STATE OF WISCONSIN
CIRCUIT COURT BRANCH 10
RACINE COUNTY

RACINE EDUCATIONAL ASSOCIATION,

Petitioner,

v.

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Respondent.

DECISION
Case No. 98-CV-0887
[Decision No. 29310-B]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

The Petitioner, Racine Educational Association, hereinafter referred to as REA, seeks judicial reversal of the February 17, 1998 Order of the Respondent, Wisconsin Employment Relations Commission, hereinafter referred to as WERC, on the grounds that WERC erroneously interpreted sec. 111.70(1) (nc), Stats., and WERC erroneously exercised its discretion when it, first, concluded that the Racine Unified School Board's offer of September 25, 1995 was a qualified economic offer, commonly known as QEO, and then, second, when it concluded that the Board's implementation of the QEO was consistent with the statute.

The review here is pursuant to secs. 111.395 and 227.52, Stats.

REA requests the court to reverse pursuant to secs. 227.57(5) and 227.57(8), Stats.

Initially, it is noted that REA asserts it is entitled to a de novo review of 111.70(1)(nc) because this issue is one of first impression and past WERC decisions are inconsistent. It is well established that statutory interpretations by an agency are

accorded three levels of deference: great weight, due weight or no weight. Telemark Development, Inc. v. DOR, 218 Wis.2d 809, 817-819, ___N.W.2d____ (CT.App.1998). Thompson v. DPI, 197 Wis.2d 688, 697-699, 541 N.W.2d 182 (Ct.App.1995).

The WERC decision here is entitled to not less than due-weight because, unquestionably, the agency has developed broad experience in the subject matter and has experience in the specific matter under consideration here. It's decision in **Shorewood School District, Dec. No. 29259 (WERC, 12/97)** demonstrates this. REA challenges because the WERC chose to decide the **Shorewood** matter first even though the matter here had been pending for a longer period of time. Even if correct REA's conclusion conclusion is irrelevant. In order for WERC to have reached its decision in **Shorewood** it must have, of necessity, reviewed and weighed factors bearing on the interpretation of 111.70(1)(nc). REA also argues that WERC prior decisions are inconsistent. Such argument is rejected. In **Campbellsport School District, Dec. No. 27578-B (WERC, 8/94)** and **Madison Metropolitan School District, Dec. No. 27612-B (WERC, 4/95)** the employers offers did not contain language appropriate to ERC 33.10. Under the facts presented to WERC in **Campbellsport** and **Madison** there was nothing inconsistent in its decisions.

The standard applied here is whether the WERC decision is reasonable. ". . . , a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation

available." UFE Inc. v. LIRC, 201 Wis.2d 274, 286-287, 548 N.W.2d 57 (S.Ct.1996).

The purpose of the statute is beyond any serious argument. It was enacted as a governmental cost containment measure primarily driven by general and widespread public outcry that real estate taxes were excessive and real estate tax increases were being driven by school costs. The purpose of the statute is germane to its interpretation. Without question the REA's arguments are driven by interpretation of 111.70(1)(nc) which is from the perspective of the employees and in their financial best interest. The ultimate goal of statutory construction is to ascertain the intent of the legislature. Rolo v. Goers, 174 Wis.2d 709, 715, 497 N.W.2d 724 (S.Ct.1993).

The primary thrust of REA's attack is aimed at the WERC's conclusion that a QEO exists here. WERC, as a legal conclusion, found that the Board's offer met the definition of a QEO under 111.70(1)(nc) and ERC 33.10. REA interprets 111.70(1)(nc) to mean that a QEO must consist of exact calculation and complete, accurate and properly attested to WERC forms A and B. In summary the REA would have the court interpret 111.70(1)(nc) strictly, consistent with the best financial interest of the employees and in such way that numerical errors would be fatal. Such interpretation would undoubtedly impede not facilitate application of the law. Among the reasons advanced for its position are: the legislature would not have appointed an investigator to determine whether an QEO had been submitted if a

mere employer statement that it would comply with the law would suffice; ERC 33 is perfunctory; the WERC conclusion is contrary to legislative history; accurate WERC forms are a condition precedent to a QEO and an integral part thereof. This paraphrasing is not intended to be exact or complete nor to do anything but convey an impression of the REA's position. Indeed, it would be virtually impossible to do more, unless one would be willing to repeat at length the entirety of the argument. While it is difficult to cull from the mass of words of the REA's Briefs a concise position statement, the following is representative: addressing the statutory scheme, ". . . it (the legislature) granted a means for school district employers to avoid interest arbitration **upon the submission of a numerically sufficient offer.**" (REA's Initial Brief, page 45) The logical extension of this position is obvious: If the numbers are not exactly correct then there is no QEO. The REA contends this interpretation is reflective of the correct legislative intent.

REA further contends that ERC 33.10 (2) and (3) must be invalidated by this court because such are in direct conflict with the proposed correct interpretation of 111.70(1)(nc). Such contention is rejected. This court relies on sec. 227.40, Stats. and adopts and deems correct the Attorney General's statement: "As the Commission noted in its decision the development of these rules was designed to provide an effective and fair process for implementing the changes made by the legislature in the interest arbitration sections of MERA." (WERC Brief, page 10.) The time

for the REA to challenge the rules has passed.

The REA's interpretation of 111.70(1)(nc) is not as reasonable as the reasonable interpretation of WERC. More pointedly the urged interpretation of 111.70(1)(nc) by REA is unreasonable. It is unreasonable because, simply, it rewrites 111.70(1)(cm) from an "offer" containing certain "proposals" to an ledger statement. It is unreasonable because it refocuses the statute from an inquiry as to whether, in fact, an employer has submitted a written intent to comply with the "provisions" to an inquiry as to whether an employer's offer will withstand critical analysis of the mathematical precision of the data recorded in Forms A and B (a bootstrap argument). It is unreasonable because it's hypothesis is a standard of exact numerical precision applicable to the employer which, if not met, destroys the QEO.

The WERC interpretation is reasonable. In practice, what occurs is described in the WERC's Brief, page 10: "Pursuant to the rule, the District is required to commit to those percentages. By so committing, the District has initiated the QEO procedures. The next step involves the math. How those statutory percentages translate into dollar amounts for salary or fringe benefits is reflected in the mathematical calculations shown on Forms A and B which the rule also mandates. **This streamlined procedure has proven effective since the QEO law went into effect in 1993.**" (Emphasis added) The WERC interpretation starts with an examination of whether the "offer" complies with the law, that is, does the employer's written submission contain

all of the "provisions" required. It is far more reasonable to first determine whether the employer's promise is made than to first determine the economic impact of the promise - as the REA suggests. The WERC interpretation is one of "common sense". WERC Decision No. 29310, page 19, February 17, 1998. This common sense, step-by-step, simple and straight forward approach to the question of interpretation is endorsed by this court. There would be no profit in going though the tedious and time consuming calculations necessary to check "the numbers" unless the "offer" had been expressed. The reasonable WERC interpretation is explained at page 20 of its Decision of February 17, 1998: "Thus, where a school district's offer commits it to do whatever is statutorily required to have a qualified economic offer, it has made a qualified economic offer." If this court were to be asked as to the starting point as to whether there is a QEO without hesitancy this court would say it is with the words used by the school district to convey its promise. Accordingly, the court finds WERC's interpretation of 111.70(1)(nc) to be reasonable. Suffice to say that even if this court were to accept REA's argument for de novo review - which this court has rejected - the conclusion reached would be the same: That a qualified economic offer is a written document submitted by a municipal employer (school district) to the representative of municipal employees (labor organization) which unequivocally offers to do all that is required by the provisions set forth in sec. 111.70(1)(nc), Stats. By making such offer the employer commits itself to an

economic course of action. Charting, calculating and complying the data necessary to fulfill the offer can be done and usually is done by others than the decision makers as the functions of the various levels of management are not the same. Indeed, in a school district context, the Board, ill equipped to complete Forms A and B, would ultimately determine whether the "offer" in the first instance should be made. The fact of the matter is that there is no language in 111.70(1)(nc) which states, directs or specifies that a QEO must contain numbers or defines a QEO as requiring numbers be set forth therein. Calculation Forms A and B, as specified by ERC 33.10(3)(b) - which forms contain numbers - are a product of the rule making authority of the ERC and the grant of that authority as set forth in 111.70(4)(cm)8s. Even a cursory reading of ERC 33.10(3)(b) leads to a singular conclusion that the numbers, that is, Forms A and B, are additions to a QEO. Moreover, the said rule clearly contemplates that the numbers are not locked-in-stone but are subject to revision. In this court's view the Petitioner's coining of the phrase "magic words" does not serve to advance the issues presented here but, rather, trivializes the legislative work evident in the text of 11.70(1)(cn). The reasonable interpretation of QEO by the WERC is affirmed. This court considers the WERC interpretation the best and most reasonable.

REA further contends that ERC 33.10 (2) and (3) must be invalidated by the court because such are in direct conflict with the REA's proposed correct interpretation of 111.70(1)(nc). This

argument's underpinning is REA's erroneous conclusion that WERC has wrongly interpreted the definition of a QEO. Moreover, this court cannot ignore sec. 227.40, Stats. The REA did not comply with this statute and it's argument that the rules were implicitly questioned is without merit.

REA also argues that the correct interpretation of 111.70(1)(nc) does not permit a QEO above the minimum. It's position is summarized in the following statement: "The QEO law passes legal muster **only** if a unilaterally implemented compensation and fringe benefit package **conforms strictly** to the **minimum** requirements of sec. 111.70(1) (nc), Stats., . . ." (REA Initial Brief, page 55) (emphasis supplied).

As a preface REA argues that on this question the standard is de novo. Such contention is rejected. The correct standard is due weight. This is because of the reasons set forth above, essentially this: WERC did not study 111.70(1)(nc) in a vacuum. It is unreasonable to assume that a particular part of the statute would be weighed, studied and evaluated and a decision rendered thereon to the exclusion of the whole. Rhetorically, how would it be possible for the WERC to make Finding 9. in it's **Shorewood** decision or Conclusion 1. in its **Madison** decision or Conclusion 1. in its **Campbellsport** decision or Conclusion 1. in its **LaCrosse** decision without considering the definition of a QEO. (LaCrosse Education Association, Decision. No. 28462)

The theme asserted by REA is that the QEO is numbers which must be exact, neither to low nor to high, and that anything

short of perfection is not a QEO since Forms A and B are integral thereto. The theme asserted would rewrite 111.70(1)(nc) to delete the words "at least". The theme asserted would negate the QEO - unless numerically exact - and return the process to pre-1993 Act 16 interest arbitration procedures.

Relying on certain conclusions drawn from documents generated during the development of the law and generalities drawn from the good faith bargaining provisions and REA asserts the "at least" language can only be interpreted to mean and apply to those situations were both parties agree to a QEO in excess of the minimum. Such interpretation would, of course, effectively destroy the concept that a municipal employer could unilaterally increase the QEO over the minimum. It also leads to the unspoken argument that anything less than the minimum is not a QEO. Thus, nothing short of exactness in not a QEO in the view of the REA. Such view is rejected. The multiple use of the phrase "at least" in 111.70(1)(nc) is consistent. The words standing alone and in context are clear and unambiguous. A reasonable person would interpret the phase to mean a minimum, or not less than, or at the least. The phase has been defined by court decisions on numerous occasions. Exemplary, though ancient, is Hall v. Dawson, 429 S.W.2d 366, 368 (Ct.App.Ky.1968): " "At least" means a minimum of and must be at least equalled." The whole of the REA argument distorts the meaning of "at least" and is without significant merit. The argument is more akin to one developed by political "spin doctors" who, having woven the threads into a

thought web, go on to predict catastrophe if the "wrong" view should prevail. Such is the REA argument here in predicting that the WERC's wrong interpretation would ". . . allow an employer to violate its obligation to bargain collectively, in good faith . . ." (REA Initial Brief, page 54) The keystone of the REA argument that the phrase "at least" is ambiguous is clearly wrong.

REA next argues that WERC ". . . erroneously found that the District had corrected Forms A and B during hearing and briefing and thus narrowed the issues requiring resolution by the Commission." To condense: The District's September 25, 1995 submission was not a QEO because there were errors in Forms A and B. Sec. 111.70(1)(nc) must be strictly interpreted which means (a) Forms A and B are a part of a QEO and (b) the calculations or numbers must be exact. Forms A and B were not offered by the District as revised Forms A and B. Therefore, the District's submission (words plus forms) did not comply with the law. It is a familiar refrain. It relinks the Forms to a QEO. The Commission did not err. Assistant Robert Stepien got it right. He viewed the QEO and the Forms as being separate. In response to the questions asked of him he indicated the recalculation was not the District's QEO. Correct. He identified Form B as being ". . . a recalculation as requested by the Commission." (Tr.III, page 340) The Commission therefore was correct in finding as it did. Again, REA's stated its position this way: "A revised Form B (Ex.37;R.24) was provided to the Commission at its request, and by the way of information **and not by way of an amendment to the**

District's September 25, 1995 QEO calculations. (emphasis supplied) REA sees this as fatal because it links the "offer" and the numbers. It is wrong. This court adopts as a correct statement that which is set forth on page 10 of the WERC Brief: "Once a school district submits a QEO proposal, any dispute that may arise concerning the mathematical calculations presents a separate and distinct matter for resolution."

Addressing "fringe benefit costs" the REA contends that WERC erred ". . . by concluding that a qualified economic offer existed even though the District's costing figures were inaccurate." (REA Initial Brief, page 78) For all of the reasons set forth above the WERC's interpretation of a QEO is reaffirmed; the REA's premise that the numbers are part and parcel of a QEO is rejected. The heart of the REA's further argument is that WERC failed to ". . . determine actual, exact and all fringe benefit calculations . . .". (REA Initial Brief, page 78) Pages 24 through 26 of the Commission's Decision set forth the WERC rationale and explanation in response to this argument. REA contends 111.70 requires data developed from actual cost. However, WERC did not agree. At issue is whether WERC's interpretation of a part of 111.70(4) (cm)8s. is reasonable, to-wit: whether it is reasonable to interpret ". . . without regard to any change in the number, rank or qualifications of the school district professional employees. . ." to mean ". . . that QEO calculations be based on the assumption that the actual employees represented by a union on the 90th day prior to contract expiration will continue to be

employed during period of time covered by the QEO . . ." (WERC Decision, page 24) Such interpretation, if reasonable, obviously led the Commission to further state: "The District properly sought to use this statutory assumption when calculating the QEO." (WERC Decision, page 24) In the context of the REA argument the word "actual" apparently comes from Form A. The word "actual" does not appear in 111.70(4)(cm)8s. This court does not believe that the tail wags the dog and accepts the WERC interpretation of the specified language of 111.70(4)(cm)8s. as reasonable as such language is clear and ambiguous and directive. This court agrees that "Act 16 does not allow the cost of a qualified economic offer to be based upon the actual cost of such an offer to the employees actually employed during the term of the contract." and " . . . , the Act requires that the cost of the offer be evaluated by assuming a fixed employe complement is present during the term of the contract." (WERC Decision, page 24, emphasis deleted) As to the methodology used by the District the REA argues that the District's use of "premium equivalent" is wrong. Such method is endorsed by WERC which interprets its own decision in **LaCrosse** to mean ". . . that use of the mechanism of a premium equivalency is appropriate for QEO determinations. . ." (WERC Decision, page 25) REA contends that **LaCrosse** does not stand for such proposition - all as set forth on pages 62-64 of its Initial Brief - but never explains why it is in a better position to interpret **LaCrosse** than the decision author WERC. The practical reasons for the use of the

premium equivalency method - which is in accordance with the statutory prohibition of using actual costs - the ". . . without regard to . . ." language of 111.70(4)(cm)8s. - are set forth in detail in the District's Brief pages 59 through 67. The approach offered by the District and adopted by the WERC with regard to fringe benefits is more reasonable and practical than the approach offered by the REA. The REA's approach is lined with landmines to blow up the QEO - as the REA views the QEO. REA suggests a head count on the 90th day followed by compilation of bills paid (or perhaps incurred and paid, or perhaps . .). Who or who does not go into the head count would obviously be a source of friction and the myriad problems one would confront in determining exact costs are frightening even to contemplate. For example, at what point would you include the exact cost of a disputed medical expense? The interpretations and conclusions drawn by the REA would in practice make the law unworkable and, thus, are unreasonable. It is axiomatic that a statute is to be given a construction which is reasonable in effect over a construction which leads to effects which are unreasonable. The REA's interpretation here applicable to fringe benefits would ultimately lead to labor unrest, controversy and delay and cannot be accepted.

This court has reviewed the REA's argument that: "Workers' compensation benefits are "fringe benefits". With all due respect this court finds such argument to be devoid of legal merit in view of the Laws of Chapter 102 of the Wisconsin

Statutes. Worker compensation benefits are not "granted" by the employer.

Likewise, REA's argument that the cost of a service contract between the District and MEI, Inc. applicable to health care benefits is not a "cost" that should be included in fringe benefits is rejected because it is apparent from the record that MEI, Inc. performs a service which indirectly benefits the employees of the District and is related to the health benefits. There is ample and substantial material evidence in the record to support the WERC conclusion.

In summary, the REA's discourse at length is found to be based on interpretation of sec. 111.70, Stats., which would, if accepted, dramatically and unequivocally negate the law and make it a sham. Having so stated this court is not so naive to believe that the review encompassed in this decision is the final word. It is acknowledged that the parties are here entitled to further review. Such review, if undertaken, shall note that the Wisconsin Employment Relations Commission Decision No. 29310 dated February 17, 1998 by this court is hereby affirmed.

Dated this 21 day of January, 1999.

BY THE COURT

Richard J. Kreul /s/

Richard J. Kreul
Circuit Court Judge