLINGTON EDUCATIONAL ASSOCIATION | Case 26<br>No. 51364 DR(M)-545<br>Decision 28456 |

Appearances:

Lathrop & Clark, by Ms. Malina R. P. Fischer and Mr. Michael J. Julka, Attorneys at Law, 122 West Washington Avenue, Suite 1000, P.O. Box 1507, Madison, Wisconsin 53701-1507, for the District.

Ms. Kira L. Zaporski, Associate Counsel, and Ms. Melissa Cherney, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708-8003, for the Association.

## FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

On August 3, 1994, the Darlington Community School District filed a petition with the Wisconsin Employment Relations Commission pursuant to Sec. 227.41, Stats., and ERC 33.16 seeking a declaratory ruling that certain proposals of the Darlington Educational Association were economic issues within the meaning of Sec. 111.70(1)(dm), Stats.

On December 19, 1994, the parties completed their submission of the evidentiary record upon which the Commission would base its decision.

On January 25, 1995, the parties filed their initial briefs.

On February 13, 1995, the parties filed reply briefs and the District filed an amended petition asserting the Association proposals were permissive subjects of bargaining.

On March 9, 1995, the Association filed a response to the amended petition.

Having considered the record and being fully advised in the premises, the Commission makes and issues the following

## FINDINGS OF FACT

1. The Darlington Community School District, herein the District, is a municipal employer having its principal offices at Center Hill, Darlington, Wisconsin 53530.

2. The Darlington Educational Association, herein the Association, is a labor organization having its principal offices at 960 North Washington, P.O. Box 722, Platteville, Wisconsin 53818-0722. The Association is the exclusive collective bargaining representative for a bargaining unit of school district professional employes employed by the District.

3. Through the interest arbitration process set forth in Sec. 111.70(4)(cm), Stats., the Association seeks inclusion in a 1993-1995 contract of the following proposals which would modify existing language from the parties' 1991-1993 agreement.

ARTICLE VIII-REDUCTION IN STAFF

D. The District will cooperate with the DEA in compiling a seniority list to be circulated by the DEA on an annual basis on or before October 1 of each year. Final determination of seniority will be made on the basis of a review of the most conclusive evidence of seniority as outlined in this article at the time of the layoff notice. This point is made here to preclude argumentation based on a published list which may inadvertently be in error.

~~It is noted that regular~~ All staff shall be placed on the same seniority list and shall have equal access to all positions ~~placement classification is a distinct classification with its' own seniority list. In addition, Title I teachers will comprise a distinct classification. Teachers in any one of these two classifications will not have job claims~~ by virtue of the identified criteria (subsection C). ~~on positions in the other classification. Job claims will only relate to positions within the classification of the teacher's employment.~~

. . .

F. Miscellaneous Benefits

1. In the event a laid off teacher becomes certified in a new area which allows application for an opening in the District, the application will be treated the same as any other ~~application with~~ recall rights ~~not applying.~~ Since this situation involves an individual previously employed by the District, it is recommended that full experience credit be granted should the teacher be hired.

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

CONCLUSION OF LAW

The Association proposals set forth in Finding of Fact 3 involve "limitations on layoff" and "job security provisions" within the meaning of Sec. 111.70(1)(dm), Stats.

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

DECLARATORY RULING 1/

1. The Association proposals set forth in Finding of Fact 3 are "economic issue(s)" within the meaning of Sec. 111.70(1)(dm), Stats.

2. The Association cannot proceed to interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., over the proposals set forth in Finding of Fact 3.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of July, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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

(footnote 1 begins on page 4)

(footnote 1 begins as referred to on page 3)

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1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the

decision

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was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

DARLINGTON SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW
AND DECLARATORY RULING

Economic Issue

Section 111.70(1)(dm), Stats., defines an "economic issue" as:

> "...any issue that creates a new or increased financial liability upon the municipal employer, including salaries, overtime pay, sick leave, payments in lieu of sick leave usage, vacations, clothing allowances in excess of the actual cost of clothing, length of service credit, continuing education credit, shift premium pay, longevity pay, extra duty pay, performance bonuses, health insurance, life insurance, vacation pay, holiday pay, lead worker pay, temporary assignment pay, retirement contributions, severance or other separation pay, hazardous duty pay, certification or license payment, job security provisions, limitations on layoffs and contracting or subcontracting of work that would otherwise be performed by municipal employes in the collective bargaining unit with which there is a labor dispute."

The District contends each of the Association proposals is an "economic issue" because both are "limitations on layoff" and both create "new or increased financial liability upon the municipal employer" within the meaning of Sec. 111.70(1)(dm), Stats.

The District asserts the Association proposal to merge existing Chapter I and non-Chapter I employe seniority lists limits existing District discretion as to which employe will be laid off and will increase the District's financial liability by decreasing the monetary savings a layoff would produce under current contract language. As to the Association proposal to improve the recall rights of laid off employes, the District argues recall rights are encompassed within the scope of "limitations on layoff" and , in any event, that the proposal's creation of a new recall preference for laid off employes increases existing District financial liability.

The Association argues that neither proposal creates "limitations on layoffs" or any new or increased financial liability for the District.

The Association asserts the disputed seniority proposal is not an "economic issue" within the meaning of Sec. 111.70(1)(dm), Stats. It contends the proposal does not create "limitations on layoffs" because the employer's right to lay off is not limited. Rather, the Association alleges the proposal simply provides a procedure to be followed if the employer elects to lay off unit employes.

As to the District's claim that the seniority list proposal creates new and increased financial liability, the Association argues: (1) the right of a higher paid employe to bump a lower paid employe only decreases the District's layoff savings and thus does not create any new or increased liability; and (2) any costs are "de minimis."

As to its recall proposal, the Association asserts recall rights fall outside the scope of "limitations on layoff" and disputes the District contention that the recall of laid off employes will create any new or increased financial liability when measured against the financial implications of hiring a new employe.

More generally, the Association contends that it would be an absurd extension of legislative intent for the Commission to conclude each of the proposals is an "economic issue." The Association asserts the legislature did want to prevent unions from circumventing limitations on salary increases but did not want to prohibit interest arbitration over "bare-bones" layoff and recall proposals. The Association claims that acceptance of the District's position would "obliterate collective bargaining" and thus be contrary to the public policy advanced by the Municipal Employment Relations Act.

The Association urges the Commission to view the specific topics identified in Sec. 111.70(1)(dm), Stats., which was created as part of 1993 Act 16, as an all-inclusive list of economic issues rather than as examples. It notes the legislature was very specific as to the topics it identified and argues such specificity was unnecessary if the listing was simply to provide examples. The Association points out that "seniority rights" and "layoff and recall rights" are not contained in the statutory list of "economic issues."

Given all of the foregoing, the Association asks the Commission to allow it to proceed to interest arbitration on the disputed proposals.

Discussion

Having reviewed the statutory language of Sec. 111.70(1)(dm), Stats., which was created as part of 1993 Act 16, it is evident the legislature intended the definition of "economic issues" to

include any specifically listed subjects. Because we are persuaded the Association's proposals constitute "limitations on layoff" and "job security provisions," respectively, we conclude they are "economic issue" proposals. Thus, since the District has made a qualified economic offer, Sec. 111.70(4)(cm)6, Stats., bars the Association from proceeding to interest arbitration as to the disputed proposals.

In reaching our conclusion as to the layoff portion of the proposal, we have considered but rejected the Association's claim that the phrase "limitations on layoff" should be read as if it stated "limitations on the employer's decision to layoff." We do so for several reasons. First, it is apparent that the statutory language is broader on its face than the Association argues. In our view, it is clear that because the Association proposal modifies existing "limitations on layoff" contained in the 1991-1993 contract, 2/ it falls within the scope of this statutory phrase. Second, the "employer's decision to layoff" is generally a permissive subject of bargaining 3/ as to which the

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2/ We are generally persuaded that the legislature intended the 1993 Act 16 restrictions on access to interest arbitration to prevent either party from arbitrating changes in existing contract provisions as to any of the various enumerated issues listed in Sec. 111.70(1)(dm), Stats., where a qualified economic offer has been made.

To conclude otherwise would be to conclude the legislature intended Act 16 to prevent union arbitrated gains in the enumerated "economic issue" subject areas but to allow employer arbitrated "take aways" as to existing contractual "economic issue" protections and benefits. Such an interpretation would be at odds with the whole concept of a "qualified economic offer" (which mandates maintenance of existing "fringe benefits", some of which are listed in Sec. 111.70(1)(dm), Stats.).

3/ West Bend Education Ass'n v. WERC, 121 Wis. 2d 1 (1984); City of Brookfield v. WERC, 87 Wis. 2d 819 (1979).

employer has therefore never been obligated to proceed to interest arbitration. Thus, because a union had no pre-1993 Act 16 right to proceed to interest arbitration over the "employer's decision to layoff", there would have been no need for the legislature to have subsequently created such a restriction through the definition of "economic issue" in Sec. 111.70(1)(dm), Stats. Given all of the foregoing, to the extent the Association's "limitations on the employer's decision to layoff" interpretation asks us to find the legislature was reiterating an existing restriction, we find the interpretation unpersuasive.

As to the recall rights portion of the proposal, it is apparent that the proposal would modify existing entitlements to employment for future vacancies and thus modifies existing job security rights. We are persuaded these "job security rights" fall within the meaning of the phrase "job security provisions" as used in Sec. 111.70(1)(cm), Stats. Thus, the recall proposal also constitutes an "economic issue" which cannot proceed to interest arbitration.

Having concluded the proposals are "economic issues," we need not resolve the District's alternative argument that the proposals are permissive.

In closing, it is important to note that our interpretation of Sec. 111.70(1)(dm), Stats., does not "obliterate" collective bargaining. Sections 111.70(1)(dm), Stats., and 111.70(4)(cm)6, Stats., limit access to interest arbitration but do not reduce the scope of the parties' obligations to collectively bargain under Sec. 111.70(1)(a), Stats.

Dated at Madison, Wisconsin, this 12th day of July, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

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