

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Motion of

PORT EDWARDS EDUCATION ASSOCIATION

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

PORT EDWARDS SCHOOL DISTRICT

Case 14
No. 63055
INT/ARB-10061

Decision No. 32049

Appearances:

Dean R. Dietrich, Ruder Ware, Attorneys at Law, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Port Edwards School District.

Michael J. Van Sistine, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Port Edwards Education Association.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

On July 15, 2005, the Port Edwards Education Association filed a motion with the Wisconsin Employment Relations Commission seeking review of the Port Edwards School District's implementation of a qualified economic offer for the period of July 1, 2003 – June 30, 2005. The Association asserts in its motion that the District did not maintain an early retirement fringe benefit and thus did not implement a valid qualified economic offer. The District admits that it did not maintain the early retirement fringe benefit but asserts that it could not do so because said benefit is illegal. The Association responds by arguing that if the District wants to make a qualified economic offer, it must maintain the early retirement fringe benefit without regard to its legality or illegality; that the District unwillingness to do so warrants a conclusion that the District has failed to make a qualified economic offer; and that the Association can now proceed to interest arbitration on all issues.

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The parties waived hearing and filed argument and stipulations of fact-the last of which was received November 1, 2006.

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

FINDINGS OF FACT

1. The Port Edwards School District, herein the District, is a municipal employer.
2. The Port Edwards Education Association, herein the Association, is a labor organization that serves as the collective bargaining of certain professional employees of the District.
3. The District and the Association were parties to a July 1, 2001 - June 30, 2003 collective bargaining agreement that contained the following provision:

ARTICLE XVIII

D. COMPENSATION

Upon application and approval under this provision, an employee shall receive an early retirement stipend to be computed as follows:

Teachers who are between the ages of 57 and 62 shall receive 25 percent of the B.A. Base salary based on the Agreement negotiated for the year following retirement. This yearly stipend will be paid in 24 installments on regular pay periods annually until the retiree reaches 62.

Teachers who retire at age 55 to 62 shall receive a stipend which is 25 percent of the B.A. Base salary based on the Agreement negotiated for the year following retirement. This amount would be multiplied by 5 to arrive at the total stipend. This stipend would be paid out until age 62 in bimonthly installments.

An additional one (1) percent of the B.A. Base will be paid for each year's service to the Port Edwards School District beginning with the 16th through the 25th year of service. The maximum percentage any retiree may collect is a yearly stipend of 35 percent of the B.A. Base.

In the event of the death of the employee, the remainder of the total stipend owed will be paid to the named beneficiary in lump sum.

E. INSURANCE

Teachers retiring under this provision shall be allowed to continue under the health insurance program (medical/surgical/prescription/drug/vision/dental) in effect for full-time teachers for the District for the duration of coverage under this provision. The Board will continue to contribute the monthly premium for the health insurance until the retiree reaches age 65. The Board contribution shall be limited to the amount contributed for full-time teachers working for the District in each school year.

4. During bargaining over a successor to the 2001-2003 agreement, the District advised the Association that it would be implementing a qualified economic offer but that said offer would not include implementation of the early retirement benefit set forth in Finding of Fact 3 because the District believed said benefit was illegal.

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

CONCLUSIONS OF LAW

1. If all or a portion of the early retirement benefit set forth in Finding of Fact 3 is illegal, said benefit or portion thereof is not a “fringe benefit” within the meaning of Sec. 111.70(1)(nc) 1. a., Stats.

2. If all or a portion of the early retirement benefit set forth in Finding of Fact 3 is illegal and if the District wishes to make and implement a qualified economic offer within the meaning of Sec. 111.70 (1)(nc), Stats., the District must propose and implement a legal early retirement benefit of equal value to the illegal benefit or portion thereof.

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

ORDER

Within 30 days from the date of this Order, the District and the Association shall seek to reach agreement on an early retirement benefit that both agree is legal and of equal value to the benefit set forth in Finding of Fact 3. If such an agreement cannot be reached, the Commission will proceed to determine whether the benefit set forth in Finding of Fact 3 is legal or illegal, in whole or in part.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

PORT EDWARDS SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

We look first at the issue of whether the District's failure and refusal to maintain the early retirement fringe benefit contained in the 2001 - 2003 agreement deprives the District of the right to make a qualified economic offer (QEO) for the 2003 - 2005 agreement even if the District is correct that it cannot maintain the fringe benefit because it would be illegal to do so.

Section 111.70(1)(nc) 1.a. , Stats defines a "Qualified economic offer" in pertinent part as an offer

. . . to maintain all fringe benefits provided to the municipal employees in the collective bargaining unit, as such . . . benefits existed on the 90th day prior to the expiration of any previous collective bargaining agreement

The Association urges a literal interpretation of this statutory language and points to the undisputed facts that the disputed early retirement fringe benefit provision was present in the parties' 2001-2003 contract on the 90th day prior to the expiration thereof and that the District did not maintain same. We do not find this interpretation persuasive and conclude that, if a fringe benefit is illegal, it is not a "fringe benefit" within the meaning of Sec. 111.70 (1)(nc) 1.a. Stats. However, we further conclude that if the fringe benefit is illegal and if the District wishes to make and implement a qualified economic offer, it must offer a legal early retirement fringe benefit of equal value.

As to the question of whether the illegality of a "fringe benefit" is a relevant consideration in the context of a qualified economic offer, DODGELAND EDUCATION ASSOCIATION v. WERC, 250 Wis. 2D 357 (2002) holds that "fringe benefits" are limited to mandatory subjects of bargaining. ¹ If a benefit provision is illegal, it is not a mandatory subject of bargaining but is instead a prohibited subject of bargaining. Therefore, we think it clear that if the disputed early retirement fringe benefit is illegal, it is not a "fringe benefit" within the meaning of Sec. 111.70 (1) (nc) 1.a. Stats. which the District must maintain as part of a qualified economic offer.

However, if the early retirement provision is illegal, we also think it clear that the District must substitute a legal early retirement fringe benefit of equal value if it wishes to make a qualified economic offer. Unlike the guaranteed preparation time provision at issue in DODGELAND, whose subject matter was itself outside the mandatory scope of bargaining, the subject matter of early retirement benefits is clearly an important mandatorily-bargainable element of the economic package available to employees. A fundamental statutory premise of

¹ Both parties acknowledge that, to the extent the early retirement benefit is legal, it is both a mandatory subject of bargaining and a "fringe benefit" within the meaning of Sec. 111.70 (1)(nc) 1.a. , Stats.

the qualified economic offer law is that employees are guaranteed that their fringe benefit

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package will be maintained if the employer elects to make a qualified economic offer. This premise is not honored if a fringe benefit – one that is fundamentally a mandatory subject of bargaining -- becomes unavailable owing to an illegal element in its composition, unless it is replaced by a fringe benefit of equal value.

Based on our resolution of this portion of the parties' dispute, it is apparent that the legality or illegality of the disputed early retirement provision is a matter which we must resolve when determining whether the District has made and implemented a qualified economic offer. However, because we believe that resolution of this portion of the dispute also enhances the likelihood that the parties can voluntarily agree upon an alternative early retirement provision which will resolve the dispute, we conclude it is appropriate to give the parties an opportunity to reach such an agreement.

If such settlement discussions do not resolve the matter within 30 days of the date of this Order (or such additional time that the parties mutually agree upon), we will proceed to decide the legality or illegality of the early retirement provision. If we conclude all or a portion is legal, we will order the District to incorporate such legal provision in its offer and, if the District fails to do so, the Association can then proceed to interest arbitration on all unresolved issues because the District will not have made a qualified economic offer.² If we

² The early retirement fringe benefit has cash payout and insurance components. If we conclude that one component of the benefit is illegal, the District will be obligated to incorporate the legal component of the fringe benefit into its qualified economic offer without regard to the "equal value" replacement for the illegal component.

conclude that all or a portion of the provision is illegal, then the District will have 15 days to advise the Commission and the Association of the provision it offers as an equal value replacement and, if the Association contests the equal value status of the replacement, then we will resolve that issue. ³

Dated at Madison, Wisconsin, this 16th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Commissioner Susan J. M. Bauman did not participate.

³ The District points to the Savings Clause in the parties' contract and asserts a willingness to proceed to interest arbitration over a replacement for what it believes to be an illegal fringe benefit. The Association contests the applicability of the Savings Clause noting that (a) it does not concede the illegality of the provision and (b) the Clause only becomes operative when a "court of competent jurisdiction" finds a contractual provision to be illegal. We do not view the Savings Clause issue as material to the outcome of the instant case. While the Savings Clause provides a contractual procedure for dealing with an illegal contract provision, it has no bearing on the statutory question of whether the District has properly maintained a fringe benefit that existed on the 90th day prior to contract expiration. As to the legality or illegality question, preclusion principles likely apply if a court of competent jurisdiction had already ruled upon the legality of this District's retirement benefits. But even if that had occurred and a determination of illegality had been made, the statutory QEO determination would still require us to decide whether the District had then offered to maintain a legal fringe benefit of "equal value." Neither a "court of competent jurisdiction" nor an interest arbitrator can perform that function.

