STATE OF WISCONSIN

CIRCUIT COURT BRANCH I ONEIDA COUNTY

THE EDUCATION ASSOCIATION OF THREE LAKES SCHOOLS, Plaintiff,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION, Defendant.

Decision No. 29104-A

BACKGROUND

This case is before the court on a petition for judicial review of the findings of fact, conclusions of law and declaratory ruling of the Wisconsin Employment Relations Commission (WERC) issued on May 30, 1997.

FACTS

Negotiations for a new collective bargaining agreement were carried out between the Three Lakes School District and the Educational Association of Three Lakes Schools (Association). The school district imposed a qualified economic offer pursuant to Sec. 111.70(1)(nc), Stats., for its 1995-97 contract. In the final offer of the Association, two proposals would modify portions of the prior collective bargaining agreement. They are:

Article XIII, *Vacancies, Transfers, and Reassignments,* amend paragraph D to read:

"Teachers within the system who apply for a vacancy in writing s/all be hired ~~considered~~ to fill vacancies before hiring new/employees. In the event two or more teachers apply for the same position and all are certified or certifiable and of comparable ability, the one with the most district-wide seniority ~~will~~ shall be ~~given first consideration~~ hired."

Article XIX, *Hours, Loads, and Considerations,* add the following paragraph:

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 a result of the lack of these materials, conditions or training.

The school district filed an objection to the Association's final offer claiming that the proposals constituted economic issues which are not subject to interest arbitration. WERC

treated the objection as a petition for declaratory ruling under Sec. 227.41, Stats. The parties submitted the issue to WERC on briefs. The Commission, composed of two commissioners, were unable to reach a unanimous decision. After a third commissioner was added, the Commission issued a split decision on May 30, 1997, which held that the proposals did constitute economic issues and that the Association could not proceed to interest arbitration.

STANDARD OF REVIEW

In this case, WERC issued findings of fact, conclusions of law and a declaratory ruling. This court must uphold an administrative agency's findings of fact if they are supported by relevant, credible and probative evidence upon which a reasonable person could rely; we may not substitute our own judgment in evaluating weight or credibility of evidence. LARSON V. LIRC, 184 WIS.2D 378, 386 N.2, 516 N.W. 2D 456 N.C. (CT.APP. 1994). This court shall, however, set aside agency action if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record. Sec. 227.57(6), Stats. "Substantial evidence" necessary to support an administrative decision is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. CITY OF LACROSSE POLICE & FIRE COMMISSION V. LIRC, 139 WIS.2D 740, 765, 407 N.W.2D 510, 520 (1987).

The general rule for review of conclusions of law is that reviewing courts are not bound by the agency's conclusions of law. WEST BEND EDC. ASS'N. V. WERC, 121 WIS.2D 1, 11, 357 N.S.2D 534, 539 (1984). Our Supreme Court discussed the appropriate standards of review of an agency's legal conclusions and statutory interpretation in JICHA V. DILHR, 169 WIS.2D 284, 290-91, 485 N.S.2D 256, 258-59 (1992):

> This court has generally applied three levels of deference to conclusions of law and statutory interpretation in agency decisions. First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." The second level of review provides that if the agency decision is "very nearly" one of first impression it is entitled to "due weight" or "great bearing." The lowest level of review, the *de novo* standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented.

The Association argues that WERC's decision is entitled to only "*de novo"* review "due to the paucity of its experience in interpreting the statute, and its retreat from its earlier decision." WERC argues its decision is entitled to great weight deference because of the Commission's experience, specialized knowledge and its longstanding interpretation of MERA in general.

A number of factors combine to suggest that *de novo* review is appropriate here. First, the statute under which this dispute arises is of recent vintage. It was enacted in 1993 as part of legislation which greatly increased state funding for public elementary and secondary education, but also imposed cost controls on local school districts. Thus, insufficient time has transpired to allow many disputed cases to have percolated up for administrative agency decision. Second, only four such cases had been decided by WERC before the present case was decided. Third, this court has been furnished with copies of the four previous decisions and none is directly on point with the issues raised here. By their nature, contract proposals advanced by teacher's unions and school districts may be unique or innovative and, thus, will not often have been the subject of prior rulings. Fourth, while courts must defer to administrative determinations on issues such as credibility, there are no issues of credibility here. In fact, as counsel for the Association points out, there are no findings as to any contested facts. This is as pure a legal determination as one can imagine. Not only that, but it involves statutory interpretation, something courts are called upon to do every day. *De novo* review is appropriate.

STATUTORY CONSTRUCTION

The statute to be construed reads as follows:

> "'Economic issue' means 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. Sec. 111.70(1)(dm), Stats.

Counsel for the Association contends that sec. 111.70(1)(dm), Stats., "contains an exhaustive list of those items which are economic issues" and the list "does not reference either evaluation or transfers as economic issues." Brief, Page 5.

In other words, the legislature could have listed matters relating to teacher transfers and teacher evaluations but did not. And since they were not specifically listed, they are excluded. Counsel cites the case of STATE V. VENNEMANN, 180 WIS.2D 81, 96, 508 N.W.2D 404 (1991), for the proposition that "under the rules of statutory construction, a specific alternative in a statute is reflective of the legislative intent that any alternative not so enumerated is to be excluded." Brief, Page 7. That certainly is what the case holds but it has

no application to the situation before us. VENNEMANN involved construing Sec. 967.08, the statute which lists court proceedings that can be conducted telephonically. In a criminal case the trial court conducted a postconviction evidentiary hearing with the defendant appearing telephonically. The case was reversed in part because "sec. 976.08 specifically enumerates proceedings intended to be included within the parameters of the statute. There is no mention of a postconviction evidentiary hearing." VENNEMANN, AT 96.

In the case at bar, "'economic issue' means **any** issue that creates a new or increased financial liability upon the municipal employer, including. . ." and there follows a long list of some 25 different items.

Clearly this lengthy statutory enumeration is not intended to be exhaustive but rather illustrative. Closer than VENNEMANN to the situation here is the case of STATE V. ENGLER, 80 WIS.2D 402, 259 N.W.2D 97 (1977), where the court had to construe a portion of the Youthful Offender Law which stated that courts could impose "reasonable conditions of probation including, but not limited to, the payment of restitution, the payment of costs of prosecution and the payment of support." As a reasonable condition of probation, the trial judge sentenced the offender to six months in jail. The Supreme Court affirmed holding that the conditions of probation available "included but are not limited to those subsequently listed." ENGLER AT 408. Here, concededly, the phrase "but not limited to" is absent. Certainly its presence in ENGLER made construction of the statute easier.

Of greater persuasiveness is the case of MILWAUKEE GAS LIGHT COMPANY V. DEPARTMENT OF TAXATION, 23 WIS.2D 195 (1965) wherein the following appears:

> Courts have found the word 'including' a perplexing one to interpret. An examination of the cases discloses that it has at least three generally accepted meanings: (1) As a term of enlargement; (2) as a word of limitation or enumeration; and (3) as referring to things which form a part of the principal thing mentioned. See 42 C.J.S., Including, pp. 525, 526, and cases cited in footnotes. This court in SCHLUCKEBIER V. ARLINGTON MUT. FIRE INC. CO. (1959), 8 WIS. (2D) 480, 483, 484, 99 N.W. (2D) 705, stated that "include" has two acceptable shades of meaning, namely, (1) the only thing included, or (2) that which follows constitutes only a part or a component of the whole. The court then went on to hold that it is in this second sense in which the word is most commonly used. The United States supreme court, in FEDERAL LAND BANK V. BISMARK LUMBER CO. (1941), 314 U.S. 95, 100, 52 SUP. CT. 1, 86 L.ED. 65, pointed out "that the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.

In fact, the MILWAUKEE GAS LIGHT COMPANY case is consistent with a myriad of other cases from all over the country which have held that the terms "include" or "including" are

ordinarily words of enlargement, not of limitation. See 20A Words and Phrases, 1992 Cumulative Annual Pocket Part, Page 53-56.

Thus, the fact that neither teacher evaluation nor transfer is specifically referenced does not mean these items are excluded. On the contrary, the use of the word "any," the use of the term "including," the length of the list of items set forth as well as their diversity and the entire context of the statute shows unequivocally that the items expressly listed in the statute are not exclusive but representative. A review of the previous four decisions of WERC, as well as the decision appealed from here, all show the commissioners struggling to "fit square pegs into round holes," i.e., substantial effort has been expended in an attempt to place contract proposals into one of the various categories available under the statute. The statute simply does not reuqire this.

What the statute does require, however, is that for a particular contract proposal to meet the definition of an "economic issue" it must "create a new or increased financial liability."

It is not sufficient that the item appears to fall within one of the categories listed. There must be a real economic impact. As a matter of fact, and irrespective of the wisdom or merit of either proposal here, neither has been shown to have such economic impact and, logically, it is doubtful either can be shown to be other than fiscally neutral.

First, with respect to the transfer proposal, counsel for the Association is correct: if a position opens up and a veteran teacher transfers into the open position, there will necessarily be an opening down the line for a new teacher. It is impossible to predict, however, whether the new person hired will be experienced or inexperienced, or will be high or low on the salary scale. The most that can be concluded in this regard from the transcript of the proceedings is that "there's a shortage of [math and science] teachers coming out because of demands of private industry in those fields." Transcript, Page 9.

We must, of course, be mindful that municipal employee negotiations do not take place in a vacuum. Nevertheless, the problems of hiring math and science teachers referenced in the transcript are the result of market conditions that have nothing to do with the proposed contract language here and would exist irrespective of the porposal. The Commission dissenter is precisely correct when he states,

> "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 same problem characterizes the Commission majorities' discussion of the Association's evaluation proposal; the conclusion that this is a "job security proposal" seems to be a stretch to begin with, but there simply is no proof of a new or increased financial liability.

There are difficulties, no doubt, in attempting to predict with certainty the fiscal impact of contract proposals, whether they be advanced by teacher's unions or school districts. Heretofore, the Commission (unlike the legislature with its required fiscal impact statements) has not been in the business of having to peruse the fiscal impact of contract proposals. The present law changes that.

CONCLUSION

Because the record here does not disclose that either proposal is other than cost-neutral, the decision of the Commission is reversed, the proposals are found to be non-economic and the parties may proceed to interest arbitration.

Dated this 9th day of December, 1997.

BY THE COURT:

Robert E. Kinney /s/

Hon. Robert E. Kinney
Circuit Court Judge - Br. I