

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Motion of
BIG FOOT EDUCATORS

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

and

BIG FOOT UNION HIGH SCHOOL DISTRICT

Case 8
No. 60585
INT/ARB-9452

Decision No. 31500

Appearances:

Anthony L. Sheehan, Staff Counsel, and **Michael J. Van Sistine**, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Big Foot Educators.

Daniel G. Vliet and **Joel S. Aziere**, Davis & Kuelthau, S.C., Attorneys at Law, Suite 1400, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202-6613, appearing on behalf of Big Foot Union High School District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Big Foot Educators filed a motion with the Wisconsin Employment Relations Commission pursuant to ERC 33.10(6) seeking review of the manner in which the Big Foot Union High School District had implemented a qualified economic offer for the parties' 2001-2003 contract.

Hearing on the motion was held on October 3, 21 and 31, 2002 in Madison, Wisconsin by Commission Examiner Peter G. Davis. The parties thereafter filed written argument until March 19, 2003.

On April 21, 2004, the Wisconsin Employment Relations Commission conducted oral argument on the motion. Following the argument, the parties submitted supplemental written argument by June 14, 2004.

Dec. No. 31500

The record was closed on December 8, 2004 with a stipulation of fact.

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

FINDINGS OF FACT

1. Big Foot Union High School District, herein the District, is a municipal employer that employs school district professional employees.

2. The Big Foot Educators, herein WEAC, is a labor organization that serves as the collective bargaining representative of the school district professional employees of the District.

3. On August 12, 1993 and July 29, 1995, the District and WEAC were parties to collective bargaining agreements which assigned the District's school district professional employees to salary ranges with steps that determined the level of progression within each salary range during a 12-month period.

4. The District and WEAC were unable to reach a voluntary agreement on the terms of July 1, 2001-June 30, 2003 contract. The District then implemented a qualified economic offer (QEO) for that contract term. WEAC then filed a motion with the Wisconsin Employment Relations Commission asserting that the District's implementation of the QEO was improper. When the motion was ultimately litigated, WEAC specified that the QEO implementation was improper because the District had failed to: (1) assign affected employees to the correct step on the salary schedule; and (2) pay salaries that reflected reduced Wisconsin Retirement System (WRS) fringe benefit costs in the amount of credits generated by 1999 Wisconsin Act 11.

5. When implementing the QEO for the period July 1, 2001-June 30, 2002, the District paid eligible employees a full step on the salary schedule and placed them at the step on the salary schedule that reflected the employees' years of service with the District. When implementing the QEO for the period July 1, 2002-June 30, 2003, the District did not pay eligible employees any portion of a step on the salary schedule and did not place them at the step on the salary schedule that reflected the employees' years of service with the District.

6. Section 27 of 1999 Wisconsin Act 11 states in pertinent part:

(b)1. The employee trust funds board shall determine each participating employer's share of the increase in the employer accumulation reserve that results from the distribution under paragraph (a) and shall establish for each employer a credit balance in the employer accumulation reserve that equals the employer's share of the increase in the employer accumulation reserve that results from the distribution under paragraph (a), based on each employer's share of covered payroll in 1998. The total amount that shall be reserved for

credit balances under this subdivision shall be \$200,000,000. **In lieu of requiring that an employer make required employer contributions under section 40.05 (2) (b) of the statutes, the employee trust funds board, beginning no later than March 1, 2000, shall deduct from the employer's credit balance in the employer accumulation reserve, on a monthly basis, an amount that the employer would otherwise have been required to contribute under section 40.05 (2) (b) of the statutes had there been no establishment of the credit balance from the distribution under paragraph (a). For any employer that is not required to make contributions under section 40.05 (2) (b) of that statutes, the employee trust funds board, beginning no later than March 1, 2000, shall deduct from the employer's credit balance in the employer accumulation reserve, on a monthly basis, an amount that the employer would otherwise have been required to contribute under section 40.05 (2) (a) of the statutes had there been no establishment of the credit balance from the distribution under paragraph (a). The employee trust funds board shall make such deductions until the credit balance is exhausted, at which time the employer shall resume making all required employer contributions.** (Emphasis added).

7. When implementing the QEO for the period July 1, 2001-June 30, 2003, the District did not treat the Act 11 credits as fringe benefit savings which reduced the cost of the WRS fringe benefit.

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

CONCLUSIONS OF LAW

1. By failing to place employees on the step of the 2002-2003 salary schedule that reflected their years of service with the District, the District failed to implement its qualified economic offer in a manner consistent with Sec. 111.70(1)(nc), Stats.

2. The District's share of the Act 11 credits reduced the cost of the WRS fringe benefit beginning in February 2000 and continuing until the District's share of the credit was exhausted.

3. By failing to treat the Act 11 credits as fringe benefit savings which 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.

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

ORDER

At the request of either party, additional hearing will be conducted to determine the financial impact of Conclusion of Law 3 on the salary component of the District's 2001-2003 qualified economic offer.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of December, 2004.

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

Big Foot Union High School District

MEMORANDUM ACCOMPANYING DECISION

I. Act 11 Issue

Section 111.70(4)(cm)5s, Stats. provides that if a school district presents a QEO to the labor organization that represents the district's professional employees for the purposes of collective bargaining, economic issues cannot be submitted to interest arbitration.

As indicated in Sec. 111.70 (1)(nc), Stats., a QEO consists of certain specified salary and fringe benefit components which, when combined, increase a district's "total compensation and fringe benefit costs" by 3.8% each year. The statute further provides that the lesser the cost of maintaining fringe benefits as part of the 3.8% total increase, the greater the portion of the 3.8% that must be paid to salary. It is this linkage of fringe benefit costs and salary that prompted this litigation.

As reflected in Sec. 111.70(1)(nc), Stats., the fringe benefit component of a QEO is the cost of maintaining all existing fringe benefits and a district's percentage contribution toward the cost thereof. Here the parties agree that, as part of its implemented QEO, the District has maintained the employees' existing Wisconsin Retirement System (WRS) retirement fringe benefit and the District's percentage contribution toward the cost thereof. However, WEAC contends that the implemented QEO does not reflect the decrease in the actual cost of the WRS benefit attributable to Act 11 credits. If it is determined that Act 11 decreased the cost of the WRS fringe benefit, WEAC asserts that the decrease occurred during the period of July 1, 2001-June 30, 2002, while the District contends the decrease occurred during the period of February 2000-June 30, 2001.

Relying on the language of Act 11 itself and the legislative intent it expresses, we conclude that the credits generated by Act 11 automatically reduced the District's WRS fringe benefit costs on a monthly basis for the period beginning February 2000 and extending until the District's share of the credits was exhausted. Our conclusion rests on the following analysis.

Section 111.70(1)(nc), Stats. specifies that "fringe benefit costs" are to be "determined" under Sec. 111.70(4)(cm) 8s., Stats. That statutory provision states in pertinent part:

8s. 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 employees.

Pursuant to the directive in the foregoing statutory language, the Commission prescribed forms by which the "fringe benefit costs" of a QEO are to be calculated. Those forms (Forms A, B, and C) are appendices to Chapter ERC 33.

As reflected in Forms A, B, and C, the calculation of the cost of a QEO requires consideration of three separate one year periods: the QEO Base Year (in this instance July 1, 2000-June 30, 2001; QEO 1 (in this instance July 1, 2001-June 30, 2002); and QEO 2 (in this instance July 1, 2002-June 30, 2003).

As also reflected in Form A, Sections 5 and 12 and as we held in ELK MOUND SCHOOL DISTRICT, DEC. NO. 30098, (WERC, 3/01), a district's actual costs 1/ of maintaining existing fringe benefits are to be used during each of the three one year periods when making QEO calculations (except for instances not relevant here where the costs increase). See Sec. 111.70(4)(cm)8s., Stats.

1/ We reject the District argument that the Act 11 credits are not relevant because QEO calculations do not consider actual fringe benefit costs. As reflected in ELK MOUND SCHOOL DISTRICT, SUPRA, we have previously concluded that Sec. 111.70(1)(nc), Stats. requires use of actual fringe benefit costs. Consistent with that understanding of the statute, our administrative rules specify in Section 5 of Form A as follows:

5. Using the same employees identified in Step 1 and the fringe benefits and employer percentage contribution levels identified in Step 2, calculate the actual employer cost of maintaining the fringe benefits and employer contribution levels . . . (emphasis added)

The following portion of ERC 33.10(5)(b) also makes clear that it is the actual fringe benefit costs that ultimately determine the salary component of the QEO that can be implemented.

(b) If the exact percentage of a qualified economic offer's salary increase or decrease is contingent upon fringe benefit costs which are not known at the time of implementation, the municipal employer may only implement the maximum possible percentage salary increase under the offer. Where the municipal employer has implemented the maximum possible percentage salary increase under its qualified economic offer, the municipal employer may retroactively implement the exact salary increase or decrease of the qualified economic offer once fringe benefit costs are known. (emphasis added)

Thus the question before us is whether Act 11 reduced the District's actual costs of providing WRS benefits to WEAC-represented professional employees during the period July 1, 2000-June 30, 2003. We have concluded that it did.

As reflected in Finding of Fact 6, Section 27 of Act 11 specifies that: (1) ETF is to "establish for each employer a credit balance" equal to the employer's proportionate share of \$200,000,000; and (2) "In lieu of requiring that an employer make required employer

contributions,” ETF “shall deduct from the employer’s credit balance . . . on a monthly basis, an amount that the employer would otherwise have been required to contribute . . . had there been no establishment of a credit balance”

From the language of Section 27, it is clear that the Legislature intended that employers not be required to make contributions for WRS benefits for whatever period could be covered by their Act 11 credit balance. Because contributions were not required, we conclude that the actual District cost of the WRS fringe benefit was reduced in the amount of the Act 11 credit balance. Any contributions the District made despite the presence of the credit were voluntary and thus not part of the District’s fringe benefit “costs” as that word is utilized in Sec. 111.70(1)(nc)1.a., Stats.

In reaching this conclusion, we have rejected the District’s contention that our result will cause the District to exceed a 3.8% salary and fringe benefit offer. As noted earlier, Act 11 makes clear that any WRS contributions were not required when Act 11 credit was available to meet the District’s WRS obligations. To the extent the District made payments beyond those required, such payments are not part of the QEO costing calculations and do not place the District in the position of offering more than a 3.8% increase.

In addition, we have rejected the District’s claim that because the Act 11 credit did not alter the District’s WRS percentage contribution rate, the District’s WRS costs did not thereby decrease. Again we return to the language of Act 11 itself, which specifies that the credit met the District’s obligations. In such circumstances, the lack of change in the percentage contribution rate is irrelevant.

In reaching our conclusion, we concur with the District that the source of the monies used to pay the cost of the WRS fringe benefit is irrelevant to our decision. However, here the source is Act 11, which not only provided funds but specified that the funds met the District’s contribution obligations. In this context, it is not the source of the funds but the fact that they were statutorily earmarked to reduce the District’s WRS fringe benefit costs that compels our conclusion.

We conclude our analysis of this portion of the Act 11 issue by rejecting the District’s claim that our result is inequitable or at odds with the intent of Act 11. There is no evidence that the Legislature intended to shield Act 11 savings from QEO implications. Indeed, the record makes clear that ETF implemented Act 11 without regard for any QEO implications. As to the equities, it is important to recall that use of the QEO is not required. If the District finds the Act 11 implications of a QEO undesirable, the District has the option of not utilizing the QEO.

Having determined that the Act 11 credits reduced the District’s fringe benefit costs, the question becomes one of determining how the reduction should be allocated in terms of time. Although ETF could not create and apply the Act 11 credits until June 2001, when the litigation over the constitutionality of Act 11 had been completed, Section 27 of Act 11 makes clear that the balance was to become available on a “monthly basis” “beginning no later than

March 1, 2000.” ETF implemented this statutory command by automatically creating a credit balance and automatically applying it beginning in February 2000 (based on the January 2000 payroll). Given the statutory language and ETF’s implementation thereof, we conclude the savings in WRS fringe benefit costs are most accurately viewed as beginning in February 2000 and continuing on a monthly basis until the credit balance was exhausted.

In reaching this conclusion, we have considered and rejected WEAC’s argument that none of the fringe benefit savings occurred in the QEO Base Year (July 1, 2000-June 30, 2001), because the first Act 11 credit invoices issued in June 2001 (which covered the payroll periods of January 1, 2000-December 31, 2000) could not have been actually used by the District until July 2001. We do so because Act 11 not only specified the non-discretionary nature of the savings (i.e. they were automatic because they were in lieu of the required contribution) but also the timing of this non-discretionary reduction in costs, i.e., monthly and beginning “no later than March 1, 2000.” Thus, Act 11 by its terms established the timing of the savings which, as noted above, began in February 2000 and continued on a monthly basis until exhausted.

As reflected in our Order, should the parties be unable to reach agreement on the fiscal ramifications of our decision on the District’s QEO, additional hearing will be conducted so that we have an evidentiary basis for making that determination. Once that determination is made, the District will have the option either to modify the manner in which it implemented the QEO consistent with our decision or to withdraw the QEO and proceed to interest arbitration. RACINE SCHOOL DISTRICT, DEC. NO. 29310 (WERC, 2/98); AFF’D RACINE EDUCATION ASSOCIATION V. WERC, 238 WIS.2D 33 (CT.APP. 2000).

II. Placement and Payment of Employees Moving through the Salary Schedule

Background

WEAC also challenges the District’s implementation of its QEO on the ground that the District failed to advance employees on the salary schedule in a manner that complies with the statute and the rules. This controversy relates strictly to distribution of salary funds in future years (i.e., after June 30, 2003).

The District’s salary schedule is typical, in that it is a grid in which a teacher 2/ progresses vertically for each year of service (steps) and horizontally for each specified level of educational attainment (lanes). At each vertical step and each horizontal lane, the schedule

2/ The term “teacher” is used here for the sake of brevity to encompass all school district professional employees who would be included in a unit affected by a QEO.

provides a salary increase. Under the statute, lane movement and the cost thereof is not part of the QEO. However, step movement and the cost thereof is subject to the QEO as specified in Secs. 111.70(1)(nc)1. and (4)(cm)8p, Stats.

In the instant case, after subtracting the increased costs required to maintain fringe benefits in accordance with the statute, the District lacked sufficient money to fund any part of a step in the second year of the QEO (2002-2003). Thus, the District did not pay any step increases to eligible employees for 2002-2003. The District also did not move eligible employees to the step on the salary schedule that reflected their years of service.

WEAC's view is that, if any funds are available for pay increases in future QEO years, those funds must first go to the teachers who are not yet being paid according to their actual years of service under the contractual salary schedule. 3/ Only after those teachers are "caught up" to the salary they should be receiving for their respective years of experience, i.e., paid at the correct step amount as stated in the schedule, may a QEO provide a general increase in the salary schedule as a whole. If successive QEO years have left a teacher's salary behind where it otherwise would have been, then WEAC would have the QEO allocate to that teacher as much of the available funds as necessary to match his salary to his years of service before providing any salary increase to teachers who are already at the top of the salary schedule.

3/ In WEAC's original submissions in this matter, it appeared to be arguing that teachers moving through the schedule would not only move up a step each year, but would also have to be paid at their corresponding contractual step even if to do so (and still remain within the 3.8% QEO cap) would require the District to decrease the salaries of teachers at the top of the schedule. However, it became clear at oral argument and in subsequent submissions that WEAC does not espouse that position. As WEAC conceded at oral argument, such a position would conflict with Sec. 111.70(1)(nc)2, Stats., which permits a general salary decrease only where maintaining fringe benefits costs more than the 3.8% annual limit on a QEO.

For its part, the District contends that a QEO may not offer any teacher more than the amount attributable to one step on the salary schedule, no matter how many steps or partial steps successive QEO years may have cost that teacher as compared with his or her years of experience on the salary schedule. Thus, if the schedule provides \$2000 for each additional year of experience and a previous QEO was only able to fund half of that step (or \$1000), the next QEO may only provide that teacher a maximum of \$2000, according to the District, regardless of how much salary money was available for distribution. WEAC's QEO, on the other hand, would provide that same hypothetical teacher up to \$3,000 of any available salary money, thus putting him or her back on track vis-à-vis the existing salary schedule.

By the same token, the District would constructively establish intermediary “incremental designations” or “phantom steps” to match the teacher’s pro-rated movement to the teacher’s pro-rated step payment. WEAC would keep moving the teacher each year step for step in the schedule, but the teacher’s salary would not match the teacher’s placement until sufficient money becomes available.

It is worth emphasizing that, despite the substantial energy devoted to this issue, the parties’ differing interpretations would have a different result for individual teachers only in the situation where a QEO has provided no step or a pro-rated step in one year, followed by a QEO year in which there is enough salary funds to cover more than the amount of one step increase for each eligible teacher. In all other subsequent-year scenarios (i.e., where there is no money available for salaries, where there is only enough money to fund up to one step, or where it is necessary to reduce the whole schedule and thus implement an “average salary decrease” pursuant to Sec. 111.70(1)(nc)2, Stats.)), both interpretations would result in the same distribution of salary among teachers. The vastly simplified diagram attached to this decision illustrates this point.

Discussion

The parties’ alternative interpretations of the law carry identical cost effects for the District. Both comply with the QEO law’s required aggregate increased costs of 3.8% over the “snapshot” costs as articulated in Sec. 111.70(1)(nc)1, Stats. The two interpretations differ only regarding which teachers would garner more of the available funds in the limited circumstance described above. 4/ To WEAC it would be those teachers who are still “moving through the schedule.” To the District, it would be those teachers who have reached the top of the salary schedule.

4/ The terms “available funds” is used here as a shorthand expression for the amount of the 3.8% increase that remains to be applied to salaries after fringe benefit costs have been subtracted.

In our view, the statute does not explicitly address the salary schedule implications of lost or pro-rated steps on the distribution of available funds in a succeeding QEO year in which funds are more than sufficient to fund a single step. 5/ Hence, we believe it is necessary to extrapolate from the QEO legislation as a whole, as well as from the underlying collective bargaining law, what the Legislature likely intended the salary distribution to be in the situation posed by the instant QEO dispute.

5/ In initially drafting the QEO language, the Legislature may not have focused on the long-term effects of successive QEO’s, but instead may have contemplated the QEO as a limited hiatus in the normal operation of the interest arbitration law for teachers, as the 1993 legislation originally carried a two year sunset provision.

We begin by identifying the applicable statutory language and principles. First, we note that the central purpose of the QEO law was to provide a mechanism by which school districts, under carefully circumscribed conditions, could avoid interest arbitration by offering teachers a 3.8% increase in salary and fringe benefits. In exchange for this, however, districts must adhere to rigidly prescribed limits on their discretion in designing and distributing the economic benefits in their offers. Thus, for instance, a district's 3.8% offer must maintain the collectively-bargained fringe benefit types and contribution rates. Of particular significance to the present controversy, the Legislature took pains to make clear that a QEO could not alter "the salary range structure, the number of steps or the requirements for attaining a step or assignment of a position to a salary range" unless the parties agreed otherwise. Sec. 111.70(4)(cm)8p, Stats. We will discuss our interpretation of Section 8p. in more detail below. For now we simply emphasize our perception of a clear legislative intent to interfere as little as possible with concepts and structures that the parties themselves had already negotiated.

Second, the Legislature mandated that specific priorities be followed within the 3.8% salary and benefits package. Fringe benefits and a district's percentage contributions toward the cost thereof must be maintained even if doing so means that step increments would have to be prorated or, indeed, as is true here, even if doing so resulted in no step increase whatsoever and an "average salary decrease." Secs. 111.70(1)(nc)1.a., (nc)1.b., and (nc)2., Stats. Similarly, if salary money were available, the Legislature granted explicit priority to funding "at least one full step for each 12-month period covered by the proposed collective bargaining agreement ... for each municipal employee who is eligible for a within range salary increase." Sec. 111.70(1)(nc)1.b, Stats. (emphasis added). In determining how much salary money would be available for an "average salary increase," the Legislature required the districts first to subtract the funds necessary to maintain fringe benefits, then the "cost of a salary increase of at least one full step for each municipal employee in the collective bargaining unit who is eligible for a within range salary increase for each 12-month period. . . ." Sec. 111.70(1)(nc)1.c., Stats. (emphasis added). By using the phrase "at least one full step," the Legislature left open the possibility that a QEO could provide more than the amount attributable to one step before granting an overall salary increase. Under the statutory language, therefore, the negotiated fringe benefits take priority over any salary increases, but step payments take priority over general unit-wide wage increases. 6/

6/ In *RACINE EDUCATION ASSOCIATION v. WERC*, 238 WIS. 2D 33 (CT. APP. 2000), the court viewed the phrase "at least" in Sec. 111.70(1)(nc)1, Stats., as applying to the entire cost of QEO and as signifying that a QEO could include a cost increase greater than 3.8%. However, the court found evidence in Sec. 111.70(4)(cm)8p, Stats., which had been enacted subsequently and which refers to a "qualified economic offer at the minimum possible cost to the municipal employer," that the Legislature did not intend to permit QEOs to exceed 3.8% increased costs. We think that the phrase "at least" need not be read to apply to the entire salary component of the QEO. Wherever that phrase appears in the QEO law, it is contiguous with the term "one full step." If construed literally and narrowly, therefore, the language would allow a salary increase of more than one step. This interpretation, which we believe accurate, is not at odds with the court's holding in *RACINE*.

Third, the statute carefully respects the difference between a collective bargaining “agreement” and a Qualified Economic “Offer.” An “offer” is a proposal for an agreement; it is not an agreement. Under the interest arbitration provisions of the statute, Sec. 111.70(4)(cm), Stats., a school district and a teacher union who have not been able to reach voluntary agreement may submit their last best “offers” to an arbitrator. Once the arbitrator selects one of those offers, the offer becomes an “agreement” that must be signed by the parties. As noted earlier, the purpose of the QEO law is to allow a district to avoid arbitration of economic issues by offering the union a 3.8% economic increase for each of two succeeding years, under highly restricted conditions. The QEO law does not require the union to agree to the district’s offer, does not require the parties to sign any document that incorporates the offer, and, except as may be implied in the 2001 amendment to Sec. 111.70(4)(cm)5s, Stats., does not require the district to implement its offer.

As directed by the Legislature in Sec. 111.70(4)(cm)8s., Stats., the Commission created mandatory forms for districts to use in developing a QEO. See Wis. Adm. Code ERC 33 and its Appendix of forms for calculating a QEO. These forms tell the district how to calculate the costs of maintaining fringe benefits, direct the districts to fund those benefits and to demonstrate the effect of the fringe benefit calculation on the required 3.8% cost increase in the QEO. Regarding steps, the WERC’s forms advise the district to determine “the total additional cost of providing [each appropriate employee] with any salary increase to which they would be entitled by virtue of an additional year of service on the salary schedule.” Form A, Steps 7 and 13. That step increase amount is then used in the Form C calculations, where districts are guided in handling each potential scenario regarding available funds.

Like the statute, the Commission’s forms do not address explicitly the issue presented here, i.e., whether a QEO may or must use available funds to make up (fully or partially) for steps that were withheld (fully or partially) under previous QEOs. The District, however, perceives no ambiguity on this subject in the forms. It interprets the phrase “any salary increase . . . by virtue of an additional year of service” to convey clearly an amount no more and no less than the amount of a single additional step. While the District’s interpretation is plausible, it is not required by the statutory language (which refers to “at least” one full step) or the language on the forms. Consider, for example, a teacher who is at Step 1 in her first year of employment and Step 2 in her second year. During both those years, she is paid in accordance with the negotiated salary schedule. In her third year, however, a QEO was implemented that funded only half of a step increment. According to the District, this teacher was paid at “phantom step” 2.5 in her third year, while WEAC would say that she was on Step 3 “by virtue of another year of service,” within the meaning of the language on the forms, even though there was not enough money to pay her accordingly. By the same token, WEAC would contend that, the following year, this teacher moved to Step 4, “by virtue of an additional year of service,” and must be paid the Step 4 salary if there are sufficient funds to do so. The District, however, contends that “salary increase . . . by virtue of an additional year of service” must be interpreted to mean no more than the amount of one increment and that the teacher therefore can move no farther than Step 3.5 in her fourth year, regardless of

how much money is available. While the District's proposed interpretation is reasonable, we concur with WEAC that it is just as reasonable to view the teacher as having reached Step 4 "by virtue of an additional year of service," and therefore entitled to the salary adjustment that would bring her salary in line with the Step 4 salary before determining whether there is money available for an overall wage increase.

Thus we conclude that the statute and the forms permit the interpretation WEAC has proposed regarding the distribution of the available salary funds. We also find support for this interpretation in the statutory principles articulated above. As noted, the Legislature designed the QEO process in a conservative manner, precluding any tinkering with the fundamental economic structures that the parties had negotiated. The Legislature was precise about one of those structure, i.e., the salary schedule, directing the District to maintain the "salary range structure," the "number of steps," and the "requirements for attaining a step." Sec. 111.70(4)(cm)8p., Stats. If the parties had agreed that teachers would reach the maximum salary after five years of teaching, and that they were entitled to \$1,000 increase for each year of teaching, then a QEO may not alter those requirements unless the available salary funds are not sufficient to meet the required increment. In that case, the increment may be pro-rated to an amount "at least equivalent to that portion of a step for each such 12-month period that can be funded. . . ." Sec. 111.70(1)(nc)1.b, Stats. As noted earlier, the Legislature also made it clear that step increases set forth in the salary schedule have priority over any general unit-wide salary increase.

These legislative judgments are in keeping with the general design of the QEO law, i.e., to place a ceiling on school district costs but otherwise not to tamper with what the parties have negotiated (or might negotiate). A collectively-bargained salary schedule providing annual service increment steps, unless it is renegotiated, represents a commitment on its face that teachers will have a certain salary after a certain number of years. By giving priority to service increments in a QEO, the Legislature required the District to honor that commitment in exchange for limiting its financial exposure. In contrast, a salary schedule does not on its face promise an increase in pay to teachers who have already reached the top of the experience stepladder. In normal collective bargaining, those teachers will obtain raises only if the union is able to negotiate such a raise. It makes sense, therefore, that the QEO process, which is deferential to the collectively bargained economic structures, would give priority to the pre-existing salary schedule commitments before distributing any "new" salary funds.

Moreover, the statute recognizes that the number of steps (or years) to the top of the schedule is an inherent and essential component of a salary schedule "structure." To be sure, by permitting a QEO to pro-rate or not pay at all established salary schedule increments, the Legislature has condoned some departure from the negotiated salary structure. Thus, a QEO, and especially a series of QEOs, could elongate the time it takes a teacher to reach the maximum salary on the schedule. However, the District's interpretation would exacerbate that impact in comparison with WEAC's interpretation. Since we perceive a clear legislative intent to honor the economic structures that the parties have already negotiated, except where deviation is specifically authorized, it seems consistent with the legislative scheme to distribute

available salary funds in the manner that least offends the negotiated salary structure. WEAC's interpretation adheres more closely to the "salary schedule structure" and the "number of steps" within the schedule and thus is more consistent with the legislative scheme than the District's interpretation.

The District argues, however, that subsection (4)(cm) 8p authorizes or even requires its interpretation. That statutory paragraph provides in pertinent part:

. .unless the parties otherwise agree, no new or modified collective bargaining agreement may contain any provision altering the salary range structure, the number of steps or the requirements for attaining a step or assignment of a position to a salary range, except that if the cost of funding the attainment of a step is great than the amount required for the municipal employer to submit a qualified economic offer, the agreement may contain a provision altering the requirements for attaining a step to no greater extent than is required for the municipal employer to submit a qualified economic offer at the minimum possible cost to the municipal employer.

Using the previous example of a teacher who received only half an increment in her third year of employment, the District would constructively place her at Step 3.5 in her fourth year, even if there was enough money to move her to Step 4. The District acknowledges that this adds an additional half-year to that teacher's progression through the schedule. To the District, this "altering [of] the requirements for attaining a step [as] required for the municipal employer to submit a qualified economic offer at the minimum possible cost to the municipal employer," is precisely what paragraph 8p was intended to authorize.

The District's argument falters by blurring the distinction between a QEO, which is a school district "offer," and an "agreement," a term whose use in the statutory paragraph cannot be reconciled with the District's argument. As discussed earlier, the statute reflects a keen legislative effort to maintain the distinction between these terms, which, after all, is at the heart of collective bargaining. A careful parsing of paragraph 8p's admittedly opaque language reveals that its central purpose is to protect negotiated salary schedule structures from QEO depredation, unless the parties agree that a QEO may modify those structures – and even then only to the extent necessary for a valid QEO. This language thus further reflects the Legislature's intention that the QEO operate as a narrow deviation from the statute's general policy favoring collective bargaining and interest arbitration. Paragraph 8p recognizes that both the union and the school district may find it advantageous in some circumstances to modify the salary schedule in a QEO context. For example, both parties may prefer to distribute the available salary funds differently than the salary schedule otherwise would require. Paragraph 8p permits the parties some latitude to agree to amend the default QEO formula. However, that paragraph by its literal language does not permit such modification merely in a QEO (an offer), but requires an agreement.

RACINE EDUCATION ASS'N V. WERC, 238 WIS.2D 33 (CT. APP. 2000) does not require a contrary interpretation of paragraph 8p. In that case, the court concluded that a QEO may not exceed 3.8%, primarily because the concluding language in paragraph 8p referred to a “qualified economic offer at the minimum possible cost to the municipal employer.” In context, as discussed above, that referenced language was the tail end of a sentence authorizing an “agreement” to modify a QEO. The court’s holding did not address the issue before us in this case, i.e., whether paragraph 8p permits a QEO to modify a salary schedule. Indeed, the court noted that the Legislature specifically delegated to the Commission the duty to articulate the precise manner in which the QEO should be calculated. *Id.*, 238 WIS. 2D AT 55-56. As discussed earlier, the Commission’s forms permit the interpretation we adopt herein.

Finally, the District advances an equity argument on behalf of the teachers who are at the top of the schedule, arguing that it is inherently unfair to deprive them of a raise in order to provide a larger raise than the amount of one step increment to teachers moving through the schedule. This argument misconceives the nature of a salary schedule. Teachers at the top step have already received the negotiated experience increments the schedule promises, and in the instant scenarios they will continue to receive the salary set forth in the schedule. In contrast, a teacher whose increment has been withheld in whole or in part is not receiving the salary he or she was promised in the schedule. In a relative but quite real sense, those teachers have experienced a cut in their expected pay, and equity arguably would make them whole before giving others an increase beyond the existing schedule. Further, it is common under a salary schedule that teachers moving through the schedule will receive a bigger raise than teachers at the top, even without a QEO. For example, if the union and employer agree on a 2% overall wage increase, the teachers moving through the steps will receive their experience based step increments plus the 2% raise, whereas teachers at the top will receive only the 2% raise. 7/ The teachers at the top, of course, have already had the benefit of the

7/ In fact, it can be a prohibited practice for an employer to withhold normal step increments after a contract has expired and before a successor contract has been settled, even though teachers at the top of the schedule would simply continue to receive the same pay as in the previous year. SCHOOL DISTRICT OF WISCONSIN RAPIDS, DEC. NO. 19084-C (WERC 3/85).

step increases. Given all of the foregoing, a persuasive argument can be made that equity is best served by the position we have adopted in this decision. However, if the District finds the QEO inequitable in this respect, it is free not to impose a QEO or to negotiate a modification of the statutory QEO in the manner permitted by paragraph (4)(cm)8p.

Accordingly, we conclude that, in the narrow circumstances present here, where a step increment has been withheld or pro-rated in a preceding year but where a QEO subsequently includes sufficient available salary funds to make up some or all of that deficiency, the QEO must allocate those funds as service increments to the extent necessary to make up that deficiency before determining whether a general salary increase is available. However, pursuant to Sec. 111.70(4)(cm)8p., Stats., the parties may agree to allocate the step increment monies differently if they choose to do so. 8/

8/ It appeared at hearing that the parties also disputed the appropriate payment and/or step placement for newly-hired teachers in the instant circumstances. The District argued that new teachers with the same years of service as previously employed teachers should receive the same pay under a QEO. WEAC argued that the appropriate salary schedule placement of new teachers would be a matter of contract interpretation and would vary according to contract language and past practice. Further, WEAC argued that payment of new teachers was not a QEO-related question, since new teachers are not part of the "snapshot" complement of employees for purposes of calculating the QEO. In their written submissions subsequent to the hearing, the parties did not address this subject as an independent issue regarding the proper implementation of the QEO, but rather discussed the potential treatment of new employees in terms of an equity argument for or against the parties' respective positions on the salary schedule issue. The parties did not present evidence (other than collective bargaining agreements themselves) clarifying their prevailing practices regarding the treatment of new employees. Accordingly, we do not think the record or the arguments are sufficient for us to decide (1) whether the treatment of new employees has been raised appropriately in the instant motion to review implementation or (2) how new employees should be handled under a QEO in the instant circumstances. Therefore, we decline to address these issues.

Dated at Madison, Wisconsin, this 23rd day of December, 2004.

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

T	Base Year (Conforms to Contractual Salary Schedule)				QEO-Year 1 (\$3000 available) (Fund ½ increment)				QEO-Year 2 (Fringes = 3.8 + 2000) (Decrease Salaries by \$2000 or \$500 per T)				QEO-Year 3 (Fringes = 3.8%) (No available funds)				QEO-Year 4 (Fringes = 3.8% - 9000) (\$9000 available)			
	WEAC		Dist		WEAC		Dist		WEAC		Dist		WEAC		Dist		WEAC		Dist	
	S	Pay	S	Pay	S	Pay	S	Pay	S	Pay	S	Pay	S	Pay	S	Pay	S	Pay	S	Pay
A	1	20,000	1	20,000	2	21,000	1.5	21,000	3	20,500	1.5	20,500	4	20,500	1.5	20,500	4	25,500	2.5	22,500 + 1000 = 23,500
B	2	22,000	2	22,000	3	23,000	2.5	23,000	4	22,500	2.5	22,500	4	22,500	2.5	22,500	4	25,500	3.5	24,500 + 1000 = 25,500
C	3	24,000	3	24,000	4	25,000	3.5	25,000	4	24,500	3.5	24,500	4	24,500	3.5	24,500	4	25,500	4	26,500
D	4	26,000	4	26,000	4	26,000	4	26,000	4	25,500	4	25,500	4	25,500	4	25,500	4	25,500	4	26,500

S = Step

T = Teacher A, B, C, or D

“Available” = the difference between 103.8% of the base year costs and the amount necessary to fully fund fringe benefits

Explanation:

The salary schedule in this hypothetical example is not intended to replicate the District’s actual contractual salary schedule.

Under the above hypothetical salary schedule, there are four annual increments (steps) of \$2000 each. In the base year, there is one teacher at each step of the schedule (A is at 1, B is at 2, C is at 3, D is at 4).

Under WEAC’s interpretation, each teacher who is not yet at the top (fourth) step moves into the next experience cell on the schedule each year until the teacher reaches the top step. Under the District’s interpretation, teachers moving through the schedule are placed into a “phantom step” (“incremental designation”) (e.g., 1.5, 2.5, etc.) that corresponds to the portion of the increment that was able to be funded in QEO Years 1 and 2.

As the table reflects, the parties agree on how to distribute the money as long as there is less than enough money to pay even one full (\$2000) increment. They only disagree on how to designate the individual’s placement (step). This is shown in QEO Years 1, 2, and 3 on the above table.

In QEO Year 4, however, there is enough money to pay more than the \$2000 one-step increment to teachers moving through the schedule. WEAC would allocate the money first to “catch everyone up” to their placement on the contractual salary schedule, i.e., corresponding to their years of service. Following WEAC’s model, everyone would have reached Step 4 by Year 4. But none except Teacher D (who started at the top) has had the benefit of the corresponding salary schedule pay. WEAC therefore would spend all of the available \$9000 on Teachers A (\$5000), B (\$3000), and C (\$1000) so that they are now paid for all of the increments they (in WEAC’s view) have earned. There would be no money left to provide a general increase in the schedule and therefore Teacher D would remain at the same pay, now matched by all other teachers.

The District, on the other hand, in QEO Year 4 would pay any given teacher a maximum of \$2000, the amount of one increment on the schedule. The District would add one full step to each eligible teacher’s phantom placement (i.e., Teacher A moves from 1.5 to 2.5) corresponding to the one full increment. Teachers A and B would move one step to 2.5 and 3.5, respectively, and increase their salaries by \$2000. Since Teacher C only needs \$1000 to reach the Step 4 salary, the District would pay Teacher C \$1000 and have \$4000 left to distribute as a general salary increase. The Commission’s rules permit various ways of implementing such a general salary increase (See Form C, part 2.A.2). Purely for demonstrative purposes, this hypothetical assumes the funds are allocated evenly as \$1000 across all steps. Thus the District’s model would provide Teachers A and B less money than WEAC’s would, but would provide a greater salary increase to Teachers C and D.