STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Motion of

MARKESAN DISTRICT EDUCATION ASSOCIATION

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

MARKESAN SCHOOL DISTRICT

Case 8
No. 60307
INT/ARB-9370

Decision No. 31379

Appearances:

Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Markesan District Education Association.

Douglas Witte, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Markesan School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On January 13, 2004, the Markesan District Education Association filed a motion with the Wisconsin Employment Relations Commission pursuant to ERC 33.10(6) seeking Commission review of the manner in which the Markesan School District implemented a qualified economic offer for the period July 1, 2001-June 30, 2003.

Hearing on the motion was held on March 23, 2004 in Markesan, Wisconsin by Examiner Peter G. Davis. The parties then filed briefs, the last of which was received May 19, 2004. Because one the issues in the proceedings related to the fringe benefit cost impact of 1999 Wisconsin Act 11, the matter was held in abeyance pending issuance of the Commission decisions on the Act 11 issue in MAPLE-DALE INDIAN HILL ET AL on December 23, 2004.

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

FINDINGS OF FACT

1. The Markesan School District, herein the District, is a municipal employer that employs school district professional employees.

2. The Markesan District Education Association, herein the Association, is a labor organization that serves as the collective bargaining representative of the District's school district professional employees. The Association and the District were parties to a collective bargaining agreement for the period July 1, 1999-June 30, 2001.

3. The District implemented a qualified economic offer, herein QEO, for the period July 1, 2001-June 30, 2003. When it implemented the QEO, the District did not treat its 1999 Wisconsin Act 11 credits as fringe benefit savings that reduced the cost of the Wisconsin Retirement System fringe benefit received by the District's school district professional employees.

4. On April 2, 2001, the District's unilaterally adopted policies provided for a post service medical benefit that allowed employees to convert unused sick leave into a cash equivalent for use to pay health insurance premiums after retirement. The 1999-2001 collective bargaining agreement did not address the issue of such a benefit. As of June 30, 2003, there had been no change in the wording of the District policy as to this benefit.

5. On April 2, 2001, the District's unilaterally adopted policies contained the following policy:

> 2. Noncompensated Absence
>
> a. The superintendent may grant employees short duration noncompensated absences at his discretion. Salary will be deducted on a per diem.

The 1999-2001 collective bargaining agreement does not address the issue of non-compensated leave.

Effective July 1, 2001, after giving written notice to the Association, the District Administrator began to deny some requests for non-compensated leave that would have been granted under the practices regarding non-compensated leave that had prevailed for many years prior thereto.

The Association grieved the Administrator's action. An arbitrator determined that the Administrator's action did not violate the parties' 1999-2001 collective bargaining agreement.

There was no change in the wording of the District policy concerning non-compensated leave as of June 30, 2001.

6. On April 2, 2001, the 1999-2001 collective bargaining agreement between the District and the Association contained the following provision:

Section 9.2 Emergency Leave and Urgent Personal Leave

. . .

> Teachers will be granted urgent personal leave. Urgent personal leave is to be used for matters that require immediate attention that cannot be attended to except during the school day. Urgent personal leave will be limited to one day per year, but may be extended at the discretion of the administration.

. . .

Effective July 1, 2001, after giving notice to the Association, the District Administrator began to deny requests for urgent personal leave that would have been granted under the practices regarding urgent personal leave that had prevailed for many previous years. The Association grieved the Administrator's action. That grievance has been held in abeyance.

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

CONCLUSIONS OF LAW

1. By failing to treat the Act 11 credits as fringe benefit savings that reduced the cost of the WRS fringe benefit, the District failed to implement its qualified economic offer in a manner consistent with Sec. 111.70(1)(nc), Stats.

2. By failing to maintain the practice as to non-compensated leave that was in effect on April 2, 2001, the District modified a "fringe benefit" within the meaning of Sec. 111.70(1)(nc)1. a., Stats. and thereby failed to implement its qualified economic offer in a manner consistent with Sec. 111.70(1)(nc), Stats.

3. By failing to maintain the practice as to urgent personal leave that was in effect on April 2, 2001, the District modified a "fringe benefit" within the meaning of Sec. 111.70(1)(nc)1. a., Stats., and thereby failed to implement its qualified economic offer in a manner consistent with Sec. 111.70(1)(nc), Stats.

4. The post service medical benefit is a "fringe benefit" within the meaning of Sec. 111.70(1)(nc)1.a., Stats. If said fringe benefit exists on the 90th day prior to the expiration of a collective bargaining agreement, the District must maintain said fringe benefit if it wishes to implement a qualified economic offer in a manner consistent with Sec. 111.70(1)(nc), Stats.[1]

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 decision, the District shall:

1. Pursuant to ERC 33.10(6), comply with Sec. 111.70(1)(nc), Stats., in implementing any qualified economic offer.

2. Pursuant to ERC 33.10(6), make all affected employees whole with 12% interest for any out of pocket losses they have suffered by the District's failure to treat the Act 11 credits as fringe benefit savings that reduced the cost of the WRS fringe benefit.

3. Pursuant to ERC 33.10(6), make all affected employees whole by providing non-compensated leave credit to employees whose requests for same were denied as a result of the District's failure to maintain the practice as to non-compensated leave that was in effect on April 2, 2001, measured by the amount of such leave that was denied.

4. Pursuant to ERC 33.10(6), make all affected employees whole by providing personal leave credit to those employees whose requests for same were denied as a result of the District's failure to maintain the practice as to urgent personal leave that was in effect on April 2, 2001, measured by the amount of such leave that was denied.

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[1] The parties have agreed that the District maintained the post service medical benefit when implementing its qualified economic offer. However, since the issue is likely to arise in the future, the parties have requested that the Commission advise them in connection with the instant proceeding whether the District would be required to maintain that benefit in order to implement a lawful qualified economic offer. To the extent the Commission's conclusion in this regard is in the nature of a declaratory ruling, it is authorized by Sec. 227.41, Stats.

5. Advise the 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 24th day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

Markesan School District

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

There are three issues in this proceeding. First, did the District err by implementing the 2001-2003 qualified economic offer (QEO) in a manner that did not treat its Act 11 credits as fringe benefit savings? Second, is the post service medical benefit a "fringe benefit" that the District must maintain if it wishes to implement a QEO? Third, were the District's actions as to non-compensated leave and urgent personal leave contrary to the District's obligation under Sec. 111.70(1)(nc)1. a., Stats., to maintain "all fringe benefits ... as such ... benefits existed on the 90th day prior to the expiration of any previous collective bargaining agreement between the parties" if the District wishes to implement a 2001-2003 QEO?

As to the first issue, we concluded in MAPLE DALE-INDIAN HILL, ET AL., DEC. NO. 31187 (WERC, 12/04), that Act 11 credits do provide fringe benefit savings that must be incorporated into the calculation and implementation of a QEO. The District in this proceeding has not advanced any argument that would cause us to change our view on the relationship between the Act 11 credits and the QEO. Therefore, consistent with our decision in MAPLE-DALE and incorporating by reference our rationale therein, we conclude that the District erred by implementing the 2001-2003 QEO in a manner that did not treat its Act 11 credits as fringe benefit savings.

As to the second and third issues, we begin by reviewing Commission precedent as to the meaning of the statutory phrase "fringe benefits" in the context of the QEO law. In DODGELAND SCHOOL DISTRICT, DEC. NO. 29490 (WERC, 1/99) AFF'D DODGELAND EDUCATION ASSOCIATION V. WERC, 250 WIS.2D 357 (2002), the Commission stated the following:

> We conclude the term "fringe benefits" has a definition which is broader than that proposed by the District and narrower than that proposed by the Association. Contrary to the District, we conclude that "fringe benefits" include matters which have not traditionally been "costed" by the parties to a specific dispute or by public sector unions and employers generally. As argued by the Association, the statutory obligation to maintain "fringe benefits" is free standing in the statutory language and not necessarily limited to "fringe benefits" which have a definable cost. For instance, many parties do not typically "cost" personal days or vacation when they are calculating the cost of a contract. Nonetheless, we think it beyond dispute that personal days and vacation are "fringe benefits" which must be maintained as part of a "qualified

economic offer." However, contrary to the Association, we further conclude that "fringe benefits" do not include permissive subjects of bargaining. The term "fringe benefit" is not defined in MERA or elsewhere in the statutes. Absent a statutory definition, a term is to be given its ordinary and accepted meaning. BROWN COUNTY, SUPRA. This meaning may be ascertained from a recognized dictionary. As noted by the District, Roberts' Dictionary of Industrial Relations (4th Edition, BNA, 1994) defines "fringe benefits" as:

> Non-wage or indirect compensation received by workers, paid for in whole or in part by employers, including such items as vacations, sick leave, holidays, pensions and insurance.

DODGELAND, DEC. NO. 55941, at 22. Thus DODGELAND teaches that, since "fringe benefit" is not statutorily defined, it is to be given its ordinary and accepted meaning which can include matters that are not traditionally "costed" as part of the collective bargaining process. The Commission also held in DODGELAND that the statutory obligation to maintain "fringe benefits" is free standing of other District obligations. ID.

The post service medical benefit, non-compensated leave and urgent personal leave clearly fall within the scope of the "ordinary and accepted meaning" of a fringe benefit. Contrary to the District's argument herein and consistent with DODGELAND, we also hold that these matters are not excluded from "fringe benefit" status merely because they may not be traditionally costed by the parties during bargaining and/or may not create costs that must be reflected in the QEO calculation.[2]

Whether these fringe benefits existed on the 90th day prior to expiration of the contract and otherwise fall within the statutory embrace of "fringe benefits" that the District must maintain when implementing a QEO present more difficult questions. We will address each benefit in turn.

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[2] The District cites RACINE SCHOOL DISTRICT, DEC. NO. 29310 (WERC, 2/98), AFF'D IN PERTINENT PART, RACINE EDUCATION ASS'N V WERC, 238 WIS.2D 33 (CT. APP. 2000) for the proposition that matters not traditionally costed in the collective bargaining process do not create fringe benefit costs when a QEO is calculated. We do not disagree. However, as reflected in DODGELAND, a benefit need not carry a QEO-calculated cost in order to be a "fringe benefit" within the statutory meaning. As reflected in Sec. 111.70(1)(nc) 1.a., Stats., the obligation to maintain fringe benefits is independent of the cost calculation process:

> A proposal to maintain the percentage contribution by the municipal employer to the municipal employees' existing fringe benefit costs … **and** to maintain all fringe benefits …. (emphasis added)

Post Service Medical Benefit

In addition to the cost argument we have already rejected above, the District contends that the post service benefit is not a "fringe benefit" because: (1) the benefit is not contained in any written agreement with the Association but only in Board policy; (2) the WERC would be giving the Association a benefit it has been unable to acquire at the bargaining table; (3) a legislative effort to amend the QEO law to require maintenance of all "conditions of employment" failed; and (4) such a holding would be bad policy.

In support of its first argument, the District cites DARLINGTON COMMUNITY SCHOOLS, DEC. NO. 28456 (WERC, 7/95) and RIVER FALLS SCHOOL DISTRICT, DEC. NO. 30563 (WERC, 2/03) as instances in which "fringe benefits" were created by a written agreement between the employer and the union. While DARLINGTON dealt more specifically with the statutory definition of an "economic issue" rather than "fringe benefit," we acknowledge that fringe benefits will often be found in collective bargaining agreements or some other form of collectively negotiated instrument, such as the side letter in RIVER FALLS. However, that reality cannot reasonably be translated into a WERC holding that a QEO "fringe benefit" must exist in a written agreement between the parties. Indeed, although the Commission suggested in dicta in SHOREWOOD SCHOOL DISTRICT, DEC. NO. 29259 (WERC, 12/97) at 10, that the meaning of "fringe benefit" could exist independently of the collective bargaining agreement, this case represents the first time the WERC has grappled directly with the issue of whether a fringe benefit must exist in a written agreement.

As the Association points out, the statutory language does not itself limit the definition of "fringe benefit" to those contained in a written agreement between the union and employer, but, indeed, expressly contemplates that "fringe benefits" can exist outside the context of a collective bargaining agreement:

> . . . 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 the expiration of any previous collective bargaining agreement between the parties, **or the 90th day prior to the commencement of negotiations if there is no previous collective bargaining agreement between the parties.** (emphasis added)

While the foregoing language most likely was intended for the circumstance in which the parties were bargaining their first contract, it nonetheless supports a broader definition of "fringe benefit" than that proffered by the District.

Ultimately, we reject the District's argument as being contrary to the legislative intent behind the QEO law. As expressed in DARLINGTON, SUPRA, the QEO law's limitations on access to interest arbitration of economic issues prevent both union-arbitrated gains and employer "take aways" as to economic issues. The post service medical benefit is a "supplemental retirement benefit" within the definition of "economic issue" found in Sec. 111.70(1)(dm), Stats. If we concluded that the post service medical benefit was not a "fringe benefit" that must be maintained as part of a QEO, the District would be able take away the (economic issue) benefit while blocking the Association from trying to reacquire the benefit through interest arbitration. Such a result would be at odds with the legislative intent behind the QEO law and thus we reject same.

The District's second argument asserts that requiring it to maintain this non-contractual fringe benefit in a QEO would effectively give the Association something that it has been unable to acquire at the bargaining table, i.e., a right to this benefit. We disagree with the premise behind the District's position, as it fails to recognize the important and pervasive distinction the QEO law makes between a "contract" and a QEO, as discussed at length in MAPLE DALE-INDIAN HILL, SUPRA, at 12-14. Finding the post service medical benefit to be a "fringe benefit" does not transform the benefit into a contractual provision, but simply requires the District to continue the benefit if the District elects to make and implement a QEO. More importantly, as we noted above when referencing DODGELAND and SHOREWOOD, determining whether a benefit must be maintained does not necessarily depend upon contract interpretation principles, but is a free standing statutory obligation. Thus, while the District is correct that contracts generally are interpreted so as to avoid giving a party something they were unable to attain at the bargaining table, we are not interpreting a contract. Rather, we are interpreting a statute, one that is intended to stabilize existing economic conditions in exchange for permitting a school district to avoid interest arbitration over wages and other economic issues. As noted, the statutory design does not allow District "take aways" of mandatory subject/economic issue items that cannot be restored through interest arbitration. Thus, we do not find this District argument persuasive.[3]

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[3] Contrary to the District's arguments, the Commission's decision in CITY OF STEVENS POINT, DEC. NO. 21646-B (WERC, 8/85), does not support the District's point of view as to existing practices that are not addressed in the collective bargaining agreement. There the Commission concluded that a city did not "unilaterally change" a promotion policy when it informed the union that, beginning with the successor agreement, the city would apply the contractual promotion provisions rather than a past practice that had developed over the years that was inconsistent with the contractual language. In STEVENS POINT the Commission noted with approval the examiner's reasoning that the city's action in reverting to the contractual language was not "unilateral" but instead congruent with the negotiated agreement. Moreover, the Commission pointed out that, even if the city had had a duty to bargain before reverting to the contractual provision, the city had discharged that duty by offering to negotiate, an offer the union had refused. ID. at 8. The relevance of STEVENS POINT in QEO situations where the practice is inconsistent with contract language is addressed in connection with the urgent personal leave benefit, INFRA.. We also note that the District may very well be obliged to continue the post service medical benefit as part of the dynamic status quo that the District must maintain pending exhaustion of its duty to bargain.

The District next asserts that the Association position is at odds with the failed legislative attempt to expand the definition of a QEO to include maintenance of "all conditions of employment." 2001 Wis. Act. 16 (Part D), Sec. 2609L (vetoed by the Governor). The proposed legislation presumably was intended to add to a district's statutory QEO obligations the maintenance of those conditions of employment that are not already subject to that statutory obligation by virtue of being fringe benefits. Thus the District's argument rests upon the premise that the post-retirement benefit is a "condition of employment" but not a "fringe benefit." However, we have already determined that this benefit falls clearly within the "ordinary and accepted meaning" of a "fringe benefit." While the District may be correct that this legislative history would support limiting what needs to be maintained in the context of a QEO (i.e., those conditions of employment that are not fringe benefits), this history does not affect what must be maintained as a "fringe benefit." Thus, we reject this District argument.

Lastly, the District asserts that the expansive definition of "fringe benefit" sought by the Association is bad policy because it would open the door to claims that any number of miscellaneous matters that arguably benefit even a single teacher are "fringe benefits" that must be maintained. The District argues that such a result would stifle a district's willingness to provide voluntarily various benefits or to bargain/discuss a wide variety of matters. We first note that several of the hypothetical items included in the District's "slippery slope" argument might be permissive subjects of bargaining. DODGELAND has already limited "fringe benefits" to mandatory subjects of bargaining.[4] Second, as indicated earlier herein, the phrase "fringe benefit" is to be given its ordinary and accepted meaning; thus future attempts to expand the definition beyond the "ordinary" meaning will be unsuccessful. Third, the dispute before us involves matters that clearly fall within the ordinary and accepted meaning, and do not raise the specter presented by the District.

Given all of the foregoing, we conclude that the post service medical benefit is a fringe benefit within the meaning of Sec. 111.70(1)(nm), Stats., which, if in effect on the 90th day prior to the expiration of an existing contract, the District must maintain if it wishes to make and properly implement a QEO for the successor agreement.

Non-compensated Leave

The District offers the same arguments against including non-compensated leave as a "fringe benefit" as it did for the post service medical benefit. For reasons similar to those we articulated in the foregoing section, we think it clear that non-compensated leave fits within the

[4] A legislative attempt to amend the definition of a QEO to require maintenance of all permissive subjects of bargaining that existed in a collective bargaining agreement was vetoed by the Governor. 2001 Wis. Act 16 (Part D), Sec. 2609M.

ordinary and accepted meaning of "fringe benefit" such that, if it exists on the 90th day preceding contract expiration, the District must maintain it if the District wishes to implement a QEO for 2001-2003.[5]

However, determining what practice "existed" regarding non-compensated leave on the 90th day prior to contract expiration presents some difficulty. The District's written non-compensated leave policy states that the District Administrator has discretion to grant employees such leave. As of April 2, 2001, the 90th day prior to contract expiration, the Administrator for approximately 25 years had consistently granted requests for non-compensated leave and indeed may never have denied any such requests.[6] The District argues that the benefit as it "existed" on April 2 is circumscribed by its own terms, i.e., it is discretionary. Hence, in the District's view discretion is incorporated into the benefit, and the District Administrator could deny requests even if they would have been granted under previous more lenient standards. The Association, on the other hand, contends that the benefit that "existed" and must be maintained is the manner in which the discretion was being exercised as of April 2, 2001.

We agree with the Association, principally because in the present circumstances the discretion had been exercised in a long and consistent manner that created a readily ascertainable practice. The practice, as both parties agree, was that the District permitted short duration non-compensated leave for a wide variety of reasons. The District raises the specter that, under this construction of the existing practice, the whole bargaining unit could request non-compensated leave at the same time and the District Administrator would be powerless to deny them. We do not see the existing practice as encompassing such a situation, however, as it has not previously occurred and would be materially different from what actually has occurred and been granted. The District also raises valid concerns about the difficulties other hypothetical cases could present, where discretion has been exercised more strictly or haphazardly than it has in this case. Suffice to say that this speculative concern if it arose would be addressed on the basis of an evidentiary record in light of the appropriate burdens of production and persuasion. The instant record, however, does not pose such an evidentiary problem.

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[5] We note that in DODGELAND the Commission commented that "we think it beyond dispute that personal days and vacation are 'fringe benefits' that must be maintained as part of a "qualified economic offer." DODGELAND, SUPRA, DEC. NO. 55941, at 22. Obviously, non-compensated leave, like personal days and vacation, allows employees to take time off from work.

[6] This statement is based upon an arbitration award that the parties introduced into this record as Joint Exhibit 3.

Urgent Personal Leave

The 1999-2001 contract contained the following provision:

> Section 9.2 Emergency Leave and Urgent Personal Leave
>
> . . .
>
> Teachers will be granted urgent personal leave. Urgent personal leave is to be used for matters that require immediate attention that cannot be attended to except during the school day. Urgent personal leave will be limited to one day per year, but may be extended at the discretion of the administration.

The parties agree that the District was administering this contractual language in a more lenient manner as of April 2, 2001 (the 90th day before contract expiration) than the District Administrator began to implement it at the beginning of the 2001-02 school year. The District asserts that its QEO obligation is to maintain the leave pursuant to the criteria described in the contract, and not necessarily according to the criteria that prevailed as of April 2001. We disagree.

As discussed earlier herein, the purpose of the QEO benefit maintenance obligation is to stabilize the parties' economic situation in exchange for relieving the District of the duty to submit economic issues to interest arbitration. In essence, the QEO is a substitute for collective bargaining and as such deliberately designed to minimize the District's latitude to disturb the existing economic relationship. This stabilizing element, the required maintenance of fringe benefits, is free standing and not necessarily coextensive with the District's contractual rights or duties.

Because it is the existing fringe benefit, not necessarily the contract, that must be maintained, the District's reliance on STEVENS POINT is inapposite. As discussed in footnote 3, above, STEVENS POINT stands for the proposition that an employer, upon proper notice, may revert to its rights and duties as set forth in contract language, rather than be compelled to comply with a practice that is directly at odds with the contract language. Thus STEVENS POINT concerns the proper interpretation of a contract and the parties' rights and duties thereunder. This relatively narrow decision does not itself address an employer's obligations to maintain the dynamic *status quo* during a hiatus between contracts nor the nature of any such *status quo*. Nor, by the same token, does that decision have any bearing on what fringe benefits "exist" and must be maintained in order to implement a proper QEO. Thus, although STEVENS POINT arguably would permit the District to disavow its prior practice and revert to the contract language as written during the term of a successor agreement, it does not affect the determination of what that practice is for purposes of implementing a QEO.

On the 90th day prior to expiration of the 1999-2001 contract, employees' requests for urgent personal leave were being granted in certain ascertainable circumstances. If it wishes to have and properly implement a QEO, the District must continue to grant requests for urgent personal leave in the same manner as it did at that time.

Pursuant to ERC 33.10(6), our Order requires the District to make employees whole with interest for Act 11-related costs, and to credit the appropriate employees for non-compensated leave and urgent personal leave denials suffered during the 2001-2003 contract period covered by the QEO in question. If there are disputes as to the extent of this remedial obligation, supplemental hearing will be held.

Dated at Madison, Wisconsin this 24th day of June, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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