BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DRUMMOND SCHOOL DISTRICT

and

DRUMMOND EDUCATION ASSOCIATION

Case 50
No. 58801
MA-11065

Appearances:

Mr. Barry Delaney, Executive Director, Northern Tier UniServ-West, 213 East First Street, P.O. Box 311, Hayward, Wisconsin 54843-0311, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, by **Attorney Kathryn J. Prenn,** 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the District.

ARBITRATION AWARD

Drummond Education Association, hereafter Union, and Drummond Area School District, hereafter District or Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union requested, and the District concurred, in the appointment of a Commission staff arbitrator to resolve a pending grievance. The undersigned was so designated. An arbitration hearing was held in Drummond, Wisconsin on September 14, 2000. The hearing was not transcribed. The record was closed on November 8, 2000, upon receipt of post-hearing written argument.

ISSUE

The Union frames the issue as follows:

Did the District violate the collective bargaining agreement when it calculated the WRS contribution costs during its QEO costing?

If so, what should the appropriate remedy be?

The District frames the issues as follows:

> Did the District violate the collective bargaining agreement by using the WRS contribution rate in effect on April 1, 1999 when calculating the base year (1998-99) for purposes of the 1999-2001 QEO calculations?
>
> If so, what is the appropriate remedy?

The undersigned adopts the District's statement of the issue.

RELEVANT BACKGROUND

During the negotiation of their 1999-2001 collective bargaining agreement, the parties did not agree upon any method of costing WRS other than that reflected in the following contract language:

ADDENDUM A

SALARY SCHEDULES

> The 1999-2000 and 2000-2001 salary schedules shall be based on a 3.8% total package (salary and fringe benefits) using the WERC's rules for costing a qualified economic offer and using 1998-99 as the base year, with the following exception: The increased costs arising from the changes in Article XXX, Sections C, D, F, and G shall not be included in the 3.8% total package.
>
> The parties have stipulated to the following WRS contribution table:

School Year	Rate for the first 6 months	**Rate for the second 6 months**
1998-99	12.9%	12.1%
1999-00	12.1%	11.5%
2000-01	11.5%	10.9%

The District interpreted the WERC's rules for costing a qualified economic offer as requiring the District to utilize a WRS cost of 12.1% for the QEO Base Year of 1998-99; a WRS rate of 11.8% for 1999-00; and a WRS rate of 11.2% for 2000-01. The QEO Base Year cost of 12.1% reflected the WRS rate in effect on April 1, 1999. The 1999-00 WRS cost and the 2000-01 WRS cost reflected an average of the two WRS rates in effect during each of these school years.

On or about March 29, 2000, the Union filed a grievance with the District challenging the District's "flip-flopping" method of costing WRS and requesting the District to use the average of WRS rates for all three years. Following receipt of the grievance, District Superintendent Dan Vernetti sent a letter to Union Representative Barry Delaney stating, inter alia, that:

> In order to complete my investigation of the grievance, I am requesting that you identify the WERC rule which the Union believes has been violated in the preparation of the 1999-2000 salary schedule. As soon as I receive that information, I will complete my investigation of the grievance and will provide a written response to the grievance as required by Step Two of the grievance procedure.

Union Representative Delaney responded with the following:

> I received your letter dated April 4th. The WERC rules that the Union believes have been violated are the same rules that the District argued in negotiations supporting the District's position of the costing of the WRS contributions.
>
> It is our understanding that the method of costing a fringe benefit can not be changed from year to year when the contribution rates are decreasing in mid-year.
>
> In the calculation of the salary schedule for the 1998-99 year (1997-99 collective bargaining agreement) the District used the average of the two WRS rates in effect for the 1998-99 year.
>
> Using the 1998-99 year as the base year for establishing the 1999-2000 salary schedule the District used just the end-of-the-year WRS contribution rate (not the average rate the District had used for the calculation of the 1998-99 salary schedule).
>
> Then for the 1999-2000 year, the District goes back to using the average WRS rate (not the end-of-the-year rate as the District used for the 1998-99 base year).
>
> It is our position that the WERC costing rules for fringe benefits require a consistent method of calculating such costs for all years.
>
> In addition, Sec. 111.70(4)(cm)8s., Wis. Stat., requires the WERC to prescribe forms for calculating the total increased cost to the municipal employer of compensation and fringe benefits. The District's use of the end-of-the-year

> WRS rate (for the base year 1998-99) does not reflect the cost of incurred by the District for WRS contributions. The only exception to the actual fringe benefit costs the statute allows is when there is an increase of rates in mid-year. This is not the present case since the WRS rates are decreasing in mid-year (not increasing) and thus the statute requires actual costs for fringe benefits.

Thereafter, the grievance was denied and submitted to arbitration.

POSITION OF THE PARTIES

Union

The Union's grievance, as reflected in the grievance documents, was not limited to challenging the District's QEO Base Year costing of WRS. The Union has consistently maintained that the WERC's rules require the District to use the same method of calculating WRS costs for each of the three years and to use the actual cost of WRS contributions for each of the three years.

ERC 33, Appendix A(2) requires only the percentage of a fringe benefit that the employer was paying on the ninetieth day prior to the expiration date of the most recently-expired agreement. Appendix A(2) does not express, in any way, that the contribution rate, in effect on April 1, should be used as if the contribution rate were in effect for the entire QEO Base Year.

The language in Appendix A(3) referring to A(2) is ". . .using the employees identified in Step 1 and the fringe benefits and employer percentage contributions identified in Step 2. . ." (Emphasis supplied) Appendix A(3) states that using the employer's contribution levels identified in Step 2 "complete Form B to calculate the employer cost of compensation and fringe benefits for the year preceding the expiration date specified in your current/most recently expired contract." (Emphasis supplied) The key terms are "costs" and "for the year". The "costs" "for the year" is not obtained by using the contribution rate at the end of the year as if it were in effect for the entire QEO Base Year.

Notwithstanding the District's argument to the contrary, the Sec. 111.70 language defining "Qualified Economic Offer" does not instruct the District to use "for the base year, the fringe benefit contribution rates (or premiums) that were in effect on the snapshot date for the year's cost." Rather, the language provides as follows:

> 1. The employer must maintain the same percentage of the cost of the benefit in years 1 and 2 as the employer paid on the snapshot date of the base year. The term "percentage" is not the same as the term "contribution (or premium) rate".

2. Existing fringe benefit costs will be determined by using sub. (4)(cm)8s.

3. The employer must maintain all fringe benefits provided to the employees as such contributions and benefits existed. Contributions mean the percentage the employer paid on the snapshot date, of the cost of the fringe benefit. "Contribution", in this part of the statute, does not mean the actual dollar amount of the contribution, nor the contribution (or premium rate) that the employer paid on the snapshot date.

The "90th day" snapshot date in Section 111.70(4)(cm)8s. is used to determine the benefits provided; the percentage of the benefit cost paid by the employer; and the complement of employees for which the District provided benefits and compensation.

Section 111.70(4)(cm)8s. references "the cost of compensation and fringe benefits". Thus, if the District were correct, then the "90th day" snapshot date would govern compensation costs, as well as fringe benefit costs. QEO costing forms, however, require that compensation not paid on the "90th day" "snapshot date", such as football coaches salaries and extended contracts, be part of the total compensation costs for the QEO Base Year.

To calculate the fringe benefit costs for a QEO 1 (first year following the base year), the WERC rules use the phrases "calculate the actual employer cost of maintaining the fringe benefit" and "subtract your Step 3 fringe benefit cost from your Step 5 cost and calculate the result as a percentage of your total Step 3 base year cost." For calculating the employer fringe benefit cost for a QEO 2 (second year following the QEO Base Year), the WERC rules use the same terms and method found in calculating the cost of fringe benefits for a QEO 1. Save for the one exception when a fringe benefit rate increases during the year of the QEO Base Year, the WERC rules do not provide different methods of calculating the cost of a fringe benefit from one year to the next.

In arguing that the SHOREWOOD decision and statutory "fall back" language supports its position, the District erroneously assumes that the term "benefit levels" means the same thing as "benefit contribution rates or benefit premium rates." The other decisions relied upon by the District are not on point.

The Union had no part in producing the calculations or in choosing the costing methodology that was used in the 1997-99 contract. Due to the District's willingness to settle above a QEO for the 1997-99 contract and the fact that the District's methodology resulted in a difference of $35.00 per teacher, the Union did not choose to grieve the WRS costing issue.

Using the actual WRS contribution costs, for the year, increases the QEO Base Year total package cost by $7,180; the 1999-00 total package cost by $7,453; and the 2000-01 total package cost by $7,736. Using actual WRS contribution costs for the year, increases the

percentage increase per cell on the salary schedule for 1999-00 from 2.93% to 3.28%. With 44.0 FTE, under the actual WRS costing for the QEO Base Year, the average teacher will receive $140.52 more in wages for the 1999-00 year and $146.64 more in wages for the 2000-01 year than provided for under the District's costing method. Given that future years are based upon total package cost and salary schedules in effect for 2000-2001, the Union's and District's methods of costing produce significant differences.

If the WERC's rules do not require the word "cost(s)" to mean actual costs, it must still be concluded that the rules require the same method of costing for all three years, save for specific exceptions. Possibilities for computing WRS yearly contribution costs, while using the same method for all three years, are

1. Use the actual District cost for all three years

2. Use the end of the year WRS contribution rate for all three years

3. Use the beginning of the year WRS contribution rates for all three years.

The Arbitrator should find that the District violated Addendum A of the 1999-2001 collective bargaining agreement. The District should be ordered to recalculate the salary schedules for 1999-00 and 2000-01, using the same method of calculating yearly costs and the actual WRS costs.

District

For the past five years, there have been two different WRS rates in effect during each school year – one for the first six months and another for the last six months. When calculating the Drummond teacher salary schedules for the 1999-00 and 2000-01, the District utilized the following methodology for costing WRS:

1998-99 (base year) - Use WRS rate in effect on "snapshot" date of 4/1/99 (12.1%).

1999-00 (year 1) – Used average of two WRS rates in effect during the year (11.8% = average of 12.1% for the first six months and 11.5% for the last six months).

2000-01 (year 2) – Used average of two WRS rates in effect during the year (11.2% = average of 11.5% for the first six months and 10.9% for the last six months).

In its written grievance, the Union requests as remedy that the average WRS rate be used for all years of the contract, including the QEO Base Year. Thus, the Union's grievance does not dispute the District's costing methodology with respect to years 1 and 2 of the contract.

At hearing, the Union stated that the real issue was utilization of the same method of costing WRS for all years of costing. The District objects to the Union's introduction of what is essentially a new remedy for the first time at hearing.

Notwithstanding the Union's argument to the contrary, both the QEO statute and the QEO costing rules prescribe that a different methodology is to be used for the QEO Base Year than for the QEO Year 1 and 2. By statute and by rule, in determining the QEO Base Year, the District is required to take a "snapshot" of fringe benefits as such contributions and benefits existed on the 90th day prior to the expiration of the contract. In this case, the "snapshot" date is April 1, 1999.

This "snapshot" provides the basis – and the base year – for calculating the QEO in Years 1 and 2 of the contract. The statutory language, as well as the WERC regulations, require that the level of fringe benefits in existence on the "snapshot date" be costed as though they were in effect for the entire QEO Base Year.

The only time the snapshot date would not be used to calculate QEO Base Year fringe benefits is in situations where a mid-year fringe benefit cost increase occurs after the snapshot date. In such a situation, the increase would be costed as if it occurred at the beginning of the year, consistent with the statute.

Section 111.70(4)(cm)8s. specifically states that mid-year fringe benefit cost increases are to be costed as if they occurred at the beginning of the year. The statute does not identify how mid-year benefit cost decreases are to be costed. The QEO Base Year code language, however, contains "fallback" language which states that the benefit levels in place on the snapshot date are to be used to calculate fringe benefit costs for the base year.

The statutory language pertaining to QEO Years 1 and 2 contains no "fallback" provision. Thus, the District has concluded that mid-year cost decreases that occur in QEO Years 1 and 2 are costed as they actually occur during the course of the year, i.e., six months at the old rate and six months at the new rate. This conclusion is not in conflict with any statutory directive and is consistent with positions taken by the Union.

Wisconsin Courts have specifically rejected the Union's argument that the WERC rules require "actual costs" to be used. The District's interpretation of the methodology to be used when costing QEO Base Year fringe benefits has been confirmed by both the WERC and Wisconsin courts. See SHOREWOOD SCHOOL DISTRICT, DEC. NO. 29259 (12/97); WISCONSIN EDUCATION ASSOCIATION COUNCIL (WEAC) V. WISCONSIN EMPLOYMENT RELATIONS

COMMISSION, 98 CV 1473 (8/00); and RACINE EDUCATION ASSOCIATION V. WISCONSIN EMPLOYMENT RELATIONS COMMISSION AND RACINE UNIFIED SCHOOL DISTRICT, 616 N.W.2D 504 (6/00).

The District used the same WRS costing methodology when calculating the 1997-98 and 1998-99 salary schedules, without challenge from the Union. Clearly, the Union was aware of the District's QEO Base Year WRS costing methodology since at least early 1997. The District has never costed the QEO Base Year any other way since that time. The Union's current claims disputing the costing methodology are misdirected.

Both the parties' past practice and the statutory/administrative code language support the District's interpretation of the proper methodology to be used in costing WRS contributions in the base year of a QEO. Thus, the collective bargaining agreement was not violated. The grievance should be dismissed.

DISCUSSION

Issue

The grievance that was filed by the Union ((Jt. #1) establishes that the Union knew that the District had used an average of two WRS rates when costing QEO Year 1 and QEO Year 2, but had used only one WRS rate, i.e., 12.1%, when costing the QEO Base Year. The remedy requested in this grievance is "that the District use the average WRS rates for all years in costing the yearly WRS total contribution costs for the purpose of calculating the 1999-00 and 2000-01 salary schedules." The grievance, on its face, indicates that the Union agreed with the District's method of costing WRS in QEO Year 1 and QEO Year 2 and that only the costing of the QEO Base Year was in dispute.

The letter submitted by the Union in support of its grievance (Jt. #3) states that "It is our position that the WERC costing rules for fringe benefits require a consistent method of calculating such costs for all years." Standing alone, this statement suggests that the Union is grieving the inconsistency of the District's calculations and that all three years, i.e. QEO Base Year, QEO Year 1 and QEO Year 2 are at issue. This statement, however, does not stand-alone. Subsequent statements of the Union indicate (1) that the consistency requested by the Union is that the District use the "actual costs for fringe benefits" when costing each of the three years and (2) that the District's use of the end-of-the-year WRS rate for the QEO Base Year 1998-99 does not reflect actual costs. The Union does not state that the District's costing in either QEO Year 1 or QEO Year 2 does not reflect "actual costs." Indeed, such a statement would be contrary to the Union position stated in the grievance, i.e., that "Using the average WRS rate for all years reflects the actual costs incurred by the District for WRS contributions each year."

In summary, the evidence of the Union grievance demonstrates that the Union was challenging only the District's method of costing WRS in the QEO Base Year (1998-99) and that the Union was not challenging the District's method of costing WRS in QEO Year 1 and QEO Year 2. The Union's statement of the issue, which permits the Union to call into question the District's method of costing the WRS fringe benefit in QEO Year 1 and QEO Year 2, raises issues that fall outside the scope of the grievance. At the start of hearing, the District made a timely objection to the Union's attempt to raise issues that fall outside the scope of the grievance. Given this timely objection, the Arbitrator must limit her Award to the issue presented in the grievance. As the District has argued, the issue presented in the grievance is as follows:

> Did the District violate the collective bargaining agreement by using the WRS contribution rate in effect on April 1, 1999 when calculating the base year (1998-99) for purposes of the 1999-2001 QEO calculations?
>
> If so, what is the appropriate remedy?

Merits

When the parties adopted the language of Addendum A, the parties agreed to be bound by the "WERC's rules for costing a qualified economic offer." The parties did not agree to be bound by the same costing methodology that was used in the 1997-99 settlement. Thus, the parties' arguments regarding the existence, or non-existence, of a "past practice" of costing are irrelevant.

The Commission and the Courts have not addressed the specific issue presented in this grievance. Thus, the Arbitrator must rely upon the language of the "WERC's rules for costing a qualified economic offer."

The "WERC rules for costing a qualified economic offer" are found in ERC 33, which rules expressly recognize that a qualified economic offer must comply with the requirements of Sec. 111.70(1)(nc), Stats. ERC 33, Appendix, contains forms for determining QEO costs that are required by, and subject to, the provisions of Sec. 111.70(4)(cm)8s, Stats.

As set forth in the introduction to the ERC 33 Appendix, the Wisconsin Act requiring the Commission to create QEO costing forms "does not allow the cost of a qualified economic offer to be based upon the actual cost of such an offer to the employees actually employed during the term of the contract" and "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." As this introductory language reveals, there is not a general prohibition against the use of an "actual cost". Rather, there is a very specific prohibition against using the actual employee complement to cost an offer. This specific prohibition is intended to ensure the use of the cast forward method of costing adopted by the legislature.

ERC 33 Appendix, Form A, was developed by the WERC to ensure the use of the cast forward method of costing adopted by the legislature. Form A, Subsection 1, states as follows:

Developing Employe Base

1. If you are bargaining a contract with a term commencing July 1, 1993 or after, identify all professional school district employes (as defined by Sec. 111.70 (1) (nc), Stats.) who were represented by the labor organization for the purposes of collective bargaining and contract administration on the 90th day prior to the expiration of the current/most recently expired bargaining agreement. Professional school district employes who were employed on the 90th day but who thereafter retire, resign or are terminated prior to the expiration of the current/most recently expired contract are included. Professional school district employes on layoff, sick leave or leave of absence must be included if they continue to be represented by the labor organization for the purposes of collective bargaining and contract administration. Professional school district employes who are replacing employes who are in leave status are not included unless they are represented by the labor organization for the purposes of collective bargaining and contract administration in the same bargaining unit as the employe being replaced. If you are bargaining a contract with a term commencing anytime from July 1, 1992 through June 30, 1993, use April 2, 1993, as your identification date.

As revealed in the plain language of this provision, the sole purpose of this provision is to set forth the guidelines for determining the complement of employees that will constitute the cast forward costing base. This provision provides no guidance with respect to the assignment of a specific cost to any fringe benefit.

Form A, Subsection 2, states as follows:

Developing Fringe Base

2. If you are bargaining a contract with a term commencing July 1, 1993 or after, identify all fringe benefits and your percentage contribution toward the cost thereof as such benefits and contributions existed on the 90th day prior to the expiration of the current/most recently expired agreement, or the 90th day prior to the date on which your negotiations actually commenced if there is no previous collective bargaining agreement between the parties. If your fringe benefit contribution level is expressed as a dollar amount, convert the dollar amount to a percentage for the purposes of this calculation. If you are bargaining a contract with a term commencing anytime from July 1, 1992 through June 30, 1993, use April 2, 1993, as your identification date.

As reflected in the plain language of this provision, the purpose of this provision, with respect to fringe benefits, is to set forth the guidelines for (1) identifying each fringe benefit to be costed in the QEO and (2) identifying the employer's percentage contribution toward the cost of such fringe benefit.

As the District argues, the plain language of Subsection 2 requires the District to take a "snapshot" on the 90th day prior to the expiration of the 1998-99 agreement. As the Union argues, the plain language of Subsection 2 requires that this "snapshot" reflect the District's percentage contribution toward the cost of the WRS fringe benefit.

It is undisputed that the 90th day prior to the expiration of the 1998-99 agreement is April 1, 1999. On April 1, 1999, the District's percentage contribution toward the cost of the WRS fringe benefit was 100% because the District paid the full cost of the WRS fringe benefit.

Form A, Subsection 3, states as follows:

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

Subsection 3 requires the District to "calculate the employer cost of compensation and fringe benefits" for the QEO Base Year 1998-99 using the employee complement identified in Subsection 1 and the "fringe benefits and employer percentage contribution levels" identified in Step 2. As discussed above, the District's "percentage contribution level" to the WRS fringe benefit, as identified in Step 2, is 100%.

Under the plain language of Subsection 3, the District's QEO Base Year cost of the WRS fringe benefit is the cost of contributing 100% of the WRS fringe benefit to the employee complement identified in Subsection 1 for the one year period preceding June 30, 1999. The cost to the District of providing a 100% WRS fringe benefit during the one-year period preceding June 30, 1999, is 12.9% of applicable wages for the first six months of this one year period and 12.1% of applicable wages for the last six months of this one year period, which is an effective cost of 12.5 % of applicable wages.

In accordance with the requirements of Sec. 111.70(4)(cm)8s, Stats., Subsection 3 of Form A states "For the purposes of this calculation, assume that any cost increase incurred during the year was in effect for the entire year." In the present case, the District did not experience a "cost increase" during the QEO Base Year, but rather, experienced a "cost decrease." It is reasonable to conclude that, if the legislature and the Commission had intended a "cost decrease" to be costed as if it were in effect for the entire year, then they would have expressed such intent.

In summary, the most reasonable construction of the plain language of Form A is that the District's QEO Base Year cost for the WRS fringe benefit is 100% of the cost of providing the WRS fringe benefit to the complement of employees identified in Subsection 1 for the one-year period proceeding June 30, 1999. Such a construction is also consistent with the Sec. 111.70(4)(cm)8s, Stats., requirement that "cost shall be determined based upon the total cost of compensation and fringe benefits provided to school district professional employees who are represented by a labor organization on the 90th day before expiration of any previous collective bargaining agreement…." (Emphasis supplied)

As discussed above, the cost to the District of providing 100% of the WRS fringe benefit during the one-year period preceding June 30, 1999, is 12.9% of applicable wages for the first six months of this one year period and 12.1% of applicable wages for the last six months of this one year period, which is an effective cost of 12.5 % of applicable wages. Thus, as the Union argues, the District did not comply with the WERC's rules for costing a qualified economic offer when it costed the QEO Base Year WRS fringe benefit as if the decreased contribution rate of 12.1% were in effect for the one-year preceding June 30, 1999. By failing to comply with the WERC's rules for costing a qualified economic offer, the District has violated Addendum A of the parties' 1999-2001 collective bargaining agreement.

Based upon the above, and the record as a whole, the undersigned issues the following:

AWARD

1. The District violated the collective bargaining agreement by using the WRS contribution rate in effect on April 1, 1999 when calculating the base year (1998-99) for purposes of the 1999-2001 QEO calculations.

2. In remedy of the District's violation of the collective bargaining agreement, the District is to immediately

a) use a WRS rate of 12.5% to calculate the base year (1998-99) for the purposes of the 1999-20001 QEO calculations and
b) make employees whole for all wages and benefits lost as a result of the District's violation of the collective bargaining agreement.

Dated at Madison, Wisconsin this 18th day of January, 2001.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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