STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Motion of

ELK MOUND EDUCATION ASSOCIATION

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

and

ELK MOUND SCHOOL DISTRICT

Case 22
No. 58540
INT/ARB-8945

Decision No. 30098

Appearances:

Attorney Melissa A. Cherney, Staff Counsel, WEAC, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Elk Mound Education Association.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Stephen L. Weld,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Elk Mound School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On November 3, 2000, the Elk Mound 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 Association argues the District improperly used a Wisconsin Retirement System (WRS) contribution rate of 11.4% for its 1998-1999 "base year" costing of a 1999-2001 QEO instead of the actual WRS cost of 11.8%. The District contends that it was obligated by statute and administrative rule to cost the "base year" using the rate in effect on April 1, 1999 -- 11.4% -- rather than using the actual WRS cost for 1998-1999.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision

The parties waived hearing and filed written argument, the last of which was received January 31, 2001.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Elk Mound Education Association, herein the Association, is a labor organization functioning as the collective bargaining representative of school district professional employees employed by the Elk Mound School District.

2. The Elk Mound School District, herein the District, is a municipal employer.

3. The July 1, 1997 to June 30, 1999 contract between the District and the Association required the District to make certain Wisconsin Retirement System (WRS) contributions for Association-represented employees. The second year of this 1997-1999 contract (July 1, 1998 through June 30, 1999) is the "base year" used for calculating the salary and fringe benefit costs of a qualified economic offer (QEO) for the contract term of July 1, 1999 through June 30, 2001.

From July 1, 1998 to December 31, 1998, the WRS contribution rate was 12.2%. Effective January 1, 1999, the WRS contribution rate decreased to 11.4%. Effective January 1, 2000, the WRS contribution rate decreased to 10.8%. Effective January 1, 2001, the WRS contribution rate decreased to 10.2%.

4. When calculating the base year fringe benefit cost for WRS contributions, the District used an 11.4% WRS contribution rate – the rate in effect on April 1, 1999.

When calculating the fringe benefit cost for WRS contributions for the two years covered by its qualified economic offer (July 1, 1999 through June 30, 2001) the District used the actual WRS contribution rates – an average of 11.1% for July 1, 1999 through June 30, 2000 and an average of 10.5% for July 1, 2000 through June 30, 2001.

5. On September 8, 2000, the District advised the Association as follows:

> Pursuant to ERC 33.10(5), Wis. Adm. Code, and in response to Investigator Emery's declaration of deadlock, this letter is intended to serve as notice that the Elk Mound School District will implement a qualified economic offer for 1999-2000 and 2000-2001 on October 1, 2000. The Union was previously provided a copy of the salary schedules and costing, as well as the supporting documents which specify the exact manner in which the offers would be implemented. A second copy is enclosed for your reference.
>
> The Union has challenged the District's WRS calculation. The same issue has been raised in Elmwood. The Union has also challenged the health and dental insurance rates used by the District. Frankly, we have no idea what rebate you are referencing. Please give more information.
>
> It is the District's belief that the District's proposed salary schedule and fringe benefits package for both contract years constitute qualified economic offers pursuant to the rules promulgated by the WERC. However, if the District's offer is found by the WERC to not constitute a qualified economic offer, it is the intention to revise its offer to result in a qualified economic offer.
>
> If you have any questions or concerns regarding this matter, do not hesitate to contact me.

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

CONCLUSIONS OF LAW

1. When calculating the 1999-2001 qualified economic offer, Secs. 111.70(1)(nc)1. and 111.70(4)(cm)8s., Stats., and ERC 33, Appendix Form A, require the Elk Mound School District to use: (1) the actual cost of providing the WRS fringe benefit during the "base year" period of July 1, 1998 through June 30, 1999 to those school district professional employees represented by the Association on April 1, 1999; and (2) the actual cost of providing the WRS fringe benefit to these same school district professional employees during the periods of July 1, 1999 through June 30, 2000 and July 1, 2000 through June 30, 2001.

2. By using an 11.4% WRS contribution rate instead of the actual average 11.8% WRS contribution rate for the base year period of July 1, 1998 through June 30, 1999, the Elk Mound School District did not calculate and implement its qualified economic offer for the

period July 1, 1999 through June 30, 2001 in a manner consistent with Secs. 111.70(1)(nc)1 and 111.70(4)(cm)8.s., Stats., and ERC 33, Appendix Form A.

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 Elk Mound School District shall:

1. Pursuant to ERC 33.10(6), calculate the qualified economic offer for the period of July 1, 1999 through June 30, 2001, in a manner consistent with Conclusions of Law 1 and 2 and make all affected employees whole with 12% interest.

2. 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 26th day of March, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

Elk Mound Area School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The dispute before us is a narrow one. Both parties agree that if the District wishes to make a QEO, Sec. 111.70(1)(nc)1.a., Stats., requires that the District propose to maintain the WRS "fringe benefit" and its contractual percentage contribution toward the cost thereof. Both parties also agree that the District in fact proposed to maintain the WRS benefit and its contractual percentage contribution toward the cost thereof during the two years covered by the 1999-2001 QEO. Both parties further agree that the District properly used the actual WRS costs for the QEO calculations during July 1, 1999 – June 30, 2001.

The disagreement between the parties arises over whether the District properly calculated the cost of the WRS benefit (the dollars needed to fund the contractual percentage contribution) during the "base year" (i.e., July 1, 1988 through June 30, 1999) upon which the 1999-2001 QEO calculations are based. The District contends that by statute and administrative rule, the "base year" WRS cost must be calculated by using the 11.4% contribution rate in effect on the 90th day prior to the expiration of the 1997-1999 contract. The Association argues that while the "90th day" identifies what fringe benefits must be maintained and the extent of the District's percentage contribution toward the cost of the fringe benefit, the cost of the fringe benefit must be based on the actual cost during the "base year" – 11.8%.

Use of 11.8% instead of 11.4% generates a higher overall base year salary and fringe benefit dollar cost which in turn generates higher QEO salary and fringe benefit dollar costs for the 1999-2000 and 2000-2001 QEO years.

Both parties appropriately point to Secs. 111.70(1)(nc)1.a. and 111.70(4)(cm)8.s. and ERC 33, Appendix Form A as being the dispositive sources to consider when resolving their dispute. We turn to a consideration of these statutory and administrative rule provisions.

Section 111.70(1)(nc)1.a., Stats., specifies that a qualified economic offer includes:

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

In the context of resolving this dispute, Sec. 111.70(1)(nc)1.a., Stats., tells us several important things. First, the statute explicitly refers to Sec. 111.70(4)(cm)8s., Stats., as being the key reference point when calculating "fringe benefit costs." Second, the statute's reference to the "90th day" is limited to the "contributions" and "benefits" then in effect. There is no mention of the "costs" then in effect.

Turning to Sec. 111.70(4)(cm)8.s., Stats., the statute provides:

> 8s. 'Forms for determining costs." The commission shall prescribe forms for calculating the total increased cost to the municipal employer of compensation and fringe benefits provided to school district professional employes. The cost shall be determined based upon the total cost of compensation and fringe benefits provided to school district professional employes who are represented by a labor organization on the 90th day before expiration of any previous collective bargaining agreement between the parties, or who were so represented if the effective date is retroactive, or the 90th day prior to commencement of negotiations if there is no previous collective bargaining agreement between the parties, without regard to any change in the number, rank or qualifications of the school district professional employes. For purposes of such determinations, any cost increase that is incurred on any day other determinations, any cost increase that is incurred on any day other than the beginning of the 12-month period commencing with the effective date of the agreement or any succeeding 12-month period commencing on the anniversary of that effective date shall be calculated as if the cost increase were incurred as of the beginning of the 12-month period beginning on the effective date or anniversary of the effective date in which the cost increase is incurred. In each collective bargaining unit to which subd. 5s. applies, the municipal employer shall transmit to the commission and the labor organization a completed form for calculating the total increased cost to the municipal employer of compensation and fringe benefits provided to the school district professional employees covered by the agreement as soon as possible after the effective date of the agreement.

As was true for Sec. 111.70(1)nc)1.a., Stats., this statutory language also does not make "the 90th day" a component of "cost" calculations. Here, the "90th day" reference is limited to identifying the "employees" who are to be considered when calculating "the total cost of compensation and fringe benefits." In terms of calculating costs, this statutory language does specify that all cost increases shall be calculated as if incurred at the beginning of the relevant 12 month period. There is no reference to any calculation rules for cost decreases.

In summary, Secs. 111.70(1)nc)1.a., and 111.70(4)(cm)8s, Stats., make the "90th day" critical when calculating a qualified economic offer as to: (1) the fringe benefits which must be maintained; (2) the employer percentage contributions toward the cost of the fringe benefits which must be maintained; and (3) the identity of the employees to be used. The cost in effect on the "90th day" is not referenced.

Consistent with these statutory provisions, our administrative rules also make the "90th day" critical as to: (1) fringe benefits; (2) percentage contribution; and (3) employee complement.

ERC 33 Appendix, Form A, Subsection 1 addresses how the employer must determine the employee complement/employee base for QEO calculations. Form A, Subsection 2 addresses how the employer must identify the fringe benefits and its percentage contribution toward the cost thereof when calculating a QEO. As mandated by the statutes, it is the (1) employee base (2) the fringe benefits and (3) the percentage contribution present on the "90th day" which must be used when calculating cost.

ERC 33, Appendix A, Subsection 3 takes the components from Subsections 1 and 2 and specifies how these components are to be used when calculating the "Base Cost" – the cost in dispute in this case. Subsection 3 states:

> **Total Base Cost Calculation**
>
> 3. If you are bargaining a contract with a term commencing July 1, 1993, or after, using the employes identified in Step 1 and the fringe benefits and employer percentage contribution levels identified in Step 2, complete Form B to calculate the employer cost of compensation and fringe benefits for the year preceding the expiration date specified in your current/most recently expired contract. For the purposes of this calculation, assume that any cost increase incurred during the year was in effect for the entire year. In your calculation, you must include the cost of any benefits Step 1 employes who retire will receive/received prior to the expiration of your current/most recently expired contract. Do not include the cost of providing benefits to employes who retired before the 90th day prior to the expiration of the current/most recently-expired contract. If you are bargaining a contract with a term commencing anytime from July 1, 1992, through June 30, 1993, perform the calculation for the year preceding July 1, 1993.

Consistent with Secs. 111.70(1)(nc)1.a. and 111.70(4)(cm)8s., Stats., Subsection 3 does not incorporate the cost of a fringe benefit on the "90th day" as part of the cost calculation. Instead, it is the cost "for the year preceding the expiration date specified in your current/most recently expired contract." Thus, except for the calculation of cost increases which by law are presumed to be "in effect for the entire year," base year fringe benefit costs are the actual costs of the employer. Here, those actual costs are the average of the 12.2% rate in effect for the first six months of the 1998-1999 base year and the 11.4% rate in effect for the second six months – 11.8%. By using the 11.4% rate in effect on April 1, 1999, the District acted contrary to Secs. 111.70(1)(nc)1.a. and 111.70(4)(cm)8s, Stats., and ERC 33 Appendix, Form A.

As reflected in our analysis, we have rejected the District's position because we conclude that relevant statutes and administrative rules do not make the "90th day" relevant for the purposes of measuring the cost of a benefit during the base year. Contrary to the District, neither the statutes nor the rules speak in broad terms of "what is in place on the 90th day." Rather, the statutes and rules speak with precision and make the "90th day" relevant for the purposes of identifying: (1) the fringe benefits that must be maintained; (2) the percentage contribution level that must be maintained; and (3) the relevant employees for whom (1) and (2) must be maintained as part of a QEO.

The District correctly notes that while the statutes and thus our rules specify precisely how cost increases are to be calculated, there is no specific statutory or administrative rule reference to how cost decreases are to be calculated. The District correctly asserts that in the absence of some specified calculation methodology, it should be presumed that the legislature intended actual costs to be used when making QEO calculations. The District correctly followed this actual cost methodology for the WRS decreases that occurred during the July 1, 1999 through June 30, 2001 period. Our disagreement with the District is limited to how the WRS decrease in the base year should be calculated. We hold that because neither the statute nor the rules provide otherwise, decreased costs during the base year are treated the same as decreased costs during the period covered by the QEO – actual costs are to be used.

In support of its position, the District cited our decision in SHOREWOOD SCHOOL DISTRICT, DEC. NO. 52498, (WERC, 12/97). However, the issue in SHOREWOOD was one of identifying the employer's percentage contribution toward the WRS benefit in effect on the "90th day" – not the cost of the fringe benefit. Thus, the SHOREWOOD decision is not relevant to the resolution of this dispute.

As reflected in Findings of Fact 5, when making what it understood to be a correctly calculated QEO, the District committed itself to correcting any deficiencies found by the WERC. We have ordered the District to calculate and implement its QEO in a manner

consistent with our decision and to make employees whole with interest as provided in ERC 33. 10(6) 1/

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> **(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 is or 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, and 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.

Dated at Madison, Wisconsin this 26th day of March, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

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

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

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