STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Motion of

SHOREWOOD EDUCATION ASSOCIATION

Requesting a Review of Implementation Pursuant to ERC 33.10(6)
Involving a Dispute Between the Association

and

SHOREWOOD SCHOOL DISTRICT

Case 47
No. 52498
INT/ARB-7617

Decision No. 29259

APPEARANCES

Mr. Anthony L. Sheehan, Staff Counsel, and **Mr. Patrick J. Farley**, Associate Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, PO Box 8003, Madison, Wisconsin, 53708-8003, for the Association.

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 10, 1996, the Shorewood Education Association filed a motion to review implementation of a qualified economic offer (QEO) with the Wisconsin Employment Relations Commission pursuant to ERC 33.10(6).

The parties waived hearing and filed a stipulation of facts on April 14, 1997. The parties filed written argument, the last of which was received September 16, 1997.

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

FINDINGS OF FACT

1. The Shorewood Education The Association) is a labor organization pursuant to Wis. Stats. §111.70(1)(h) (1995) and the exclusive bargaining agent for the non-supervisory certified personnel of the District that are employed half-time or more excluding substitute, per diem teachers, and all other aides, whether certified or not, in conferences and negotiations with the Board or its representatives on questions of wages, hours and conditions of employment.

2. The Shorewood School District (The District) is a municipal employer pursuant to Wis. Stats. §111.70(j) (1995).

3. The Association and the District have been parties to a series of collective bargaining agreements.

4. The 1986-87 collective bargaining agreement between the Association and the District contained the following language:

K. The Board will pay to the Wisconsin State Teacher's Retirement System three and one-half percent (3.5%) of the gross salary of non-tenured members of the bargaining unit. The Board will continue to pay three and one-half (3.5%) of the gross salary of such teachers until the beginning of their tenured contract at which time such payment shall be increased to five percent (5%) of their gross salary. Effective May 1, 1986, the Board shall pay four and one-half percent (4.5%) of the gross salary of nontenured teachers to the Wisconsin Retirement System until the beginning of their tenured contract. Also effective May 1, 1986, the Board shall pay six percent (6%) of the gross salary of tenured teachers to the Wisconsin Retirement System commencing with the beginning of their tenured contract. Employee's share of retirement payments will not be paid by the District for summer work.

5. The 1987-90 collective bargaining agreement between the Association and the District contained the following language:

K. The Board will pay to the Wisconsin State Teacher's Retirement System four and one-half percent (4.5%) of the gross salary of non-tenured members of the bargaining unit. The Board will continue to pay four and one-half (4.5%) of the gross salary of such teachers until the beginning of their tenured contract at which time such payment shall be increased to six percent (6%) of their gross salary. The Board shall pay six percent (6%) of the gross salary of tenured teachers to the Wisconsin Retirement System commencing with the beginning of their tenured contract. Employee's share of retirement payments will not be paid by the District for summer work.

6. The 1990-92 collective bargaining agreement between the Association and the District contained the following language:

K. The Board will pay to the Wisconsin State Teacher's Retirement System four and one-half percent (4.5%) of the gross salary of non-tenured members of the bargaining unit. The Board will continue to pay four and one-half (4.5%) of the gross salary of such teachers until the beginning of their tenured contract at which time such payment shall be increased to six and one tenth percent (6.1%) of their gross salary. The Board shall pay six and one-tenth (6.1%) of the gross salary of tenured teachers to the Wisconsin Retirement System commencing with the beginning of their tenured contract. Employee's share of retirement payments will not be paid by the District for summer work.

7. The last signed collective bargaining agreement between the parties was the 1992-1994 agreement, attached as Exhibit A. That Agreement contained the following language:

K. The Board will pay to the Wisconsin State Teacher's Retirement System four and one-half percent (4.5%) of the gross salary of non-tenured members of the bargaining unit. The Board will continue to pay four and one-half (4.5%) of the gross salary of such teachers until the beginning of their tenured contract at which time such payment shall be increased to six and two-tenths percent (6.2%) of their gross salary. The Board shall pay six and two-tenths percent (6.2%) of the gross salary of tenured teachers to the Wisconsin Retirement System commencing with the beginning of their tenured contract. Employee's share of retirement payments will not be paid by the District for summer work.

8. The WRS employee contribution rate over the last 12 years have been as follows:

a. 1984 = 5.0%
b. 1985 = 5.0%
c. 1986 = 6.0%
d. 1987 = 6.0%
e. 1988 = 6.0%
f. 1989 = 6.0%
g. 1990 = 6.0%
h. 1991 = 6.1%
i. 1992 = 6.2%
j. 1993 = 6.2%
k. 1994 = 6.2%
l. 1995 = 6.2%

9. The most recent negotiations over the 1995-97 collective bargaining agreement resulted in the District implementing a Qualified Economic Offer (QEO). The Shorewood School Board voted to implement the QEO on January 9, 1996.

10. On or about September 21, 1995, Director of Business Services, Terrence Quinn provided a memorandum with certain attachments to appropriate SEA representatives, attached as Exhibit B. No response or objections to these documents were received from the SEA, either before or after September 29, 1995, except as described in paragraph 14 below. These documents were not "attested to" by the District.

11. The WRS employee Contribution rate increased from 6.2% in 1995 to 6.5% effective 1/1/96. The WRS employee contribution rate is 6.4% in 1997.

12. The District continued to pay 6.2% during 1996 and 1997. Employees have paid the WRS increase through payroll deductions beginning on January 15, 1996.

13. On January 9, 1996, the District communicated its decision concerning implementation of the QEO by a press release, attached as Exhibit C. The SEA received a copy of this document. On January 10, 1996, a memorandum was sent to the SEA, attached as Exhibit D. The SEA was aware the District did not intend to pay the increase in WRS contributions as part of its QEO implementation.

14. In June of 1996, the SEA sent a letter to the School Board, asking that the District comply with Wis. Stats., §111.70(1)(ne)1 and to pay 100% of the Wisconsin Retirement System (WRS) employee contribution for the 1995-96 school year and for the entire period covered by the QEO, indicating to the District that the SEA preferred settling this matter outside of filing a motion with the Wisconsin Employment Relations Commission (WERC) under Wis. Admin. Code §ERC 33.10(6) (December, 1994). A copy of that letter is attached as Exhibit E.

15. Before and after June of 1996, the District made various decisions, such as setting the District's 1996-97 budget, the school district tax levy, and staffing and related personnel decisions, all prior to receiving the December 9, 1996 Motion in this case.

16. On December 9, 1996, the Association filed a motion with WERC to review the District's implementation of the QEO pursuant to Wis. Admin. Code §ERC. 33.10(6) (December, 1994).

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

CONCLUSIONS OF LAW

1. The motion to review implementation was timely filed.

1. The Shorewood School District failed to honor its obligations under ERC 33.10(3)(b) to provide the Shorewood Education Association with Forms A and B.

1. The Shorewood School District did not implement its qualified economic offer in a manner consistent with Sec. 111.70(1)(nc)1.a., Stats., when it failed to pay 100% of the Wisconsin Retirement System employe contribution for tenured teachers for the period of July 1, 1995, through June 30, 1997.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

Within 30 days of the date of this Order, the Shorewood School District shall:

1. Provide the Shorewood Education Association with Forms A and B completed in a manner consistent with ERC 33.10(3)(b) and this decision.

1. Pursuant to ERC 33.10(6), make all affected employes whole with 12% interest for all retirement contributions made by tenured teachers during the period July 1, 1995, through June 30, 1997.

1. Advise the Wisconsin Employment Relations Commission in writing as to the actions the District has taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of December 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Meier, Chairperson

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A. Henry Hempe, Commissioner

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Paul A. Hahn, Commissioner

Shorewood School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DISCUSSION

BACKGROUND

ERC 33.10(6) states:

> (6) COMPLIANCE. Any dispute that the salary and fringe benefits have been or will be implemented in a manner consistent [with] s.111.70(1)(nc), Stats. and this chapter shall be filed by the labor organization with the commission as a motion to review implementation. Following any necessary hearing and receipt of any necessary written or oral argument, the commission shall issue a written decision determining whether the municipal employer's proposed or actual implementation was consistent with s.111.70(1)(nc), Stats. and this chapter. If the commission determines that any implementation was not consistent with s.111.70(1)(nc), Stats., and this chapter, the commission shall order the municipal employer to comply with s.111.70(1)(nc), Stats., and this chapter, to take appropriate action including reimbursement to the municipal employer of excess salary payments in the same manner specified in sub. (5) and payment to employes of any monies owed with interest at the rate established by s.814.04, Stats. The pendency of a motion to review implementation does not bar a municipal employer from implementing its qualified economic offer.

We created this administrative rule provision to provide a mechanism for resolution of implementation disputes such as the one before us in the proceeding.

Timeliness

The District asks that the Association motion be dismissed as untimely filed. The District asserts the Association improperly waited almost a year before filing the motion so as to minimize any negative financial impact on Association represented employes and limit the District's ability to prudently budget for a negative litigation result. The District contends the doctrine of laches warrants dismissal of the motion.

The Association argues that before filing the motion, it put the District on notice that the parties had an implementation dispute and sought to resolve that dispute informally without resort to litigation. Under such circumstances, the Association contends its motion is timely.

In January 1996, the WRS employe contribution rate increased from 6.2% to 6.5%. At the time of the increase, the District made the Association aware that the District did not intend to pay the additional .3% as part of a QEO implementation. In mid-January 1996, the District implemented the QEO and did not pay the additional .3%. In June 1996, the Association asked the District to pay the increased employe WRS contribution and indicated it "prefers not to be forced to seek a remedy for this situation by filing a motion with the WERC under ERC 33.10(6)." Prior to and after receiving the Association's request, the District was making various budget and staffing decisions. In December 1996, the Association filed its motion.

ERC 33.10(6) does not contain a time limitation for filing a motion to review implementation. This reflects the Commission's interest in being an accessible forum for resolution of disputes over implementation. While there may be circumstances where doctrines such as laches would appropriately restrict access to the Commission for resolution of implementation disputes, we are not satisfied the facts presented here warrant dismissal of the motion as untimely. While the facts do not provide much support for the Association contention that the motion was delayed by any actual efforts at informal resolution, nor is there much support for the District's contention that it proceeded to make various financial decisions under the mistaken, but good faith, belief that the Association had abandoned the legal position it took in June 1996 regarding WRS contributions. Thus, even assuming dismissal could be appropriate under a laches theory, the facts presented here provide insufficient support for the District's position. Thus, the motion to dismiss is denied.

Forms A and B

ERC 33.10(3)(b) states:

> (b) At the time it submits a qualified economic offer to the labor organization or 60 days prior to the stated expiration date of any existing collective bargaining agreement, whichever is earlier, the municipal employer's treasurer and superintendent or business manager shall provide the labor organization with completed commission qualified economic offer calculation Forms A and B. Forms A and B are appendices to this chapter. When completing Forms A and B, the treasurer and superintendent or business manager shall use all available cost and employe complement information and shall attest to of the information. If additional cost or employe complement information becomes available, the treasurer and superintendent or business manager shall provide the labor organization with revised qualified economic offer calculation Forms A and B.

ERC 33.10(3)(b) requires use of Forms A and B when a district provides a union with QEO calculation information. Among other matters, the Forms require district officials (the treasurer and superintendent or business manager) to "attest" to the accuracy of the information. The District concedes that it did not use the required Forms or "attest" to the accuracy of the information it did provide. However, the District argues that it provided most, if not all, of the Form A and B information in another format. The District also notes that ERC 33.10(3)(b) does not contain sanctions for failure to use Forms A and B and, in any event, questions whether the Commission has statutory authority to impose sanctions.

We take a dim view of the District's conduct. The District seems to have simply chosen to ignore the requirements of our administrative code for its own convenience. We have ordered the District to provide appropriately "attested to" Forms A and B to the Association.

However, as ERC 33.10(2) and (3) reflect 1/, the obligation to provide Forms A and B is separate and distinct from the issue of whether a QEO exists or has been properly implemented. The Forms must be provided whether or not the employer elects to submit a QEO. [ERC 33.10(3)(b)]. Under these circumstances, while failure to provide the Forms is inappropriate behavior 2/, it does not warrant a conclusion that a QEO cannot or does not exist or was not or cannot be properly implemented. Thus, we reject the Association's request that the failure to provide Forms A and B allow it to proceed to interest arbitration.

Retirement Contribution

Section 111.70(1)(nc)1.a., Stats., defines a "qualified economic offer" as consisting in part of:

> a. A proposal to maintain the percentage contribution by the municipal employer to the municipal employes' existing fringe benefit costs as determined under sub. (4)(cm)8s., . . . as such contributions and benefits existed on the 90th day prior to the expiration of any previous collective bargaining agreement between the parties . . . . (emphasis added)

Both parties agree that on the "90th day," the District was paying "6.2%" of the WRS employe contribution and that 6.2% was the entire WRS employe contribution. The parties disagree on the scope of the District's QEO implementation obligations when the WRS increased the employes' contribution rate to 6.5% on January 1, 1996.

The Association contends the District was paying 100% of the "employes' existing fringe benefit costs" for retirement and was thus obligated to continue to pay 100% pursuant to Sec. 111.70(1)(nc)1.a., Stats., when the employe contribution rate increased to 6.5%. The Association asserts a "dynamic status quo analysis" of the issue is inappropriate because the Legislature instead chose to focus the inquiry on the benefits and contributions which exist at a statutorily established point in time.

The District argues that where, as here, a contribution is contractually defined as a "capped percentage," that "capped percentage" continues to define the District's contribution obligations under Sec. 111.70(1)(nc)1.a., Stats. The District asserts the statutory definition of a QEO seemingly establishes inconsistent obligations of maintaining "fringe benefits" (which the District defines as the 6.2% cap) while maintaining the same percentage contribution (which the Association views as 100%). However, where, as here, the parties have specifically not bargained a "full" or "100%" payment, but have limited the District's obligation to no more or less than "6.2%," the District contends the clear language of the contract, legislative intent, and the dynamic status quo doctrine all support the view that 6.2% is the extent of the District's QEO obligation.

First, we concur with the Association's view that the District's QEO fringe benefit obligations are separate and distinct from the District's obligations under the "dynamic status quo," or, for that matter, under the parties' contract. The Legislature gave a QEO a specific statutory definition. It is this statutory definition which controls this dispute. The Legislature could have, but did not define a school district's QEO fringe benefit obligations as "maintaining the dynamic status quo" or "complying with the contract." Thus, our task in this dispute is not to determine the appropriate result under a dynamic status quo analysis or a determination of contractual intent, but rather to apply Sec. 111.70(1)(nc)1.a., Stats., to the facts at hand.

The District correctly concedes that if its contribution obligation were described in the contract as "full" or "100%," Sec. 111.70(1(nc)1.a., Stats., would obligate it to pay the .3% increase if it wished to have and properly implement a QEO. However, although "6.2%" was also the "full" or "100%' contribution in April 1995 (the point in time when QEO contribution levels are established under Sec. 111.70(1)(nc)1.a., Stats.), the District asserts a different QEO result is appropriate where the contract explicitly states a "6.2%" contribution. We conclude otherwise.

By stating the obligation as "6.2%", the contract protects the District against paying any mid-contract-term increases in the WRS employe contribution rate. But that internal contractual cap is not operative for purposes of calculating a QEO.

When we view the statutory language of Sec. 111.70(1)(nc)1.a., Stats., we see the Legislature as asking a simple question. What percentage of the "employes' existing fringe benefit costs" (in this case, retirement) is the employer paying on the "90th day prior to . . ."? We also see the Legislature as seeking a simple objective answer to that question. -- an answer which is not dependent on an analysis of bargaining history, past practice and contractual intent, but instead simple mathematics. No matter how the employer's contractual obligations are contractually expressed, the QEO question is simply what percentage was the employer paying? Thus, for instance, in our administrative rules (Form A-Developing Fringe Base-2.), we specify that where contribution levels are contractually expressed in dollar amounts, the dollar amount should be converted to a percentage for the purposes of QEO calculations. In such circumstances, where, for instance, health insurance contributions are expressed in dollar amounts rather than percentages, the employer must convert that dollar contribution into a percentage, and then maintain that percentage if it wishes to make and correctly implement a QEO. If the dollar amount conversion reflects that the employer is paying the entire cost, the employer must continue to pay the entire cost if it wishes to make a QEO even though its contractual contribution obligation is not expressed as "full" or "100%."

Applying the foregoing to the case at hand, we find that because the District was paying all of the employe retirement contribution costs on the "90th day," it must continue to do so if it wishes to make a QEO and properly implement same. 3/ Whether contractually expressed as "6.2%" or "full" or "100%," the mathematical QEO reality is the same – the District was and must continue to pay all employe contribution retirement costs. 4/

Because the District has not acted in a manner consistent with Sec. 111.70(1)(nc)1.a., Stats., the Association asks by way of remedy that it be allowed to proceed to interest arbitration. The Association argues that if the District wishes to take advantage of the power given to school districts by the "QEO law," then the District must be required to strictly follow the requirements of the QEO law or suffer the consequences.

As is evident from the text of ERC 33.10(6) and 33.10(2) and (3)(a), we view the appropriate remedy to be compliance with Sec. 111.70(1)(nc), Stats. Where the school district has committed itself to comply with the Sec. 111.70(1)(nc), Stats., it has made a qualified economic offer [ERC 33.10(2) and (3)(a)]. Where it is determined the school district has acted in a manner inconsistent with its qualified economic offer, ERC 33.10(6) reflects the Commission's judgment that it is appropriate to require compliance with the still existing offer/commitment to comply with Sec. 111.70(1)(nc), Stats. As long as the school district maintains its commitment to honor Sec. 111.70(1)(nc), Stats., it has a qualified economic offer and access to interest arbitration as to economic issues is barred by Sec. 111.70(4)(cm)5s, Stats.

Given the foregoing, we deny the Association's remedial request and have instead ordered compliance with Sec. 111.70(1)(nc), Stats., pursuant to ERC. 33.10(6). 5/

Given under our hands and seal at the City of Madison, Wisconsin, this 5th day of December 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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James R. Meier, Chairperson

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B. Henry Hempe, Commissioner

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Paul A. Hahn, Commissioner

ENDNOTES

1/ ERC 33.10(2) and (3) state:

> (2) CONTENTS. A qualified economic offer is a proposal in which the municipal employer obligates itself to at least comply with the salary and fringe benefit requirements of s.111.70(1)(nc), Stats., for the entirety of any collective bargaining agreement for any period after June 30, 1993.
>
> (3) EXISTENCE. (a) A qualified economic offer exists if the municipal employer submits an offer to a labor organization which at least states the following:
>
> 1. For any period of time after June 30, 1993, covered by the proposed collective bargaining agreement, the municipal employer shall maintain all fringe benefits and its percentage contribution toward the cost thereof as required by s.111.70(1)(nc), Stats.
>
> 2. For each 12 month period or portion thereof which commences July 1, 1993, and is covered by this agreement, the municipal employer shall provide the minimum increase in salary which s.111.70(1)(nc)2, Stats., requires for the purposes of a qualified economic offer, or may provide the decrease in salary which s.111.70(1)(nc)2, Stats., allows for the purposes of a qualified economic offer.
>
> (b) At the time it submits a qualified economic offer to the labor organization or 60 days prior to the stated expiration date of any existing collective bargaining agreement, whichever is earlier, the municipal employer's treasurer and superintendent or business manager shall provide the labor organization with completed commission qualified economic offer calculation Forms A and B. Forms A and B are appendices to this chapter. When completing Forms A and B, the treasurer and superintendent or business manager shall use all available cost and employe complement information and shall attest to the accuracy of the information. If additional cost or employe complement information becomes available, the treasurer and superintendent or business manager shall provide the labor organization with revised qualified economic offer calculation Forms A and B.

2/ The duty to bargain in good faith includes the obligation to provide information relevant and necessary when bargaining a contract. MAYVILLE SCHOOL DISTRICT, DEC. NO. 25144-D (WERC, 5/92). In appropriate circumstances, failure to provide Forms A and B can reasonably be viewed as a violation of the duty to bargain.

3/ In its brief, the District rhetorically inquired as to its QEO obligations for non-tenured teachers for whom it was making a 4.5% contribution on the "90th day." Application of our rationale to non-tenured teachers' employe retirement contributions yields a District obligation to pay 72.58% (4.5% divided by 6.2%) of such costs if it wishes to properly implement a QEO.

4/ Contrary to the District's arguments, this result is not in conflict with our decision in CAMPBELLSPORT SCHOOL DISTRICT, DEC. NO. 27578-B (WERC, 8/94). In CAMPBELLSPORT, we interpret the "percentage contribution" language of Sec. 111.70(1)(nc)1.a., Stats., in the context of an offer requiring payment of "full" health insurance premiums. We termed the Campbellsport result as "self-evident" (i.e., "full" creates QEO obligation to pay 100% of the premiums). Thus, in CAMPBELLSPORT, we were not confronted with the precise issue at hand herein.

5/ Now that it knows its qualified economic offer requires payment of the disputed retirement contributions, the District could decide to withdraw the offer and thereby give both parties access to interest arbitration to resolve the 1995-1997 contract dispute. Although the cost of the District's QEO is increased by our result, it of course remains the case that the District cannot be required to exceed a 3.8% total package QEO offer. Section 111.70(1)(nc)1.c., Stats.

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