STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY
BRANCH 10

WISCONSIN EDUCATION ASSOCIATION COUNCIL,

Plaintiff,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Defendant.

Case No. 98CV1473
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]
[WERC is using the following Electronic file name: 98-1473C1.doc]

DECISION AND ORDER DENYING PLAINTIFF'S
MOTION FOR DECLARATORY JUDGMENT

Plaintiff Wisconsin Education Association Council ("WEAC") has filed suit against the Wisconsin Employment Relations Commission ("WERC") pursuant to secs. 227.40 and 806.04 Wis. Stats. (1995-96)[1]. It seeks an order declaring that Wisconsin Administrative Rules ERC 33.10(3)(b), 33.10(5) and 33.10(6) and ERC 33 appendix are invalid, and enjoining WERC from applying those rules to any contract between school districts and teachers. WEAC also requests that the court direct WERC to order school districts to use actual costs when calculating a qualifying economic offer. WEAC contends that WERC exceeded its statutory authority in promulgating the rules in question. WEAC asserts that it properly exercised its rule-making authority, and that the rules in question accurately interpret and apply sec. 111.70.

The parties submitted pre-trial briefs and entered into a stipulation. This court held an

[1] All references to the Wisconsin Statutes are to the 1995-96 version.

evidentiary hearing on March 7, 2000, and took the matter under advisement. The parties then filed post-trial briefs. After considering all of the parties' submissions and arguments, I determine that rules ERC 33.10(3)(b), 33.10(5) and 33.10(6) and ERC appendix are authorized by sec. 111.70, and are not invalid. I therefore decline to enjoin WERC from applying those rules, and decline to order school districts to use actual costs when calculating qualified economic offers.

STANDARD OF REVIEW

Sections 227.40 and 806.04(11) provide the exclusive means for judicial review of the validity of administrative rules. Section 227.40(4)(a) states:

> In any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.

WEAC contends that WERC exceeded its statutory authority in adopting ERC 33.10(3)(b), (5) and (6) and the ERC 33 Appendix. A determination of whether an administrative agency has exceeded its authority in promulgating a rule is a question of statutory construction, which a court reviews de novo. DeBeck v. DNR, 172 Wis. 2d 382, 386 (Ct. App. 1992). An agency exceeds its rule-making authority when it promulgates a rule that conflicts with an unambiguous statute. Basic Products Corp. v. Wis. Dep't of Taxation, 19 Wis. 2d 183; 186 (1963). A court looks "to the enabling statute to determine whether there is express or implied authorization for the rule." In Interest of A.L.W., 153 Wis. 2d 412, 417 (1990). A court:

> should identify the elements of the enabling statute and match the rule against those elements. If the rule matches those elements, then the statute expressly authorizes the rule.

Wis. Hosp. Assoc. v. Nat. Resources Bd., 156 Wis. 2d 688, 705 (1990); See also, Kimberly-Clark Corp. v. Public Services Comm., 110 Wis. 2d 455, 461-62 (1983).

DECISION

QEO Calculation

WEAC first challenges rule ERC 33.10(3)(b) and ERC 33 appendix, specifically Forms A and B. ERC 33.10(3)(b) explains and interprets "qualified economic offers" (QEOs), as established by sec. 111.70(1)(nc), while Forms A and B are used in the preparation of QEOs. ERC 33 employs the "cast forward" method in determining salary and benefit increases. Under this method, the QEO for the new collective bargaining agreement is determined based on the complement of employees represented by the union 90 days prior to expiration of the current collective bargaining agreement, known as the "snapshot". The district does not adjust for any staff changes, and assumes for the purposes of the QEO that the employee complement remains constant throughout the term of the collective bargaining agreement.

Section 111.70(1)(nc) defines "Qualified economic offers":

> 1. "Qualified economic offer" means an offer made to a labor organization by a municipal employer that includes all of the following, except as provided in subd. 2.:
>
> a. a proposal to maintain the percentage contribution by the municipal employer to the municipal employes' existing fringe benefit costs as determined under subd. (4) (cm) 8s., and to maintain all fringe benefits provided to the municipal employes 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...
>
> b. a proposal to provide for a salary increase of at least one full

> step... for each municipal employe who is eligible for a within range salary increase, unless the increased cost of providing such a salary increase, as determined under sub. (4) (cm) 8s., exceeds 2.1% of the total compensation and fringe benefit costs for all municipal employes in the collective bargaining unit... plus any fringe benefit savings, or unless the increased cost required to maintain the percentage contribution by the municipal employer to the municipal employes' existing fringe benefit costs and to maintain all fringe benefits provided to the municipal employes, as determined under sub. (4) (cm) 8s., in addition to the increased cost of providing such a salary increase, exceeds 3.8% of the total compensation and fringe benefit costs for all municipal employes...in which case the offer shall include provision for a salary increase for each such municipal employee in an amount at least equivalent to that portion of a step for each such 12-month period that can be funded after the increased cost in excess of 2.1% of the total compensation and fringe benefit costs....
>
> c. A proposal to provide for an average increase for each 12-month period covered by the proposed collective bargaining agreement...for the municipal employes in the collective bargaining unit at least equivalent to an average cost of 2.1% of the total compensation and fringe benefit costs for all municipal employes in the collective bargaining unit...plus any fringe benefit savings...

WERC has been charged by the legislature with enforcing and interpreting sec. 111.70, and therefore is authorized by sec. 227.11(2)(a) to promulgate rules relating to sec. 111.70. See School Dist. v. WERC, 121 Wis. 2d 126, 132-33 (1984). WERC promulgated rule ERC 33.10 to interpret sec. 111.70, and to aid in its implementation. ERC 33.10, Qualified economic offer, states in relevant part:

> (2) Contents. A qualified economic offer is a proposal in which the municipal employer obligates itself to at least comply with the salary and fringe benefit requirements of s. 111.70(1)(nc), Stats., for the entirety of any collective bargaining agreement for any period after June 30, 1993.
>
> (3) Existence. (a) A qualified economic offer exists if the municipal employer submits an offer to a labor organization which at least

states the following:

> 1. …the municipal employer shall maintain all fringe benefits and its percentage contribution toward the cost thereof as required by s. 111.70(1)(nc), Stats.
>
> 2. …the municipal employer shall provide the minimum increase in salary which s. 111.70(1)(nc)1., Stats., requires for the purposes of a qualified economic offer, or may provide the decrease in salary which s. 111.70(1)(nc)2., Stats., allows for the purposes of a qualified economic offer.
>
> (b) …the municipal employer's treasurer and superintendent or business manager shall provide the labor organization with completed commission qualified economic offer calculation Forms A and B. Forms A and B are appendices to this chapter….

WERC is specifically authorized to prescribe forms used in calculating QEOs by sec. 111.70(4)(cm)8s., which provides in relevant part:

> The commission shall prescribe forms for calculating the total increased cost to the municipal employer of compensation and fringe benefits provided to school district 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…without regard to any change in the number, rank or qualifications of the school district professional employes….

WERC prescribed ERC 33 Appendix Forms A and B for use in QEO calculation. A note to the appendix states:

> 1993 Wis. Act 16 required the Wisconsin employment relations commission to create forms by which the components of a minimum qualified economic offer could be established and measured. Act 16 does not allow the cost of a qualified economic offer to be based upon the actual cost of such an offer to the employes actually employed during the term of the contract. Instead, the Act requires that the cost of the offer be evaluated by assuming a fixed employee complement is present during the term of the contract.

Form A directs employers filling out the form:

> For the purposes of the following calculations, *do not* assume any change in: (1) the identity of step 1 employes; (2) the level of service they provide to the district or (3) the fringe benefits step 1 employes received or the applicable employer % contribution level. *Do* assume that any cost increase incurred during the year was in effect for the entire year.

The parties have stipulated to their agreement on the general requirements of a QEO. A district must offer to maintain the fringe benefits found in the parties' expiring contract and the district's level of financial contribution toward those fringe benefits. If meeting the fringe benefit requirements of a QEO does not produce a 3.8% increase in total compensation, the district must also offer salary increases sufficient to attain at least a 3.8% compensation increase. The district must first offer to pay "step increases" and "lane increases" earned by virtue of an additional year of employment or additional education. If the step and lane increases do not result in a 3.8% increase in compensation, a general salary increase must be offered to provide a 3.8% increase in compensation.

The parties have also stipulated to their agreement on the workings of ERC 33. ERC 33.10(3) provides that a district has a QEO when it commits to pay salary and fringe benefit increases compliant with sec. 111.70(1)(nc). The district must provide the union with ERC 33 Forms A and B, which assume that the employes present on the 90th day prior to expiration of the previous collective bargaining agreement would continue to be present during the forthcoming two years covered by the QEO. QEO calculation under WERC rules therefore does not reflect changes in the number, identity, and qualifications of employes after the making of the QEO, and does not account for staffing cost increases or decreases resulting from a change in the

composition of employes. The parties agree that it is far more common for a QEO calculation to result in the exclusion of "savings", due to employee turnover, than to result in the exclusion of additional costs.

WEAC contends that the "cast forward" method of costing salaries and fringe benefits that WERC rules and forms utilize is contrary to sec. 111.70(1)(nc), Stats., and results in the distribution of salary and fringe benefits to "phantom employees". It asserts that WERC rules require that a QEO be computed by use of the "actual cost" method, under which the costs are determined when the actual complement of employes is known. WEAC contends that the "actual cost" method is consistent with sec. 111.70(1)(nc), which requires the employer to provide for a 2.1% increase for each employee in the bargaining unit, and would not violate the mandate of sec. 111.70(4)(cm)8s. that the base cost and the total increased cost must be based upon the employee complement on the "snapshot" date. According to WEAC, the costs are to be determined based on the "snapshot", but salary increases must be based on the actual complement of employees. It claims that each municipal employee in the collective bargaining unit must receive a 2.1% salary increase for each 12-month period. It points to the language in sec. 111.70(1)(nc)1.c., stating that a QEO must include:

> an average salary increase...for the municipal employes in the collective bargaining unit at least equivalent to an average cost of 2.1% of the total compensation and fringe benefit cost for all municipal employes in the collective bargaining unit for each 12 month period covered...

At the evidentiary hearing, WEAC adduced testimony from its Negotiation Specialist Dennis Eisenberg. Mr. Eisenberg testifies that according to his interpretation of sec. 111.70, a school district must utilize the "actual cost" method when calculating a QEO. He also stated that

the cast forward system was used at Wilmot High School during the 1994-95 school year, and resulted in the average salary of municipal employes in Wilmot declining, although the QEO had showed that they had received a 3.8% compensation increase. WEAC also submitted exhibits demonstrating a hypothetical situation in which a 3.8% compensation increase under WERC rules could result in an actual salary decrease for employes remaining at a school after the calculation of a QEO.

Conversely, WERC contends that the "without regard to any change in the number, rank or qualifications of the school district professional employes" language in sec. 111.70(4)(cm)8s refers to the municipal employes in the collective bargaining unit, the same employes referred to in sec. 111.70(1)(nc)1.c. According to WERC, the requirement that staff changes cannot be considered means that the "cast forward" system must be utilized. WEAC's general counsel Peter Davis testified that while the "cast forward" method may at times result in an unfair salary distribution, sec. 111.70 requires school districts to employ it. Mr. Davis also testified that before promulgating ERC 33, WERC had sought input from the Wisconsin Association of School Boards {WASB} and WEAC regarding the implementation of sec. 111.70. According to Mr. Davis, WERC received a letter from WASB stating that it agreed with WEAC that WERC rules should employ the "cast forward" method.

When determining the meaning of a statute, a court looks first to the language of the statute. If the plain meaning is clear, the court simply applies that meaning. "If, however, the statute is ambiguous, the court looks to the scope, history, context, subject matter, and purpose of the statute." MCI Telecommunications Corp. v. State, 203 Wis. 2d 392, 400 (Ct. App.). Neither WEAC nor WERC contend that any of the statutes relevant to this case are ambiguous.

While the court finds that the statutory scheme is not particularly clear, it does not find it to be ambiguous. It will therefore look solely to the language of the statutes to determine their meaning.

Reading sec. 111.70(1)(nc)1.c., in concert with sec. 111.70(4)(cm)8s., the court finds that the cost of a QEO is to be determined based upon the "snapshot" of the municipal employes employed 90 days prior to the expiration of the previous collective bargaining agreement. Pursuant to sec. 111.70(c)1.c., a QEO must include:

> a proposal to provide for an average salary increase … for the municipal employes in the collective bargaining unit at least equivalent to an average cost of 2.1% of the total compensation and fringe benefit costs for all municipal employes in the collective bargaining unit...unless the increased cost of providing such a salary increase, as determined under sub. (4)(cm)8s., exceeds 2.1% of the total compensation and fringe benefit costs for all municipal employes in the collective bargaining unit...or unless the increased cost required to maintain the percentage contribution by the municipal employer to the municipal employes' existing fringe benefit costs and to maintain all fringe benefits provided to the municipal employes, as determined under sub. (4)(cm)8s., in addition to the increased cost of providing such a salary increase, exceeds 3.8% of the total compensation and fringe benefit costs for all municipal employes in the collective bargaining unit...

The "municipal employes in the collective bargaining unit" language cited by WEAC as referring to the "currently employed employes", must actually refer to the employes constituting the "snapshot". Section 111.70(1)(nc)1.c. refers to **increased costs** of a salary increase as compared to the costs of "all municipal employes in the collective bargaining unit". In order to calculate the **increased costs as determined under sub. (4)(cm)8s.,** the district must calculate the costs of providing the base compensation level of those municipal employes, as determined under sub. (4)(cm)8s., and then the cost of providing a 2.1% compensation increase, as

determined under sub. (4)(cm)8s. Section 111.70(4)(cm)8s., requires that the costs be:

> based upon the total cost of compensation...to school district employes who are represented by a labor organization on the 90th day before expiration of any previous collective bargaining agreement... without regard to any change in the number, rank or qualifications of the school district professional employes....

It is therefore clear that the "snapshot" group must be used in finding base costs, costs of new QEO, and the increased cost of the QEO. Because sec. 111.70(4)(cm)8s. instructs the district to determine costs based on the "snapshot" date, sec. 111.70(1)(nc)1.c. cannot refer specifically to municipal employes currently employed. The current municipal employes have no established base compensation level, as determined under sec. 111.70(4)(cn)8s. The note to ERC 33 appendix, and Forms A and B explicitly follow this mandate. Therefore they are authorized by sec. 111.70.

The court has determined that the statutory language in issue is unambiguous, and therefore may not consider legislative history or any other extrinsic evidence in interpreting the statutes. It notes, however, that while the "cast forward" method may lead to unfavorable results for teachers, and while the "actual cost" method could be used in calculating a QEO, the extrinsic evidence does not lead the court to believe that the legislature intended to use the "actual cost" method. The parties have stipulated that WERC based ERC 33 in part on a reported agreement between WEAC and the Wisconsin Association of School Boards. The court noted that the legislature has incorporated WERC's QEO calculation method into sec. 118.245, regarding employes not represented by unions. Finally, the court also notes that legislation requiring the use of the "actual cost" method was proposed in the 1999-2000 session, but did not become law. Substantiation and implementation of a QEO.

WEAC also contests rules ERC 33.10(5) and 33.10(6), regarding the "implementation of a qualified economic offer", and "compliance" with the QEO. WEAC contends that rules ERC 33.10(5) and (6) allow a school district to unilaterally implement an alleged, but unsubstantiated QEO, and therefore do not comply with sec. 111.70(4)(cm)5s.

Section 111.70(4)(cm)5s., "Issues subject to arbitration", provides in relevant part:

> In a collective bargaining unit consisting of school district professional employes, the municipal employer or the labor organization may petition the commission to determine whether the municipal employer has submitted a qualified economic offer. The commission shall appoint an investigator for that purpose. If the investigator finds that the municipal employer has submitted a qualified economic offer, the investigator shall determine whether a deadlock exists between the parties with respect to all economic issues...if the commission's investigator finds that the municipal employer has submitted a qualified economic offer and that a deadlock exists between the parties with respect to all economic issues, the municipal employer may implement the qualified economic offer.

WERC rule ERC 33.10(5) states:

> (5) Implementation of a qualified economic offer. (a) After a reasonable period of negotiations and an investigation by the commission or its investigator, if the parties are determined to be deadlocked in their negotiations, the municipal employer may implement its qualified economic offer if no collective bargaining agreement is in effect and it maintains all other economic provisions contained in the predecessor agreement...except as modified only by the terms of the salary and fringe benefit qualified economic offer or as otherwise agreed to by the parties.

Rule 33.10(6) states:

> (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 is or was 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.

WEAC points to sec. 111.70(4)(cm)5s., asserting that it requires that "an investigator must be appointed and shall determine if the parties are deadlocked if and only if the investigator finds that a QEO has been submitted." According to WEAC, under ERC 33.10(5), an employer is allowed to simply submit a QEO, and may implement it without substantiating it. Additionally, if the union challenges the QEO, and is successful in a legal action to determine that the QEO is incorrect, the employer can simply amend the QEO without penalty. WEAC asserts that sec. 111.70(4)(cm)5s. requires the employer to provide the necessary data to the investigator to allow the investigator to determine whether the information making up the QEO is correct. According to WEAC, if the QEO is not substantiated, the union should be allowed to go to interest arbitration. WEAC also claims that ERC 33.10(6) improperly places the burden on the union to file a motion to review the implementation of a QEO. WEAC asserts that sec. 111.70(4)(cm)5s prohibits WERC from allowing the employer to implement a QEO that does not meet the mandates of sec. 111.70(1)(nc), or from amending a defective QEO. According to WEAC, ERC 33.10(6) allows a district to make a disingenuous QEO and thereby compel the

union to challenge it, wasting time and consuming union resources.

The question for the court is whether the enabling statue matches the rules. See Wis. Hosp. Assoc., supra, at 705. Section 111.70(4)(cm)5s. requires that if either party petitions for an investigator, WERC must provide one. The investigator determines whether the district has made an offer constituting a QEO. Pursuant to sec. 111.70(1)(nc), a district must make an offer that includes a proposal to maintain fringe benefits and salaries and give "at least a 3.8% increase in total compensation to its professional employes for each year of a two year contract." Once the investigator determines that the district has submitted a QEO, he then determines whether a deadlock exists. If so, the district may implement the QEO.

Section 111.70(1)(nc) does not by its unambiguous language require any more than a proposal obligating the district to meet the fringe benefit and salary requirements, as determined under sec. 111.70(4)(cm)5s. The calculations are to be made on forms prescribed by WERC. However, Forms A and B are not specifically mentioned in sec. 111.70(1)(nc). The calculations made on Forms A and B are clearly necessary for calculating a QEO, but separate from the QEO. Therefore, numerical accuracy in the completion of Forms A and B is not specifically required under sec. 111.70(1)(nc) for a QEO to exist. Consequently, an investigator need not determine that a QEO is numerically accurate, or "substantiated" in order to find the parties deadlocked, and to allow implementation of the QEO.
Section 111.70(4)(cm)5s specifically allows the employer to implement a QEO once the investigator has determined both that a QEO exists, and that the parties are deadlocked.

Rule ERC 33.10(5) provides for a "reasonable period of negotiations" and an investigation. If the parties are determined to be deadlocked, ERC 33.10(5) allows

implementation by the employer. Rule 33.10(5) requires negotiations, an investigation, a finding of QEO existence and a deadlock, before implementation of the QEO. It therefore accurately reflects the mandates of sec. 111.70(4)(cm)5s.

The union is allowed under ERC 33.10(6) to challenge a QEO after its implementation. If the commission determines that the mandates of sec. 111.70(1)(nc) are not met in the QEO, it is required to order the employer to comply with sec. 111.70(1)(nc), Stats. If it owes the employes any monies, the employer is ordered to reimburse them with interest. While WEAC claims that it should not have the burden of challenging the implementation, it points to no statute which states otherwise. A union is allowed to petition for an investigator to determine that a QEO has been made, and is then allowed to file a motion challenging the implementation, or accuracy of the QEO. Section 111.70(4)(cm)5s requires nothing more.

While it has found that rules ERC 33.10(5) and (6) are statutorily authorized by an unambiguous statute, the court notes that allowing a district to amend a QEO is good public policy. Section 111.70(6) establishes that it is the public policy of the state to encourage voluntary settlement of labor disputes, and to provide parties to a labor dispute with a "fair, speedy, effective, and above all, peaceful procedure for settlement..." The making of a QEO allows an employer to avoid "compulsory arbitration on economic issues such as wages, hours or conditions of employment. See Madison Teachers, Inc. v. Madison Metro. Sch. Dist., 197 Wis. 2d 731, 743 (Ct. App. 1995). The court is convinced that allowing a party to invoke interest arbitration on issues covered by a QEO if the QEO is imperfect, is not consistent with the state's asserted public policy. Instead, in the interests of fairness and a speedy, effective settlement, the employer should be allowed to amend the QEO. ERC 33.10(5) and (6), and their

application by WERC therefore comply with the statutory mandates and with the public policy of Wisconsin.

CONCLUSION

For all of the reasons stated above, and based on the record herein, WEAC's request for an order declaring that Rules ERC 33.10(3)(b), 33.10(5) and 33.10(6), and ERC 33 appendix are invalid, and requiring the use of actual costs in calculating a QEO is hereby DENIED.

Dated: August 8, 2000.

BY THE COURT:

Angela B. Bartell /s/

Angela B. Bartell
Circuit Judge

cc:
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