STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

THREE LAKES SCHOOL DISTRICT

Requesting a Declaratory Ruling
Pursuant to Sec. 227.41, Wis. Stats.,
and ERC 33.16

Involving a Dispute Between Said
Petitioner and

THE EDUCATION ASSOCIATION OF THREE
LAKES SCHOOLS

Case 9
No. 54137 DR(M)-580
Decision No. 29104

Appearances:

O'Brien, Anderson, Burgy and Garbowicz, Attorneys at Law, by Mr. John L. O'Brien, P. O. 639, Arbutus Court Building, Eagle River, Wisconsin, 54521, for the District.

Ms. Chris Galinat and Mr. Anthony Sheehan, Attorneys at Law, 33 Nob Hill Drive, P. O. Box 8003, Madison, Wisconsin, 53708-8003, for the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

On July 19, 1995, the Education Association of Three Lakes Schools filed a petition with the Wisconsin Employment Relations Commission seeking interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats. as to the terms of a 1995-97 collective bargaining agreement between the Association and the Three Lakes School District. Following an investigation of the petition, the parties submitted their final offers on unresolved issues. On March 5, 1996, the Commission's Investigator advised the Commission that his investigation of the petition was closed and that he recommended issuance of an Order directing the parties to interest arbitration as to the unresolved issues.

By a letter dated April 22, 1996, the Commission advised the parties of its view that economic issues cannot proceed to interest arbitration where the employer has made a qualified economic offer and its belief that at least a portion of the Association's final offer likely contained economic issues. The Commission's letter further advised the parties that they could proceed to

interest arbitration of the offers presently before the Commission if they wished to exercise their right to enter into a voluntary impasse resolution procedure pursuant to Sec. 111.70(4)(cm)5, Stats.

On April 24, 1996, the District filed an objection to the Association's final offer asserting that it consisted of economic issues not subject to arbitration. By letter dated April 26, 1996, the Commission advised the parties that it would treat the District's objection as a Petition for Declaratory Ruling filed pursuant to Sec. 227.41, Stats. and ERC 33.16(2).

The parties initially waived hearing and filed written argument, the last of which was received August 1, 1996.

In September 1996, the Commission telephonically advised the parties that it was deadlocked 1-1 as to the status of at least one of the two proposals.

On October 30, 1996, the Commission was served with an Alternative Writ of Mandamus and a Petition for a Writ of Mandamus filed by the Association in Dane County Circuit Court. The Writs sought an order directing the Commission to issue a decision.

In response to the Writs, the Commission advised the parties that it would conduct a hearing in the hope that additional information regarding the proposals would break the existing 1-1 deadlock.

On December 4, 1996, a telephonic hearing was conducted. On December 16, 1996, the Commission received a copy of the parties' 1993-95 contract as an exhibit.

The hearing and exhibit did not dissolve the deadlock.

Hearing on the Association's Writs was scheduled for January 8, 1997. Prior to hearing, the Commission telephonically advised the parties that Chairperson Meier and Commissioner Hempe were willing to issue separate opinions as to the deadlocked issue(s) in hopes that said opinions would change the existing dynamic between the parties and increase the opportunity for the parties to voluntarily settle their dispute.

In response to this information, the Association sought and received a postponement of the hearing on the Writs until April 11, 1997.

By letter dated April 8, 1997, the Commission advised the parties that effective March 31, 1997, Paul Hahn had begun to serve as the third Commissioner; that Commissioner Hahn had reviewed the matter; and that the Commission had begun preparing a 2-1 decision.

In response to this information, the Association sought and received a postponement of the hearing on the Writs until June 2, 1997.

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

FINDINGS OF FACT

1. The Three Lakes School District, herein the District, is a municipal employer having its offices at P. O. Box 280, Three Lakes, Wisconsin, 54562.

2. The Education Association of Three Lakes Schools, herein the Association, is a labor organization having its offices at P. O. Box 1400, Rhinelander, Wisconsin, 54501.

3. The 1993-95 contract between the District and the Association contained the following provisions:

ARTICLE XIII
VACANCIES, TRANSFERS AND RE-ASSIGNMENTS

A. Notices of teacher vacancies will be given or sent to the Association President or his/her designee.

B. Teachers who desire a change in grade and/or subject assignment or who desire to transfer to another building may file a written statement of such desire with the superintendent.

C. A teacher-administrator conference shall precede any re-assignment or transfer.

D. Teachers from within the system shall be considered to fill vacancies before hiring new employees. In the event two or more teachers apply for the position and all are certified or certifiable and of comparable ability, the one with the most districtwide seniority will be given first consideration.

ARTICLE XVIII
DISCIPLINE PROCEDURE

. . .

B. No teacher who has fulfilled his/her probationary contract requirement shall be non-renewed,

> suspended, discharged, or disciplined (not to include reprimand) without just cause . . .
>
> . . .

4. During collective bargaining for 1995-97 collective bargaining agreement, the District made the Association a qualified economic offer within the meaning of Sec. 111.70(1)(nc), Stats., and the Association made the following proposals which the District asserts are economic issues within the meaning of Sec. 111.70(1)(dm), Stats.

> Article XIII, Paragraph D. Teachers within the system who apply for a vacancy in writing shall be hired to fill vacancies before hiring new employees. In the event two or more teachers apply for the position and all are certified or certifiable and of comparable ability, the one with the most district-wide seniority shall be hired.
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> Article XIX, Paragraph I. Any regular education teacher receiving students with special needs for which the District fails to provide the teacher with the necessary training, materials, or other instructional needs as deemed necessary by the IEP shall not be adversely evaluated as the result of the lack of these materials, conditions, or training.

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

CONCLUSIONS OF LAW

1. The Association proposal to modify existing Article XIII, Paragraph D as set forth in Finding of Fact 4 is an "economic issue" within the meaning of Sec. 111.70(1)(dm), Stats.

2. The Association proposal to create Article XIX, Paragraph 1 as set forth in Finding of Fact 4 is an "economic issue" 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/

Because the Association's proposals set forth in Finding of Fact 4 are "economic issues" and the District has made a qualified economic offer, the Association cannot utilized the interest arbitration process under Sec. 111.70(4)(cm)6, Stats., to seek inclusion of these proposals in a 1995-97 collective bargaining agreement.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of May 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James R. Meier, Chairperson

_____
Paul A. Hahn, Commissioner

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

(Footnote 1 continues on page 6)

(Footnote 1 continued from page 5)

> 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 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.
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> . . .
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> (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.

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

POSITIONS OF THE PARTIES

The District

The District contends that both Association proposals constitute economic issues within the meaning of Sec. 111.70(1)(dm), Stats. It argues that both proposals create a "new or increased financial liability upon the municipal employer" and also constitute "job security provisions" and/or "limitations on layoffs" as those terms are used in Sec. 111.70(1)(dm), Stats.

The District contends the Association's Article XIII proposal expands the rights of bargaining unit employes when a vacancy occurs within the unit. Presently, a teacher must only be "considered" for the vacancy. The Association's proposal would require the District to hire a teacher from within the system who applies for a vacancy. The District asserts that the proposal thus prevents it from deciding to hire a less costly individual to fill a vacancy, and therefore creates a "new or increased financial liability" upon the District.

The District further argues that the proposal impacts upon "job security" and limits the District's decision-making abilities regarding layoffs. For instance, the proposal would require that teachers presently on layoff status be allowed to fill vacancies. The District asserts that in Darlington Community School District, Dec. No. 28456 (WERC, 6/95) the Commission concluded that a proposal which expands existing recall rights is an economic issue because such a proposal modifies existing "job security provisions" as that phrase is used in Sec. 111.70(1)(dm), Stats.

Turning to the Association's Article XIX proposal, the District contends that this portion of the Association's offer is a "job security provision" on its face. The District argues that job performance is reflected by the evaluations an employe receives. Evaluations can be used to improve teacher performance and also as a standard by which the District can determine if a teacher is meeting job performance expectations. The District asserts that if a teacher does not meet those expectations, discipline or non-renewal of the teacher can result. The District alleges the Association's proposal limits the District's existing ability to evaluate a teacher which, in turn, directly affects the teacher's job security. The District also contends that this proposal would create new financial liability because of the additional training/materials and other instructional needs the proposal would generate if it became part of the contract.

The District asserts that the Commission has already rejected the interpretation of Sec. 111.70(1)(dm), Stats. which the Association offers in this dispute. Contrary to the Association's claim, the District asserts that the existing Commission precedent as to the definition of "economic issues" is supportive of the District's position herein.

Given all the foregoing, the District asks the Commission to conclude that the Association final offer consists entirely of economic issues which cannot proceed to interest arbitration in the presence of the District's qualified economic offer.

The Association

The Association contends that the teacher transfer and teacher evaluation proposals at issue herein are not economic issues within the meaning of Sec. 111.70(1)(dm), Stats. The Association asserts that because transfers and evaluations are not included in the extensive and exhaustive list of economic issues contained in the statutory definition, it was the Legislature's intent that such matters are not economic issues. The Association alleges that the legislative intent was to limit wage and benefit increases that teachers could achieve through interest arbitration, but not to eliminate the opportunity for improving existing contracts in other areas of concern. The Association argues that its approach to the interpretation of Sec. 111.70(1)(dm), Stats. is consistent with the approach used by the Commission in prior decisions.

The Association contends that not only do the proposals in dispute fall outside the scope of the statutory list of economic issues, the proposals also do not fit within the overall definition of an economic issue as one which creates "new or increased financial liability." The Association argues that the evaluation proposal only prohibits the District from providing a negative evaluation in one limited circumstance. The Association contends there is no financial penalty attached to the evaluation condition. Similarly, the Association asserts the transfer provision would not create or increase the District's financial liability. The Association argues that if a current employe were able to transfer to a vacant position, the District would still pay the same amount to the transferred teacher and would still have to fill one vacancy with a new employe. The Association asserts the transfer provision does not move an employe to a higher pay category or increase the District's financial liability.

Given all the foregoing, the Association asserts the proposals are not economic issues and can proceed to interest arbitration.

DISCUSSION

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.

We have previously held that from the statutory language in Sec. 111.70(1)(dm), Stats., it is evident that the legislature intended the definition of "economic issues" to include any specifically listed subject. Darlington Community School District, Decision No. 28456 (WERC, 6/95); Grafton School District, Decision No. 28620 (WERC, 12/95); LaCrosse School District, Decision No. 28642 (WERC, 11/95); Randall Consolidated School Joint District #1, Decision No. 28734 (WERC 5/96). Because we are satisfied that the two disputed proposals fall within the scope of specifically listed examples of "economic issues," we conclude the proposals are economic issue proposals which, in the face of the District's qualified economic offer, cannot proceed to interest arbitration.

The Article XIII proposal expands existing employe rights to fill vacancies which occur within the bargaining unit. At present, unit employes not on layoff need only be "considered" for a vacancy. Under the proposal, such employes are entitled to receive the position. Because it expands the positions which unit employes are entitled to receive, we think it clear that this proposal inherently enhances the employes' "job security." Thus, it is an "economic issue" proposal.

The Article XIX proposal is also a "job security provision" within the meaning, of Sec. 111.70(1)(dm), Stats. Thus, it is an economic issue proposal which cannot proceed to interest arbitration where, as here, the District has made a qualified economic offer. The Article XIX proposal prohibits the District from adversely evaluating a teacher with special needs students over matters related to the District's failure to provide "necessary training, materials, or other instructional needs as deemed necessary by the IEP." Adverse evaluations reduce job security. Prohibiting adverse evaluations enhances job security. Thus, this is a job security provision.

Our colleague holds otherwise because he believes this proposal does not give teachers more protection than they currently enjoy under the existing, contractual "just cause" standard. If our colleague is correct, why is the Association making this proposal? Is the Association willing to go through the delay and expense of this proceeding for a proposal which gives **it** nothing? We think not. Instead, as forthrightly and correctly admitted by the Association itself during the hearing, it is clear the proposal provides additional job security protection. Thus, it is an economic issue.

Our colleague had the foregoing paragraph before him when he prepared his dissent. To avoid any further delay in the issuance of this decision, we will not be responding further to his dissent.

Given our holding herein, the Association cannot proceed to interest arbitration as to the

proposals contained in its final offer. We have remanded the interest arbitration petition to the Commission Investigator in hopes that the parties will be able to use his services to reach a voluntary agreement.

In closing, it is important to note that our interpretation of Sec. 111.70(1)(dm), Stats., does not impact the parties' rights to collectively bargain under Sec. 111.70(1)(a), Stats. 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.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of May 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

DISSENTING OPINION OF COMMISSIONER A. HENRY HEMPE

Having made a qualified economic offer to the professionals represented by the Three Lakes Education Association, the Three Lakes School District asks this Commission to banish from interest arbitration two Association proposals: the first would grant qualified teachers transfer rights into existing position vacancies; the second would prevent the District from adversely evaluating any regular education teacher for whom the district has failed to provide necessary training, materials, or other instructional matter deemed necessary by the Individual Educational Plan (IEP) of any special education student "mainstreamed" to his or her classrooms.

The majority bars both propositions of the Association from interest arbitration consideration on the grounds that each constitutes an "economic issue." I would bar neither, for I am not persuaded that result in this instance is consistent with legislative intent.

> Section 111.70(1)(dm) defines "economic issue" as follows:
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> ". . . 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 pay, 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."

As to the transfer proposal, the majority postulates that since the proposal seeks to expand existing employe rights to fill vacancies which occur within the bargaining unit it "inherently enhances the employes' job security." Similar semantic surgery is performed on the Association's evaluation proposal: a) adverse job evaluations reduce job security; b) prohibiting adverse job evaluations enhances job security; ergo, c) the Association's evaluation proposal is transformed into a job security proposal.

Then applying a rationale expressed in past Commission cases, 1/ the majority next concludes that once each of these bargaining proposals is fitted in the topical list contained in sec. 111.70(l)(dm), Stats., it is doomed as a possible subject of consideration for interest arbitration.

1/ ". . .(I)t is evident that the legislature intended the definition of "economic issues to include any specifically listed topic." See *Darlington Community School District,* Dec. No. 28456 (WERC; 7/95); *LaCrosse Education Association,,* Dec. No. 28462 (WERC; 11/95) *Grafton School District*, Dec. No. 28620 (WERC; 12/95).

Written in an effort to draw a "bright line" visible to all, this rationale has done adequate past service as a rough guide, if not to legislative policy intent, to Commission administrative intent. The device seems to work well enough in cases where the proposal under scrutiny not only fits neatly into one of the statute's designated categories, but has a fairly obvious increased fiscal impact. 2/ Application of it to the facts of this case, however, reduces simplicity to simplism.

For to assume (as does the majority) that any category listed in Sec. 111.70(1)(dm) is proscribed from interest arbitration *even if it is cost-neutral* seems to suggest a non-sequitur. Those categories are not listed as equal and independent *correlatives* of the initial generic definition, 3/ but as illustrative *appositives* - specific examples of the kinds of issues that may create a new or increased financial liability upon the school district. Read in conjunction with the other relevant provisions of 1993 Act 16 (of which it was part), Sec. 111.70(1)(dm) seems clear enough on its face: the Legislature intended to prevent the involuntary assumption through interest arbitration of increased financial liabilities by a school district, beyond those associated with the statutory ingredients of a qualified economic offer. However laudable our efforts to create a simple, easy-to-administer bright line, we are obligated to carry out that legislative intent without first tailoring it to fit our administrative convenience.

The Commission seemed to recognize this when we last examined Sec. 111.70(1)(dm). In addressing whether a proposal expanding the grievance procedure was an economic issue, we said:

> "The statute does not list grievances as an economic issue. *In our view this is so*

2/ *Darlington Community School District, supra, and Grafton School District, supra,* each presented proposed contract language which didn't require extensive analysis to conclude would create new or increased financial requirements on the districts (and were permissive subjects of bargaining as well). A more cumbersome application of the rationale also achieved the desired, correct result in *LaCrosse School District, supra,* in which the Commission found, *inter alia,* that a school district proposal to lower existing standards for additional duty pay to teachers was an "economic issue" and thus ineligible for interest arbitration where the district had also submitted a qualified economic offer. In retrospect, the same result could have been reached by a Commission determination that the salary structure alterations being proposed (in addition to the adjustments proposed under the q.e.o) reduced the district's total package offer to something less than the qualified economic offer it intended to make.

3/ Put another way, the statute does not define an economic issue as an "either . . . or" proposition, i.e., . . . **either** any issue which creates a new or increased financial liability . . . **or** salary . . . *et cetera.*"

> *because a grievance procedure does not independently create any new or increased financial liability upon a municipal employer.* The procedure simply serves as a contractual mechanism by which disputes over the interpretation of a collective bargaining agreement can be resolved. While the District argues it would be ironic for the Commission to conclude that a wage provision in a collective bargaining agreement constitutes an economic issues (sic) while a dispute resolution mechanism as to the meaning of the same provision is not, we are satisfied that is precisely what the Legislature intended. *The presence of an expanded grievance procedure does not in and of itself create any new or increased liability within the meaning of Sec. 111.70(1)(dm).* 4/ (Emphasis supplied)

Had we taken the course in *Randall* that the majority follows in this decision, we would have concluded that a) since an absence of a grievance procedure reduces job security, b) the presence of a grievance procedure enhances job security, therefore c) a proposal for a grievance procedure is a job security provision. That equation may reflect a syllogistic certainty; it would also be an unwarranted administrative expansion of the provisions of Sec. 111.70(l)(dm). Wisely, the Commission refrained from adopting it.

But, on the other hand, if we were to have followed the *Randall* corollary today a different result may have issued. For the identical case can be made for both Association proposals in the instant matter as was made for the grievance process proposal in *Randall:* Sec. 111.70(l)(dm), Stats., lists neither "transfer rights" nor evaluation processes" because neither the transfer proposal nor the adverse evaluation proposal *independently* creates a new or increased financial liability upon the school district.

Yet even should we indulge in the majority's apparent propensity for semantic transplants, when we follow the same analytic model suggested in *Randall* we are still provided with a reasonably simple standard that doesn't rely on arguably arbitrary semantic substitutions. For under this model it doesn't matter whether an issue is identified as a transfer proposal, an adverse evaluation proposal, or a job security proposal. The sole question to be resolved is whether the proposal *independently* creates a new or increased financial liability on the school district. 5/

4/ *Randall Consolidated Joint School District,* Dec. No. 28734 (WERC; 5/96)

5/ The District raises a worst-case hypothetical of the dually-certified teacher opting to transfer from teaching math and science to a social studies vacancy. (Transcript, p. 7.)

(Footnote 5 continues on page 14)

(Footnote 5 continued from page 13)

(Market forces apparently assign a greater hiring value to math and science teachers than to

Employing the *Randall* model in the instant case, it is by no means clear that a new or increased financial liability on the school district is a probable consequence of the Association's transfer proposal. Certainly, under some circumstances the proposal might be administered in a way which could create a new or increased financial liability on the district. Equally plausible, however, are other scenarios under which district costs would be reduced or left unchanged. Under these circumstances - particularly since the *financial* consequences are to some extent controllable by the district and appear to be cost-neutral at worst - I do not believe there is a sufficient legal basis to prevent the proposal from proceeding to interest arbitration.

The Association's adverse evaluation proposal 6/ offers an even more legally compelling case. Although the nexus between that proposal and "job security proposals" seems too attenuated to justify the redefinition supported by the majority, 7/ utilization of the analytic model provided in

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their social studies counterparts). But the converse seems just as likely, i.e., the multi-certified social studies teacher may opt to fill a math and science vacancy. School District Superintendent Karl conceded, moreover, that in his eight years with the school district no district employe certified to teach math and science has ever requested to be transferred into a completely different certification area. (Transcript, p. 18.) The fact is that the transfer proposal could probably best be described as "cost-neutral," which the District comes close to acknowledging: "(i)t is impossible to forecast what effect all this might have on other teachers, its financial impact." District's Brief, p. 3.

6/ I read this proposal as preventing an adverse evaluation only when the District has failed to provide the teacher with the necessary materials or training required to carry out the IEP for any special education student assigned to that teacher's classroom - and only as to the interaction between that teacher and the individual special education student. Contrary to the apprehension expressed by Superintendent Karl, I do not read the proposal as preventing the District from evaluating the teacher's job performance in any other relevant area.

7/ The District agrees that evaluations are not intended to be punitive, but provide "instructional improvement." (Transcript, p. 20) Certainly, unsatisfactory evaluations can lead to termination of a teacher's employment. But where the adverse evaluation is caused by the District's failure to provide the teacher with required training or materials or training it is difficult to envision what is described as an instrument of "instructional

(Footnote 7 continues on page 15)

(Footnote 7 continued from page 14)

Randall makes moot any nexus debate. The sole question becomes whether the adverse evaluation proposal *independently* requires any *new or increased* financial liability upon the school district. As to that it does not appear that the proposal *requires* the District to spend an extra nickel.

Obviously, if the District fails to provide a regular education teacher to whose classroom it has assigned a special education student the training or materials required by the student's IEP the District could possibly incur a new financial liability, *e.g.*, a court judgment awarding money damages to the student and/or the student's parents. This, of course, would result from a statutory cause or causes of action totally independent of the Association's proposal.

Moreover, the Association's proposal gains no substantive right for the teachers *which they do not already possess.* The labor agreement between the Three Lakes Education Association and the Three Lakes School District already prohibits the District from disciplining or non-renewing employes without just cause. Given that existing contract language, it is unlikely that an arbitrator would uphold any teacher non-renewal based on an adverse evaluation of a teacher caused by the District's failure to provide the necessary materials or training required by a student's IEP.

The majority has difficulty with this point and rhetorically inquires why the Association is making this proposal if its members are already contractually protected. 8/ But reaching

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improvement" being utilized as a basis to terminate the teacher's employment. Moreover, as emphasized by District Superintendent Karl, IEPs do not specify teacher training; they define individual training required by the student. Transcript, p. 44. Thus, no teacher would have a basis to avoid an adverse evaluation based on inadequate training of the teacher if none had been specified by the IEP. The parties' failure to agree on this somewhat fundamental point is both curious and unfortunate, but is not a basis to prevent the proposal from going to interest arbitration.

8/ The majority credits the Association with ". . . forthrightly and correctly admit(ting) . . ." that the adverse evaluation proposal provides additional job security. Presumably it is referring to the following colloquy that appears in the transcript (p. 39) of a telephone hearing conducted by Chairperson Meier in which WERC General Counsel Peter Davis also participated:

MR. DAVIS: ... Even if this clause wasn't in the contract and there was some discussion about if that was so, well, why would they want -- why would they have this proposal

(Footnote 8 continues on page 16)

(Footnote 8 continued from page 15)

conclusions from a party's motives with the paucity of evidence that exists in this case amounts to little more than idle speculation. Perhaps the benefit perceived by the Association is nothing more than an elevated visibility for the issue covered. Whatever the case, inquiry as to motivation in this matter is immaterial.

In summary, the majority's interpretation of Sec. 111.70(1)(dm), Stats., suggests that any contractual improvement desired by the teachers is an "economic issue" if it can be redefined and shoe-horned into one of the statutorily specified categories, *even though the proposals do not create any new or increased financial liability for the school district.* In my opinion, this reflects a rigid dogmatism and harshness not intended by the Legislature.

The Legislature's efforts were limited to protecting school districts from the involuntary assumption of financial consequences to the school district. The Commission should demonstrate similar restraint.

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

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out there? It must enhance something in terms of an existing contract right. Can you respond to that at all?

MR. DEGNER: (Gene Degner, Uniserve Representative): Well, I think it probably does give them more protection. I suppose the position would be the district would say, well, that's not our problem. The student has to have it and you can do something else even though the IEP isn't there. We as a faculty member don't have a right to seek enforcement of an IEP. The only person that can really do that is the district -- or the parent, I mean. We can't go into court and say the district is not following the IEP.

But majority overlooks the following questions and answers recorded three pages later (Transcript, p. 42):

MR. O'BRIEN (John O'Brien, Attorney for the District): Isn't it more realistic that the real thrust of that (adverse evaluation) proposal and what you should say in answer to Mr. Meier's (sic) question is that there's additional job security in that provision because the teacher is gaining something from that in the way of job security?

MR. DEGNER: No, I don't think -- (Emphasis supplied.)

MR. O'BRIEN: That's the way they're supposed to be trained on the IEPS. If the teacher does something, they should be trained for it. If the teacher can't do it, then the teacher can't be held responsible unless the district trains them some more?

MR. DEGNER: No. Now you're reading something into that retraining proposal. That's not the intent of the proposal. I don't see that at all. (Emphasis supplied.)