STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of GRAFTON SCHOOL DISTRICT Requesting a Declaratory Ruling Pursuant to Sec. 227.41, Stats., Involving a Dispute Between Said Petitioner and GRAFTON PARAPROFESSIONAL AND AIDES ASSOCIATION	Case 13 No. 52025 DR(M)-550 Decision No. 28620

Appearances:

von Briesen & Purtell, S.C., Attorneys at Law, by Mr. James R. Korom, Suite 700, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4470, for the District.

Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin 53708, for the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On December 23, 1994, the Grafton 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 a proposal of the Grafton Paraprofessional and Aides Association is an economic issue within the meaning of Sec. 111.70(1)(dm), Stats.

Hearing on the petition was held March 2, 1995 before the Wisconsin Employment Relations Commission in Madison, Wisconsin.

The parties thereafter filed written argument, the last of which was received March 15, 1995. The Commission subsequently sought additional argument from the parties as to the possible impact of 1995 Wisconsin Act 27 on the instant dispute. The parties filed supplemental argument by September 12, 1995.

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

makes and issues the following

FINDINGS OF FACT

1. The Grafton School District, herein the District, is a municipal employer having its principal offices at 1900 Washington Street, Grafton, Wisconsin 53024.

2. The Grafton ParaProfessional and Aides Association, herein the Association, is a labor organization representing certain school district professional employes of the District having its principal offices at 550 East Shady Lane, Neenah, Wisconsin 54956.

3. On December 14, 1994, the District and the Association met with an Investigator from the staff of the Wisconsin Employment Relations Commission pursuant to Sec. 111.70(4)(cm)6, Stats., in an effort to reach agreement on an initial contract for the school district professional employes represented by the Association. With the assistance of the Investigator, the parties reached tentative agreements on all issues except layoff and recall rights. Included among the tentative agreements were wage and fringe benefits sufficient to meet the definition of a qualified economic offer set forth in Sec. 111.70(1)(nc), Stats.

As to the issue of employe layoff and recall rights, the Association gave the Investigator a final offer and asked that the investigation be closed with the layoff/recall issue proceeding to interest arbitration for resolution. The District then advised the Investigator that it believed the Association's layoff and recall proposal was an economic issue which was ineligible for submission to interest arbitration pursuant to Sec. 111.70(4)(cm)5s, Stats., and therefore objected to closure of the investigation. The Investigator nonetheless closed the investigation on December 14, 1994 and recommended to the Commission that an order directing the parties to interest arbitration be issued. Prior to any action by the Commission, the District filed the instant petition for declaratory ruling pursuant to Sec. 227.41, Stats.

In its January 19, 1995 response to the District's petition, the Association argued that the District should be estopped from litigating whether the layoff/recall proposal is an economic issue because of alleged prior opportunities to raise the issue. By letter dated February 16, 1995, the Commission advised the parties that it had rejected the estoppel argument and would be proceeding to hearing.

4. The Association's December 14, 1994 layoff and recall proposal stated:

> Seniority of the following listed employees shall be deemed to be their time of employment with the Grafton School District under the "66:30 Coop EEN Aide" program, as noted below in Column A.

Provided, however, when elimination of a position held by one of the employees listed below results in layoff, listed employees shall be deemed to have alternative seniority dates as shown in column B for the purposes of determining which listed employees shall ultimately be laid off when more than one is qualified to fill an available listed position held by one of the other listed employees. Column B shall be the date of hire by Ozaukee County as a EEN Aide.

The effect of this provision is that column B seniority shall be used to differentiate seniority among the listed employees. Column A seniority shall be the seniority for listed employees relative to all other bargaining unit members. It is understood the position of Special Education/PE shall be a separate job classification which requires certification in Physical Education license 860.

Employee Name	Column A	Column B
Kathy Kirsch		
Laura Lacher		
Mary Ornowski		
Ann-Marie Stangel		
Carol Szudrowitz		

The Association and the Wisconsin Education Association Council do hereby indemnify and shall save the District harmless against any and all claims, demands, suits, and other forms of liability regarding this seniority agreement, including court costs, that arise out of or by reason of action taken or not taken by the District, which District's action or nonaction is in compliance with the provisions of this agreement. The defense of any such claims, demands, suits, or other forms of liability shall be, at the option of the Association, under the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceeding challenging the application or interpretation of this seniority agreement through representation of its own choosing and its own expense.

11.0 REDUCTION IN PERSONNEL, LAYOFF AND RECALL - OPEN

(Effective Upon Receipt of Arbitrator's Award)

11.1 When the District eliminates a job or reduces hours of employment because of reduced workloads, budgetary or financial limitations, or for reasons other than performance or conduct of the employee, the following procedure shall be used:

11.1.1 To the extent feasible, a reduction in staff shall be accomplished through normal attrition or through a voluntary waiver of seniority rights.

11.1.2 Thereafter no employee shall be laid off pursuant to a reduction in the work force unless said employee shall have been notified of said layoff at least thirty (30) days prior to the effective date of the layoff. Child-specific aides shall be notified as soon as possible, which may be less than 30 days notice. In the event of a reduction in work force, the District shall identify the specific position(s) to be eliminated within each classification and shall notify the employee(s) in those positions. Employes whose positions have been eliminated due to reduction in work force, or who have been affected by a layoff/elimination of position, shall have the right to assume a position or portion of a position in their classification(s) for which they are qualified, which is held by a less senior employee. In no case shall a new employee be employed by the District while there are laid-off employees who are qualified for vacant or newly-created positions.

11.2 In the event of a reduction in the work hours within a position, an employee with the greater seniority in that classification may use same to maintain his/her normal work schedule by displacing employees with less seniority on the work schedule.

11.3 Laid-off employees may continue their health, dental, and life insurance benefits by paying the regular monthly per-subscriber group-rate premium for such benefits to the District effective with the first premium payment after such layoff, during which time all fringe benefits will be

continued by the District. Laid-off employees shall be recalled in order of seniority, with the most senior being recalled first, to any position for which they are qualified. Notices of recall shall be sent by certified or registered mail to the last known address as shown on the District's records. The recall notice shall state the time and date on which the employee is to report back to work. It shall be the employee's responsibility to keep the District notified as to his/her current mailing address. A recalled employee shall be given ten (10) calendar days from receipt of notice, excluding Saturdays, Sundays and holidays, to report to work. The District may fill the position on a temporary basis until the recalled employee can report for work, providing the employee reports within the ten (10) day period. Employees recalled to full-time work for which they are qualified are obligated to take said work. An employee who declines recall to full-time work for which he/she is qualified shall forfeit his/her seniority rights. Employees on layoff shall accrue seniority during the period of such layoff. The recall period shall be eighteen (18) months from the date of layoff.

Article 11.0 shall become effective upon ratification by both parties of the Collective Bargaining agreement or receipt of the interest arbitrator's award, except that the provisions of Section 19.5 shall apply according to their terms.

19.5.2 If recalled, the employers shall be paid at the hiring rate in existence at the time of the recall.

5. The Association subsequently modified its layoff and recall proposal for the post-July 1, 1993 periods and as of the March 2, 1995 hearing, the proposal stated:

GRAFTON PARAPROFESSIONAL AND AIDES ASSOCIATION

CERTIFIED AIDES UNIT

FINAL OFFER

March 2, 1995

10.5 SENIORITY FOR FORMER "66:30 COOP EEN AIDES"

10.5.1 Seniority of the following listed employees shall be deemed to be their time of employment with the Grafton School District, under the "66:30 Coop EEN Aide" program, as noted below in Column A. Provided, however, when elimination of a position held by one of the employees listed below results in layoff, listed employees shall be deemed to have alternative seniority dates as shown in column B for the purposes of determining which listed employee shall ultimately be laid of when more than one is qualified to fill an available listed position held by one of the other listed employees. Column B shall be the date of hire by Ozaukee County as an EEN Aide.

The effect of this provision is that column B seniority shall be used to differentiate seniority among the listed employees. Column A seniority shall be the seniority for listed employees relative to all other bargaining unit members.

Employee Name	Column A	Column B
Kathy Kirsch		
Laura Lacher		
Mary Ornowski		
Anne-Marie Stangel		
Carol Szudrowitz		
Rebecca Lawton		

10.5.2 The Association and the Wisconsin Education Association Council do hereby indemnify and shall save the District harmless against any and all claims, demands, suits, and other forms of liability regarding this seniority agreement, including court costs, that arise out of or by reason of action taken or not taken

by the District, which District's action or nonaction is in compliance with the provisions of this agreement. The defense of any such claims, demands, suits, or other forms of liability shall be, at the option of the Association, under the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceeding challenging the application or interpretation of this seniority agreement through representation of its own choosing and at its own expense.

11.0 REDUCTION IN PERSONNEL AND RECALL
(Effective Upon Receipt of Arbitrator's Award)

11.1 When the District eliminates a position, combines two or more positions and/or reduces hours of employment because of reduced workloads, budgetary or financial limitations, or additional reasons other than performance or conduct of the employee, the following procedure designed to effectuate a reduction in personnel shall be used:

11.1.1 In the event of a reduction in work force, the District shall identify the specific position(s) to be eliminated or to have hours reduced and shall notify the employee(s) in those positions. Employees whose positions have been eliminated or have had their hours of work reduced due to reduction in work force, shall have the right to assume a position or portion of a position for which they are qualified, that is held by the least senior employee(s). In no case shall a new employee be employed by the District while there are laid-off employees who are qualified for vacant or newly-created positions.

11.2 Employees who positions have been eliminated may continue their existing health, dental, and life insurance policies by paying the full amount of the regular monthly per-subscriber group-rate premium for such policies to the District at the time when the reduction in personnel goes into

effect. Continued eligibility for such policies shall be governed by federal COBRA regulations and/or the eligibility requirements of the insurance carrier(s).

11.3 Employees affected by District actions taken under provisions of Sec. 11.1.1 above shall be recalled in order of seniority, with the most senior being recalled first, to any position for which they are qualified. Notices of recall shall be sent by certified or registered mail to the last known address as shown on the District's records. The recall notice shall state the time and date on which the employee is to report back to work. It shall be the employee's responsibility to keep the District notified as to his/her current mailing address. A recalled employee shall be given ten (10) calendar days from receipt of notice, excluding Saturdays, Sundays and holidays, to report to work. The District may fill the position on a temporary basis until the recalled employee can report for work, providing the employee reports within the ten (10) day period. Employees recalled to full-time work for which they are qualified are obligated to take said work. An employee who declines recall to full-time work for which he/she is qualified shall forfeit his/her seniority rights. Employees affected by District actions taken under Sec. 11.1.1 above shall accrue seniority during such period of time. The recall period shall be eighteen months from the date of layoff, except for those employees covered by Sec. 19.5, in which case their recall rights shall be governed by Sec. 19.5. Employees recalled under Sec. 11.3 shall be paid at the hiring rate in existence at the time of the recall.

11.4 Article 11.0 shall become effective upon ratification by both parties of the Collective Bargaining Agreement or receipt of the interest arbitrator's award, except that the provisions of Section 19.5 shall apply according to their terms.

19.5 PREVIOUSLY TERMINATED EMPLOYEES

19.5.1 For purposes of this Agreement, all employees who received termination notices for non-disciplinary reasons subsequent to the Association becoming the

exclusive bargaining representative of the employees shall have recall rights with the District under Article 11.3 of this Agreement. These recall rights shall become effective upon ratification by both parties of the Collective Bargaining Agreement or receipt of the interest arbitrator's award, and shall extend for an 18 month period thereafter.

19.5.2 If recalled, these employees shall be paid at the hiring rate in existence at the time of the recall.

6. By letter dated August 27, 1995, the Association submitted a new final offer to the District with the following cover letter:

> Enclosed is the final offer of the Grafton Paraprofessional and Aides Association regarding the Certified Aides Unit. This offer has been modified from the previous Association offer to reflect the fact that certified aides are no loner (sic) considered to be professionals as defined in SS 111.70 and are, therefore, not subject to the "QEO" provisions contained in said statutes.
>
> You will note that Articles 2, 3, 4, 5, 6, 7, 8, (8.1, 8.2 and 8.3 only), 10, 11, 12, 13 and 15 have already been "TA'd" by the parties and that sections 14.1 and 14.2 are the same wage rates contained in the District "QEO" offer. Article 1.0, Recognition, has been modified to reflect the fact that certified aides are no longer considered to be professionals; Article 8.0, Seniority and 9.0, Reduction in personnel and Recall have been modified to reflect the fact that the "economic impact" provisions of the "QEO" sections of the statute no longer apply. The intent of Articles 8 and 9 is that they cause no economic impact for the period that certified aides came under the provisions of the "QEO" via provisions of Act 16.
>
> Further, Section 14.3 reflects the Association's salary proposal for the third year of the contract and Article 16 has been modified to reflect the Association's proposal to add a third year to the duration of the contract.
>
> It is the view of the Association that this final offer is eminently reasonable in all respects and should form the basis for the resolution of the very lengthy bargaining dispute between the parties.

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

the following

CONCLUSIONS OF LAW

1. The amendment of Sec. 111.70(1)(ne), Stats., contained in 1995 Wisconsin Act 27 does not retroactively apply to the Association's pre-Act 27 petition for interest arbitration.

2. Because Sec. 111.70(4)(cm)5s, Stats., and ERC 33.13(2) prohibit interest arbitration of final offers which contain economic issues for any period beginning on or after July 1, 1993, the District is not estopped from seeking a determination as to whether the Association's layoff/recall proposal is an "economic issue" proposal.

3. The Association's layoff/recall proposal involves "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 Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING

1. The Association's layoff/recall proposal set forth in Finding of Fact 5 is an "economic issue" 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 layoff/recall proposal set forth in Finding of Fact 5.

Given under our hands and seal at the City of Madison, Wisconsin, this 28th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/

James R. Meier, Commissioner

GRAFTON SCHOOL DISTRICT

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

Impact of Act 27

1995 Wisconsin Act 27 amended the definition of a "school district professional employe" found in Sec. 111.70(1)(ne), Stats., as follows:

> 111.70(1)(ne) "School district professional employe" means a municipal employe who is a professional employe and who is employed ~~by~~ to perform services for a school district~~, who holds a license issued by the state superintendent of public instruction under s.115.28(7), and whose employment requires that license.~~

Based upon the amendment, the Association asserts that: (1) the employes in the bargaining unit are no longer "school district professional employes"; (2) the Association unit is thus no longer subject to the 1993 Wisconsin Act 16 "qualified economic offer" provisions; and (3) the Association can now proceed to interest arbitration without regard to whether its proposals are "economic issues". The District disagrees and contends that Act 27 is not retroactive and that, in any event, the issue of whether the employes in question continue to be "school district professional employes" has not been decided by the Commission.

Section 991.11, Stats., provides in pertinent party that:

> "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication ..."

1995 Wisconsin Act 27 was vetoed in part and then published July 28, 1995. Thus, pursuant to Sec. 991.11, Stats., the Act generally took effect July 29, 1995. Sections 9320 and 9420 of Act 27 contain "initial applicability" and "effective dates" for some but not all of the portions of

Act 27 which alter statutes administered by the Commission. 1/ However, a review of Sections 9320 and 9420 demonstrates that there is no "expressly prescribe(d)" effective date for amended Sec. 111.70(1)(ne), Stats. Thus, pursuant to Sec. 991.11, Stats., amended Sec. 111.70(1)(ne), Stats., took effect July 29, 1995.

1/ **Section 9320. Initial applicability; employment relations commission.**

(1) SCHOOL DISTRICTS; PROHIBITED SUBJECTS OF BARGAINING. The treatment of section 111.70(1)(a) (as it relates to the cross-reference to section 111.70(4)(m) of the statutes) and (4)(m) of the statutes first applies to employes who are affected by a collective bargaining agreement that contains provisions inconsistent with that treatment on the day on which the collective bargaining agreement expires or is extended, modified or renewed, whichever occurs first.

(2j) LOCAL GOVERNMENT INTEREST ARBITRATION FACTORS. The treatment of section 111.70(4)(cm)5. and 7., 7g. and 7r. of the statutes first applies with respect to petitions for arbitration filed under section 111.70(4)(cm)6. of the statutes on the effective date of this subsection.

* * *

Section 9420. Effective dates; employment relations commission.

(2) UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY COLLECTIVE BARGAINING. The repeal of section 111.81(7)(d) of the statutes and the repeal and recreation of sections 111.81(15)(a) (intro.) and (b) (intro.), 111.815(1), 111.825(1) (intro.), 111.85(4), 111.86(1), 111.90(1) and (2) and 111.91(2)(a) of the statutes take effect on July 1, 1997.

(2g) TRANSCRIPT, FACT-FINDING, MEDIATION AND ARBITRATION FEES.

(a) The treatment of sections 20.425(l)(i), 111.09(1) and (2), 111.10, 111.71(1) and 111.94(1) and (2) of the statutes and the repeal and recreation of section 111.71(2) (by SECTION 3803t) of the statutes take effect on January 1, 1996.

However, establishing the date the amended statute took effect by operation of Sec. 991.11, Stats., does not resolve the question of what impact, if any, the Legislature intended the amendment to have upon parties such as those herein who were already immersed in collective bargaining and interest arbitration when the amendment took effect. We turn to an analysis of that questions.

It is a general canon of statutory construction that:

> An amendatory statute, like other legislative acts, takes effect only from its passage and will not be construed as retroactive or as applying to prior facts or transactions, or to pending proceedings, unless a contrary intention is expressly stated or necessarily implied. 2/

As already discussed, Act 27 does not contain an "expressly stated" intention of retroactive application for Sec. 111.70(1)(ne), Stats. Thus, unless it is "necessarily implied" that the amendment is retroactive, application of the above-quoted canon of construction yields a determination that amended Sec. 111.70(1)(ne), Stats., has no applicability to the instant dispute.

Here, at the time Act 27 became effective, the parties were participating in collective bargaining and interest arbitration proceedings applicable to "school district professional employes" for a contract with a legally mandated expiration date of June 30, 1995. 3/ Whether we view the interest arbitration process as a "pending proceeding" or a "prior fact" or transaction", we are persuaded that retroactive application should not be "necessarily implied" herein. Especially where the contract being bargained will have expired prior to the effective date of the amendment, it seems far more probably to us that the Legislature would intend that the bargaining of such a contract should be governed by the law then in place rather than any subsequent amendment. Put another way, we don't believe it is likely that Legislature would want the substantive nature of the interest arbitration process for contracts expiring June 30, 1995 to be dependent on whether settlement had been reached prior to July 29, 1995. Thus, even assuming for the sake of argument the Association is correct that the employes it represents no longer qualify as "school district professional employes", our conclusion regarding the retroactivity issue makes the employes' alleged new status under Sec. 111.70(1)(ne), Stats., irrelevant for the purposes of the instant proceeding. Therefore, we will proceed to resolve the remaining issues within the context of 1993 Wisconsin Act 16 and our applicable administrative rules in ERC 33.

2/ Department of Revenue v. Dziubek, 45 Wis. 2d 499, 505, (1970); Dallman v. Dallman, 159 Wis. 480, 486, (1915).

3/ Section 111.70(4)(cn), Stats., and nonstatutory provision (2xg)(a) of 1993 Wisconsin Act 16.

Procedural Issues

As reflected in Finding of Fact 4, during the December 14, 1994 investigation of the Association's interest arbitration petition, the parties agreed that the District had made a "qualified economic offer" to the Association but were unable to reach agreement on the issue of layoff/recall. The Association wanted to pursue that issue to interest arbitration, presented its final offer to the Investigator, and asked that the Investigator close the investigation and recommend to the Commission that arbitration proceed. The District asserted to the Investigator that the Association's layoff/recall proposal was an "economic issue" which could not proceed to interest arbitration given the District's "qualified economic offer" and objected to any closure of the investigation. The Investigator closed the investigation and recommended to the Commission that an order directing the parties to arbitration be issued.

The parties disagree as to the consequences of the foregoing scenario as to the Association's right to modify its proposal after the Investigator closed the investigation or after the Commission issues its decision in this proceeding. Our administrative rules clearly resolve a portion of the parties' dispute.

ERC 33.11 provides in pertinent part:

> **ERC 33.11 Informal investigation or formal hearing when the municipal employer has submitted a qualified economic offer** (1) PURPOSE. When the municipal employer has submitted a qualified economic offer, the commission or its investigator shall conduct an informal investigation or formal hearing to determine whether the parties are deadlocked in their negotiations. If it is determined that the parties are deadlocked, the commission or its investigator shall obtain the single ultimate final offers of the parties containing their final proposals on all noneconomic issues in dispute, and a stipulation on all matters agreed upon to be included in the new or amended collective bargaining agreement. During the informal investigation or formal hearing, the commission or its investigator may engage in an effort to mediate the dispute.
>
> (2) INFORMAL INVESTIGATION PROCEDURE. The

commission investigator shall set a date, time and place for the conduct of the informal investigation and shall notify the parties thereof in writing. The informal investigation may be adjourned or continued as the investigator deems necessary. Prior to the close of the investigation, the investigator shall obtain in writing the single ultimate final offers of the parties on the noneconomic issues in dispute and a stipulation on all matters agreed upon to be included int he new or amended collective bargaining agreement. If the investigator determines that the parties are deadlocked in their negotiations, the investigator shall advise the parties in writing of the date on which deadlock occurred. The investigator shall also obtain each party's written position regarding authorization of inclusion of nonresidents of Wisconsin on the arbitration panel to be submitted by the commission. <u>If at the time of the exchange of final offers or during any additional time permitted by the investigator, no objection is raised that either final offer contains an proposal or proposals relating to non-mandatory subjects of bargaining or economic issues, the commission investigator shall serve a notice in writing upon the parties indicating the investigation is closed.</u> The investigator may not close the investigation until the investigator is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer and that both final offers conform to the requirements of s. ERC 33.13(2). (emphasis added)

* * *

ERC 33.13(2) Final Offers.

* * *

(2) CONTENTS REGARDING ECONOMIC ISSUES, TERM OF AGREEMENT, REOPENER PROVISIONS AND SALARY STRUCTURE. (a) If the municipal employer submits a qualified economic offer applicable to any period beginning on or after July 1, 1993, final offers for the period may not contain any economic issues as defined in s. 111.70(1)(dm), Stats.

* * *

> **ERC 33.16 Procedure for raising objection that a proposal is not subject to interest arbitration.** (1) TIME FOR RAISING OBJECTION. After a stipulation is reached pursuant to s. ERC 33.11(2) on all economic issues to be included in a new or reopened agreement and prior to close of the investigation of an interest arbitration petition, either party may raise an objection that a proposal is an economic issue into subject to interest arbitration.
>
> (2) FILING AN OBJECTION. An objection that a proposal is an economic issue not subject to interest arbitration shall be filed with the commission as a petition for declaratory ruling pursuant to s. 227.41, Stats. During the pendency of a petition for declaratory ruling,t he investigation of the petition for interest arbitration may not be closed.
>
> (3) PROCEDURE FOLLOWING ISSUANCE OF DECLARATORY RULING. Following the issuance and service of the declaratory ruling, the commission or its investigator shall conduct further investigation or hearing for the purpose of obtaining the final offer of each party before closing the investigation. (emphasis added)

A review of the foregoing rules establishes that the Investigator erred when he closed the investigation despite the presence of a District objection that the Association's layoff/recall proposal was an economic issue. ERC 33.11(2) specifies that it is appropriate to close the investigation only when no objection has been raised.

Review of the foregoing rules further establishes when an "economic issue" objection is raised, the Commission resolves the objection through issuance of a Sec. 227.41, Stats., declaratory ruling. See ERC 33.16

Lastly, our rules specify that following issuance of the declaratory ruling decision, the parties return to the investigation process with the opportunity to settle their dispute or to amend their offers (if they wish) prior to the close of the investigation. See ERC 33.16(3) and ERC 33.11(2).

Given the foregoing, we think it clear that the investigation presently remains open (because it was improperly closed); that the Commission (as opposed to the Investigator) is the entity with

authority to determine whether a proposal relates to an economic issue; and that following our decision both parties have the opportunity to amend their position/offer.

The remaining question of the Association's right to amend its offer in response to the District's declaratory ruling petition is not explicitly resolved by our rules. However, we are satisfied that no useful purpose is served by denying the Association the opportunity to amend its proposal prior to or during hearing on the declaratory ruling. Such amendments have the potential to narrow or resolve the parties' dispute and thus to save the parties' time and resources better spent on the collective bargaining process. Further, given the Association's clear right under ERC 33.16(3) and 33.11(2) to modify its proposal after our decision, there also is no advantage to the District obtaining a decision on the December 14, 1994 proposal only to have the Association then place the amended proposal on the bargaining table which in turn could produce yet another round of litigation. Thus, we are satisfied that it is appropriate for us to allow the Association to amend its December 14, 1994 proposal. Further, we will only rule on the "economic issue" status of the March 2, 1995 proposal inasmuch as the December 14, 1994 proposal no longer constitutes the Association position on the layoff/recall issue and inasmuch as the Association's August 27, 1995 proposal is premised on the inapplicability of Act 16 to this dispute (a premise we rejected earlier herein).

Economic Issue Dispute

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 that the Association proposal, as modified at hearing, is an "economic issue" because it creates new and increased financial liability for the District and because it establishes "limitations on layoff" and "length of service credit" within the meaning of Sec.

111.70(1)(dm), Stats.

More specifically, the District asserts that: (1) Section 11.1.1 of the proposal limits the District's right to achieve "economic efficiencies" by combining or modifying job classifications because the proposal gives senior employes the right to assume the "position or portion of a position" held by less senior employes if there is a reduction in personnel; (2) Section 11.1.1 of the proposal creates new and increased financial liability by guaranteeing that higher paid senior employes can replace lower paid less senior employes in the event of a full or partial lay off of the higher paid employe; (3) the proposal generally limits the District's existing freedom to lay off and thus establishes "limitations on layoffs" as specified to Sec. 111.70(1)(dm), Stats.; and (4) Section 11.3 of the proposal provides "length of service credit" within the meaning of Sec. 111.70(1)(dm), Stats., because the proposal specifies that laid off employes continue to accrue seniority.

The District urges the Commission to reject the Association's claim that the proposal is not a "limitation" on layoff. It contends the proposal clearly limits existing District rights to lay off. The District further urges the Commission to reject Association claims that the new costs of the proposal are "de minimis." The District asserts there is no "de minimis" test created by Act 16 and that, in any event, the costs in question are more than "de minimis."

The Association argues the disputed 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 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."

More generally, the Association contends that it would be an absurd extension of legislative intent for the Commission to conclude the proposal 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(4)(dm), Stats., 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 proposal.

Having reviewed the statutory language of Sec. 111.70(1)(dm), Stats., it is evident the legislature intended the definition of "economic issues" to include any specifically listed subjects. Because we are persuaded the Association's proposal constitutes "limitations on layoff" and "job security provisions" we conclude it is an "economic issue" proposal. 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 proposal.

In reaching our conclusion as to the layoff portion of the proposal, we have considered but rejected the Association's claim that the phrase "limitation 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. Second, the "employer's decision to layoff" is generally a permissive subject of bargaining 4/ as to which the employer has therefore never been obligated to proceed to interest arbitration. Thus, because a union had no pre-1993 Act 16 rights 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. Instead, we are satisfied that the commonly understood meaning of the word "limitations" conveys a legislative intent that proposals such as the Association's which modify the pre-existing contract or the status quo (where, as here, the parties are bargaining an initial contract), as to layoff decisions and procedures are "economic issue" proposals. Because the Association proposal modifies existing "limitations on layoff" under the status quo, it falls within the scope of the statutory definition of an "economic issue".

As to the recall rights portion of the proposal, it is apparent that the proposal creates an entitlement which does not presently exist to employment for future vacancies and thus creates job security rights which are not present under the status quo. We are persuaded these types of "job security rights" fall within the meaning of the phrase "job security provisions" as used in Sec. 111.70(1)(dm), Stats. Thus, the recall portions of the proposal also constitute "economic issues" which cannot proceed to interest arbitration.

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

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. 5/

Given all of the foregoing, the Commission's Investigator will contact the parties to discuss how the parties can best proceed in their efforts to reach agreement on an initial contract.

Dated at Madison, Wisconsin, this 28th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Herman Torosian /s/
Herman Torosian, Commissioner

James R. Meier /s/
James R. Meier, Commissioner

5/ The analysis set forth in this decision parallels that previously set forth in Darlington Community School District, Dec. No. 28456 (WERC, 7/95) and LaCrosse School District, Dec. No. 28462 (WERC, 11/95).