

If during any mediation by a commission mediator, the parties have exchanged and submitted to the mediator their single ultimate final offers, as well as a stipulation on matters agreed upon, the parties may waive the informal investigation or formal hearing under s. ERC 33.11 or 33.12. A waiver shall be in writing and may be filed with or subsequent to a petition or stipulation requesting arbitration.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.10 Qualified economic offer. (1) TIME FOR MAKING A QUALIFIED ECONOMIC OFFER. A municipal employer may submit a qualified economic offer to a labor organization at any time after the commencement of negotiations but prior to the close of the investigation.

(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. For any period of time after June 30, 1993, covered by the proposed collective bargaining agreement, 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. For each 12 month period or portion thereof which commences July 1, 1993, and is covered by this agreement, 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) At the time it submits a qualified economic offer to the labor organization or 60 days prior to the stated expiration date of any existing collective bargaining agreement, whichever is earlier, 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. When completing Forms A and B, the treasurer and superintendent or business manager shall use all available cost and employee complement information and shall attest to the accuracy of the information. If additional cost or employee complement information becomes available, the treasurer and superintendent or business manager shall provide the labor organization with revised qualified economic offer calculation Forms A and B.

(4) PROCEDURE FOLLOWING SUBMISSION. The existence of a qualified economic offer does not alter the parties' obligation to engage in collective bargaining as defined in s. 111.70 (1) (a), Stats., or the municipal employer's obligation to maintain the dynamic status quo during any contract hiatus.

(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 par-

ties 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 (or, where the parties are negotiating a reopener under an existing agreement, if it maintains all other economic provisions of the existing 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. The municipal employer shall provide the labor organization with at least 15 days notice of the exact manner in which the qualified economic offer will be implemented. If possible, notice of the manner of implementation shall be given before any determination of deadlock.

(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.

(c) The municipal employer may require professional school district employes to reimburse the municipal employer for the difference between the exact implemented salary increase or decrease and any previously implemented increase and for the difference between any implemented increase or decrease and any salary increase received during a contract hiatus. Except as the parties otherwise agree, to complete any reimbursement, the municipal employer shall withhold the prorated amount necessary from each remaining employe paycheck which will be received prior to expiration of the bargaining agreement or an employe's cessation of employment, whichever occurs first.

(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 was not 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.

(7) The municipal employer's implementation of a qualified economic offer under this section shall not relieve the parties of their mutual obligation to reach agreement and

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stipulate to agreement on all economic issues pursuant to s. 111.70 (4) (cm) 5s, Stats., before any unresolved noneconomic issues are subject to interest arbitration under this chapter.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.11 Informal investigation or formal hearing when the municipal employer has submitted a qualified economic offer. (1) **PURPOSE.** When the municipal employer has submitted a qualified economic offer, the commission or its investigator shall conduct an informal investigation or formal hearing to determine whether the parties are deadlocked in their negotiations. If it is determined that the parties are deadlocked, the commission or its investigator shall obtain the single ultimate final offers of the parties containing their final proposals on all noneconomic issues in dispute, and a stipulation on all matters agreed upon to be included in the new or amended collective bargaining agreement. During the informal investigation or formal hearing, the commission or its investigator may engage in an effort to mediate the dispute.

(2) **INFORMAL INVESTIGATION PROCEDURE.** The commission investigator shall set a date, time and place for the conduct of the informal investigation and shall notify the parties thereof in writing. The informal investigation may be adjourned or continued as the investigator deems necessary. Prior to the close of the investigation, the investigator shall obtain in writing the single ultimate final offers of the parties on the noneconomic issues in dispute and a stipulation on all matters agreed upon to be included in the new or amended collective bargaining agreement. If the investigator determines that the parties are deadlocked in their negotiations, the investigator shall advise the parties in writing of the date on which deadlock occurred. The investigator shall also obtain each party's written position regarding authorization of inclusion of nonresidents of Wisconsin on the arbitration panel to be submitted by the commission. If at the time of the exchange of final offers or during any additional time permitted by the investigator, no objection is raised that either final offer contains a proposal or proposals relating to non-mandatory subjects of bargaining or economic issues, the commission investigator shall serve a notice in writing upon the parties indicating the investigation is closed. The investigator may not close the investigation until the investigator is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer and that both final offers conform to the requirements of s. ERC 33.13 (2). If a party fails to submit a single ultimate final offer within the time prescribed by the investigator, the investigator shall close the investigation based on the last written position of the party. Following the close of the investigation, the commission investigator shall report the findings to the commission, either orally or in writing, as the commission may direct, and at the same time transmit to the commission the final offers and the stipulation received from the parties. The commission investigator shall also notify the commission as to whether both parties have agreed in writing to authorize the commission to include one or more nonresidents of Wisconsin on the arbitration panel to be submitted in the matter.

(3) **FORMAL HEARING PRACTICE AND PROCEDURE.** The commission or its investigator shall set a date, time and place for the conduct of the formal hearing and notify the

parties by formal notice. The commission or its investigator may adjourn or continue the hearing. Hearing practice and procedure shall be as set forth in ch. ERC 10. Prior to the close of the hearing the commission or its investigator shall obtain and exchange the single ultimate final offers, stipulation of agreed upon items and written positions concerning non-resident arbitrators in the manner set forth in sub. (2). If a party fails to submit a single ultimate final offer within the time prescribed by the commission or its investigator, the commission or its investigator shall close the investigation based on the last written position of the party.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction in (2) and (3) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.12 Informal investigation or formal hearing when the municipal employer has not submitted a qualified economic offer. (1) **PURPOSE.** The purpose of the informal investigation shall be as set forth in s. ERC 32.09 (1).

(2) **INFORMAL INVESTIGATION PROCEDURE.** The informal investigation procedure shall be as set forth in s. ERC 32.09 (2). The investigator may not close the investigation until the investigator is satisfied that neither party, having knowledge of the content of the final offer of the other party, would amend any proposal contained in its final offer and that both offers conform to the requirements of s. ERC 33.13 (2). If a party fails to submit a single ultimate final offer within the time prescribed by the investigator, the investigator shall close the investigation based on the last written position of the party.

(3) **FORMAL HEARING PRACTICE AND PROCEDURE.** Formal hearing practice and procedure shall be as set forth in s. ERC 32.09 (3).

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; corrections made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.13 Final offers. (1) **CONTENTS GENERALLY.** Final offers shall contain proposals relating only to mandatory subjects of bargaining, except either final offer may contain proposals relating to permissive subjects of bargaining if there is no timely objection under s. ERC 33.14 by the other party to the inclusion of the proposals in such a final offer. Absent a timely objection, the proposals shall be treated as mandatory subjects of bargaining for the duration of the s. 111.70 (4) (cm), Stats., impasse resolution process, including any exchanges of final offers which may follow declaratory ruling proceedings under s. ERC 33.14 or 33.15 or injunction proceedings referred to in s. ERC 33.22 (1).

(2) **CONTENTS REGARDING ECONOMIC ISSUES, TERM OF AGREEMENT, REOPENER PROVISIONS AND SALARY STRUCTURE.** (a) If the municipal employer submits a qualified economic offer applicable to any period beginning on or after July 1, 1993, final offers for the period may not contain any economic issues as defined in s. 111.70 (1) (dm), Stats.

(b) Final offers for any collective bargaining agreement entered into on or after August 12, 1993 which covers any period of time prior to July 1, 1995 shall have an expiration date of June 30, 1995. If compliance with the requirement of a June 30, 1995 expiration date would require that the parties enter into a contract with a term in excess

of 3 years, final offers for such an agreement shall have an expiration date of June 30, 1993, and final offers for any successor agreement shall have an expiration date of June 30, 1995. Final offers for the successor agreement to collective bargaining agreements which have an expiration date of June 30, 1995 shall have an expiration date of June 30, 1997.

(c) Final offers may not contain a provision for reopening of negotiations during the term of an existing agreement for any purpose other than negotiation of a successor agreement or with respect to any portion of an agreement that is declared invalid by a court or administrative agency or rendered invalid by the enactment of a law or promulgation of a federal regulation. Any other provisions for reopening of negotiations during the term of an existing agreement shall be agreed upon by the parties as a part of the stipulation of agreed upon items. Parties may agree to reopen negotiations as to any period of any agreement whose expiration date is consistent with this subsection.

(3) **MODIFICATION OF FINAL OFFERS FOLLOWING CLOSE OF INVESTIGATION.** After the investigation, a party may modify its final offer only with the consent of the other party. A modification shall be in writing, supported by a written statement signed by the representative of the other party.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; corrections in (1) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.14 Procedure for raising objection that proposals relate to non-mandatory subjects of bargaining. (1) OBJECTION. (a) Time for raising an objection. An objection that a proposal relates to a non-mandatory subject of bargaining may be raised at any time after the commencement of negotiations, but prior to the close of the informal investigation or formal hearing.

(b) *During negotiations, mediation or investigation.* If either party, during negotiations or during commission mediation or investigation, raises an objection that a proposal or proposals by the other party relate to a non-mandatory subject of bargaining, either party may seek a declaratory ruling before the commission pursuant to s. 111.70 (4) (b), Stats., s. ERC 33.15 and ch. ERC 18.

(c) *At time of call for final offers.* If either party, at such time as the commission or its investigator calls for and obtains and exchanges the proposed final offers of the parties, or within a reasonable time thereafter as determined by the commission or its investigator, raises an objection that a proposal or proposals by the other party related to a non-mandatory subject of bargaining, the offers shall not be deemed to be final offers. The commission or its investigator shall not close the investigation or hearing but shall direct the objecting party to reduce the objection to writing, identifying the proposal or proposals claimed to involve a non-mandatory subject of bargaining and the basis for the claim. The objection shall be signed and dated by a duly authorized representative of the objecting party, and copies of the objection shall, on the same date, be served on the other party, as well as the commission or its investigator conducting the investigation or hearing, in the manner and within a reasonable time as determined by the commission or its investigator. The objecting party shall then file a petition for declaratory

ruling pursuant to s. 111.70 (4) (b), Stats., s. ERC 33.15 and ch. ERC 18.

(2) **EFFECT OF BARGAINING ON PERMISSIVE SUBJECTS.** Bargaining with regard to permissive subjects of bargaining during negotiations and prior to the close of the investigation does not constitute a waiver of the right to file an objection under in sub. (1) (c).

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; corrections made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.15. Petition or stipulation to initiate a declaratory ruling proceeding. (1) WHO MAY FILE. Either party may file a petition, or both of the parties may file a stipulation, to initiate a declaratory ruling proceeding before the commission to determine whether a proposal or proposals relate to a mandatory subject of bargaining.

(2) **WHERE TO FILE.** A petition or stipulation shall be filed with the commission, and if a petition is filed a copy shall be served on the other party at the same time.

(3) **WHEN TO FILE.** A petition or stipulation may be filed with the commission during negotiations, mediation or investigation. If a petition or stipulation is filed after the investigator calls for final offers, the petition or stipulation for declaratory ruling must be filed within 10 days following the service on the commission or its investigator of the written objection that a proposal or proposals relate to non-mandatory subjects of bargaining. Failure to file such a petition or stipulation within this time period shall constitute a waiver of the objection and the proposal or proposals involved therein shall be treated as mandatory subjects of bargaining.

(4) **PROCEDURE FOLLOWING ISSUANCE OF DECLARATORY RULING.** Following the issuance and service of the declaratory ruling, the commission or its investigator shall conduct further investigation or hearing for the purpose of obtaining the final offer of each party before closing the investigation. A final offer may not include any proposal which the commission has found to be a non-mandatory subject of bargaining unless consented to in writing by the other party. If the commission's decision is appealed the parties may agree to the conditional inclusion of such proposals in their final offers.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.16 Procedure for raising objection that a proposal is not subject to interest arbitration. (1) TIME FOR RAISING OBJECTION. After a stipulation is reached pursuant to s. ERC 33.11 (2) on all economic issues to be included in a new or reopened agreement and prior to close of the investigation of an interest arbitration petition, either party may raise an objection that a proposal is an economic issue not subject to interest arbitration.

(2) **FILING AN OBJECTION.** An objection that a proposal is an economic issue not subject to interest arbitration shall be filed with the commission as a petition for declaratory ruling pursuant to s. 227.41, Stats. During the pendency of a petition for declaratory ruling, the investigation of the petition for interest arbitration may not be closed.

(3) **PROCEDURE FOLLOWING ISSUANCE OF DECLARATORY RULING.** Following the issuance and service of the declaratory ruling, the commission or its investigator shall conduct further investigation or hearing for the purpose of

obtaining the final offer of each party before closing the investigation.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction in (1) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.17 Certification of results of investigation or hearing, or certification based on stipulation. (1) WHEN ISSUED. After consideration of either the report of the commission or its investigator following the conduct of the investigation or formal hearing, or after the consideration of the parties' stipulation to waive investigation or formal hearing, the commission shall issue a certification determining whether there has been substantial compliance with s. 111.70 (4) (cm), Stats., the commission may order compliance with s. 111.70 (4) (cm), Stats., if it would tend to result in a settlement.

(2) CONTENTS. The certification shall contain findings of fact and conclusions of law material in the matter, as well as an order either initiating arbitration or dismissing the petition or stipulation, consistent with the intent of s. 111.70 (4) (cm), Stats.

(3) SUBMISSION OF PANEL. If the certification requires that arbitration be initiated and the parties have not previously agreed to their own procedures for resolving the deadlock, the parties shall be directed to select an arbitrator within 10 days following the issuance of the certification from a panel of 7 arbitrators designated by the commission. Unless the parties mutually agree otherwise, the panel members shall be selected by a random computer process. Unless the parties have mutually agreed otherwise in writing, the panel shall not include individuals who are nonresidents of Wisconsin at the time the panel is submitted. In the absence of an agreement to another method of selection, the parties shall select the arbitrator by alternately striking names from the panel until a single name remains, who shall be the arbitrator. The order of proceeding in the selection process shall be determined by lot.

(4) TRIPARTITE PANEL. In lieu of the procedures set forth in sub. (3), both parties may request the commission to appoint a tripartite arbitration panel consisting of one member selected by each of the parties and a neutral person designated by the commission who shall serve as chairperson. Unless the parties have mutually agreed otherwise in writing, the commission's designee shall be a resident of Wisconsin at the time of designation.

(5) RANDOM APPOINTMENT. In lieu of the procedures set forth in sub. (3), at the request of both parties the commission shall submit a list of 7 arbitrators from which each party will strike one name as specified in sub. (3). Unless the parties mutually agree otherwise, the panel members shall be selected by a random computer process. Unless the parties have mutually agreed otherwise in writing, the panel may not include individuals who are nonresidents of Wisconsin at the time the names of the panel members are submitted. Upon notification of the names stricken by each party, the commission shall select the arbitrator by lot from the 5 remaining names.

(6) SERVICE OF CERTIFICATION AND PANEL. Copies of the certification and the names of the panel members shall be served on the parties by certified mail.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

Register, December, 1994, No. 468

ERC 33.18. Order appointing arbitrator. (1) NOTIFICATION OF SELECTION. The parties, or either of them, shall notify the commission in writing as to the identity of the arbitrator selected by them immediately upon selection. In this section "arbitrator" refers to a single arbitrator, a tripartite arbitration panel, or the impartial chairperson of a tripartite arbitration panel.

(2) ORDER. Upon notification of the identity of the arbitrator selected or after completing designation or random selection of the arbitrator, the commission shall serve the parties with copies of its order of the appointment of the arbitrator. The commission shall at the same time submit a copy of the order to the selected arbitrator, as well as copies of the final offers of the parties. A notice to the public shall be appended to the order setting forth the nature of the order, the identity of the arbitrator and the procedure for obtaining copies of final offers and requesting a public hearing.

(3) PUBLIC NOTICE. Immediately upon receipt of the notice, the municipal employer shall post copies of the notice where notices to the public are usually posted. In addition, using the procedures of s. 19.84, Stats., the municipal employer shall inform the public of the content of the notice.

(4) COPIES OF FINAL OFFERS. The single final offers submitted to the appointed arbitrator are public documents and copies may be obtained from the commission, by any person upon written request, following the issuance of the order making such appointment, at the cost of reproduction and postage.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.19. Public hearing and arbitration hearing. (1) TIME AND PLACE. The arbitrator shall within 10 days of his or her formal appointment, establish the date, time and place for the arbitration hearing and shall issue and serve upon the parties a notice of hearing specifying the date, time and a place within the school district where the hearing will be held. The hearing date shall not fall within the 10-day period. The hearing shall be open to the public.

(2) WITHDRAWAL OF FINAL OFFERS. The arbitrator shall notify the parties of a date, preceding the arbitration hearing, when a party shall provide written notice to the arbitrator, the other party, and the commission that said party is withdrawing its final offer. If both parties timely withdraw their final offers and mutually agreed upon modifications, and the labor organization gives 10 days written notice to the municipal employer and the commission of its intent to strike, the commission shall endeavor to mediate the dispute.

(3) PETITION FOR PUBLIC HEARING. Five citizens of the jurisdiction served by the municipal employer involved may, within 10 days after the appointment of the arbitrator, file a request in writing with the commission that a public hearing be convened prior to the arbitration hearing. A request shall be deemed a petition under s. 111.70 (4) (cm) 6.b, Stats. The signers shall set forth their addresses and a statement that they are citizens of the jurisdiction served by the school district. A copy of the request shall be served on both the parties and the arbitrator.

(4) NOTICE OF PUBLIC HEARING. Upon receipt of a citizen petition and after the arbitration hearing has been sched-

uled by the arbitrator, the school district involved shall notify the public, as provided in s. ERC 33.18 (3), that a public hearing will be convened prior to the arbitration hearing. The notice shall identify the parties involved and shall set forth the date, time and place of the hearing. Copies of the notice shall be served by the municipal employer on the collective bargaining representative involved, the arbitrator, and the commission.

(5) **PURPOSE OF PUBLIC HEARING.** The public hearing shall provide an opportunity for both parties to explain or present supporting arguments for their positions and provide an opportunity to members of the public to offer their comments and suggestions.

(6) **PROCEDURE IN PUBLIC HEARING.** The arbitrator shall take reasonable steps to ensure that the public hearing is orderly and that it does not result in undue delay or cost to the parties. The arbitrator may require members of the public, who desire to offer comments and suggestions, to register, may determine the sequence in which the parties and the members of the public shall be heard, and may determine when the hearing shall be terminated.

(7) **TRANSCRIPTS.** Either party or any person participating in the public hearing may make their own arrangements to have a transcript of the public hearing prepared at the party's or person's own expense. Arbitration proceedings shall not be delayed for the purpose of awaiting the preparation of a transcript. If the public hearing is recorded or transcribed, the arbitrator shall be furnished a copy upon request.

(8) **SCOPE OF ARBITRATION HEARING.** The arbitration hearing shall involve matters necessary for the arbitrator to issue a compulsory and final and binding arbitration award by selecting the final offer and mutually agreed upon modifications of either party. In making such selection the arbitrator shall give weight to the factors set forth in s. 111.70 (4) (cm) 7, Stats., and the parties shall be prepared to present evidence and argument relative to the factors involved.

(9) **ARBITRATION HEARING PROCEDURE.** Hearings shall be within the control of the arbitrator and shall be as expeditious as the nature of the dispute will allow. The arbitrator may:

- (a) Administer oaths and affirmation;
- (b) Issue subpoenas in the name of the commission;
- (c) Rule on offers of proof and receive relevant evidence;
- (d) Regulate the course of the arbitration hearing; and
- (e) Dispose of procedural requests and similar matters.

(10) **WAIVER OF HEARING, TRANSCRIPT AND BRIEF.** With the consent of the arbitrator, the parties may agree to waive the convening of a formal hearing, the preparation of a transcript of the arbitration hearing or the filing of briefs.

(11) **MEDIATION.** Nothing in this chapter or s. 111.70 (4) (cm), Stats., precludes the parties from mutually agreeing during arbitration to have the arbitrator or the commission or both attempt to mediate the dispute at any time prior to the issuance of an award, but no party shall be

obligated to participate in mediation or to continue to participate in mediation.

(12) **ISSUANCE OF AWARD.** The arbitrator shall issue the arbitration award in writing as expeditiously as possible following the receipt of final arguments or briefs, if any. If the award is issued by a tripartite panel, each member shall execute the award, either affirming or dissenting. The arbitrator shall submit copies of an executed and signed award, as well as a statement reflecting fees and expenses, if any, to the parties and the commission. An arbitrator who repeatedly or egregiously fails to issue a decision within 60 days following receipt of final arguments or briefs, if any, shall be subject to removal from the commission's list of qualified arbitrators following notice and an opportunity to be heard. Reinstatement to the list may be granted where the commission is satisfied that the individual will be able to consistently issue timely awards under s. 111.70 (4) (cm) 6.d., Stats.

(13) **COSTS.** The fees and expenses of the arbitrator including, but not limited to, the conduct of the public hearing, arbitration hearings, the rental of hearing rooms, and the preparation of the award, shall be equally borne by the parties. The parties may obtain information with regard to the per diem and other charges of arbitrators upon request from the commission. Costs of subpoenas and witness fees shall be borne by the party requesting the subpoena or witness. Fees of and expenses incurred by the reporter, if any, shall be borne equally by the parties if the arbitrator desires a transcript, or where both parties have agreed that the hearing be transcribed. If only one party desires a transcript, that party is solely responsible for the fees and expenses incurred by the reporter and shall provide a copy of the transcript to the arbitrator. The fees and expenses of arbitrators selected by one of the parties to serve on a tripartite panel shall be paid by the party making the selection.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction in (4) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.20 Enforcement of award. (1) **PROCEDURE.** If either party refuses or otherwise fails to implement an interest arbitration award lawfully made by failing to incorporate it into a written collective bargaining agreement, the other party may file a complaint of prohibited practices as provided in ch. ERC 12. The proceeding shall be a class 2 proceeding under s. 227.01 (3) (b), Stats., and shall be governed by ss. 111.07 and 111.70 (4) (a), Stats. In determining whether an interest arbitration award was lawfully made, the commission shall find that said award was not lawfully made if:

(a) The interest arbitration award was procured by corruption, fraud or undue means;

(b) There was evident partiality on the part of the neutral arbitrator or corruption on the part of the arbitrator;

(c) The arbitrator was guilty of misconduct in refusing to conduct an arbitration hearing upon request, refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear supporting arguments or evidence pertinent and material to the controversy; or was guilty of any other misbehavior by which the rights of any party have been prejudiced; or

(d) The arbitrator exceeded his or her powers, or so imperfectly executed them, that a mutual, final and definite interest arbitration award was not made.

(2) **CIVIL LIABILITY.** Any party refusing to include an arbitration award or decision under s. 111.70 (4) (cm), Stats., in a written collective bargaining agreement or failing to implement the award or decision, unless good cause is shown, shall be liable for attorney fees, interest on delayed monetary benefits, and other costs incurred in any action by the nonoffending party to enforce the award or decision.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction in (1) (intro.) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.21 Modification of award. Where, in a proceeding for enforcement, it appears that an interest arbitration award was lawfully made, but that the award requires modification or correcting, the commission shall issue an order modifying or correcting the award. An interest arbitration award may be modified or corrected where:

(1) A court enters an order, which is not subject to further appeal, reversing a commission ruling that a particular proposal contained in the award is a mandatory subject of bargaining;

(2) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;

(3) The arbitrator has awarded upon a matter not submitted, unless it is a matter not affecting the merits of the award upon the matters submitted; or

(4) The award is imperfect in matter of form not affecting the merits of the controversy.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

ERC 33.22 Procedure following court injunction of a strike posing an imminent threat to public health or safety. (1) **NEW FINAL OFFERS.** Following the issuance of a court order enjoining a strike which poses an imminent threat to the public health and safety, and pursuant to the order of the court, the parties shall submit to the commission new written final offers which are consistent with s. ERC 33.18 (2) on all disputed issues within the time limit set by the court.

(2) **MEDIATION.** Within the time limit set by the court for the submission of new final offers, the parties may mutually, in writing, request that the commission proffer its mediation services to the parties in an attempt to resolve their deadlock. Upon receipt of a request, the commission or its investigator shall arrange a mutually satisfactory date and place for mediation.

(3) **ARBITRATION.** If, after mediation, within the time limits set by the court, the parties remain deadlocked, the commission shall transmit the new final offers to the arbitrator, or to a successor designated by the commission. The arbitrator or a successor shall immediately commence to arbitrate the dispute. The arbitration proceeding shall be in accordance with s. ERC 33.19.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94; correction in (1) and (3) made under s. 13.93 (2m) (b) 7, Stats., Register, December, 1994, No. 468.

ERC 33.23 Information. Parties subject to s. 111.70 (4) (cm), Stats., shall, upon request, provide the commission with information the commission deems necessary to meet its statutory responsibilities to report on the operation of the arbitration law under s. 111.70 (4) (cm), Stats., and on its effect on collective bargaining in the state.

History: Cr. Register, May, 1994, No. 461, eff. 6-1-94.

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APPENDIX

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
MINIMUM QUALIFIED ECONOMIC OFFER CALCULATION

Note: 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 employe complement is present during the term of the contract.

FORM A

This form and Form B must be provided by the district to the labor organization 60 days prior to contract expiration, or whenever a qualified economic offer is made, whichever is earlier.

Note: If the base year salary and fringe benefit costs cannot be established because the parties have not reached voluntary agreement for the period prior to July 1, 1993, or have not submitted single ultimate final offers for the period prior to July 1, 1993, then Forms A and B must be provided to the labor organization within 60 days of the voluntary agreement or the commission's certification of results of investigation. If the parties have submitted single ultimate final offers, Forms A and B shall be completed for each offer.

DEVELOPING A MINIMUM QUALIFIED ECONOMIC OFFER

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.

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.

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 _____

ERC 33 Appendix

QEO 1 Dollar Amounts

4. Calculate 3.8%, 2.1% and 1.7% your step 3 total and enter here
 3.8% = _____ 2.1% = _____ 1.7% = _____

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

QEO 1 Fringe Benefit Calculation

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 percentage contribution levels for the first 12-month period following the stated expiration date in the current/most recently expired contract. If your contract will have a duration of less than 12 months, prorate your cost calculation to reflect your actual contract duration, if appropriate. Enter this cost here and on Form B, QEO 1, fringe benefit cost. _____
6. Subtract your Step 3 base fringe benefit cost from your Step 5 cost and calculate the result as a percentage of your total Step 3 base year cost. Enter the result here and on Form B, QEO 1, fringe benefit percentage. _____

QEO 1 Step Calculation

7. For the first 12-month period following the stated expiration date in the current/most recently expired contract, calculate the total additional cost of providing each employee identified in Step 1 with any salary increase to which they would be entitled by virtue of an additional year of service on the salary schedule (longevity is to be included if part of salary schedule). Enter this cost here and on Form B, QEO 1, steps _____
8. Calculate your Step 7 cost as a percentage of the total Step 3 base year cost. Enter the result here. _____

QEO 1 Promotion/Lane Calculation

9. Calculate any increase in salary received by Step 1 employees due to promotions or additional professional qualifications during the year preceding the stated expiration date of the current/most recently expired contract. Enter this cost here and on Form B, QEO 1, lanes/promotions. _____
10. Calculate your Step 9 cost as a percentage of your total Step 3 base year cost. Enter the result here. _____

End of first year QEO calculation

If you are bargaining a contract with a duration of 12 months or less, stop and proceed to the Qualified Economic Offer Instruction, Form C.

Start of second year QEO calculation

Total QEO 1 Base Cost Calculation

11. Repeat Step 3 for the first 12-month period following the stated expiration date of your current/most recently expired contract. Enter the total QEO 1 salary and fringe benefit costs from Form B here.

Salary _____
 Fringe _____
 Total _____

QEO 2 Dollar Amounts

12. Calculate 3.8%, 2.1% and 1.7% of your Step 11 total and enter here:
 3.8% = 2.1% = _____ 1.7% = _____

QEO 2 Fringe Benefit Calculation

If your contract will have a duration of less than 24 months, prorate your QEO 2 cost calculation to reflect your actual contract duration, if appropriate.

13. Repeat Step 5 for the second 12-month period following the stated expiration date in the current/most recently expired contract. Enter this cost here and on Form B, QEO 2, fringe benefit cost. _____
14. Subtract your Step 5 fringe benefit cost from your Step 13 cost and calculate the result as a percentage of your Step 11 total QEO 1 cost. Enter the result here and on QEO 2, Form B, fringe benefit percentage. _____

QEO 2 Step Calculation

15. Repeat Step 7 step calculation for the second 12-month period following the stated expiration date in the current/most recently-expired contract. Enter the cost here and on Form B, QEO 2, steps _____
16. Calculate your Step 15 cost as a percentage of your Step 11 total QEO 1 cost. Enter the result here _____

QEO 2 Promotion/Lane Calculation

17. Repeat the amount calculated in Step 9 lane for the second 12-month period following the stated expiration date in the current/most recently-expired contract. Enter this cost here and on Form B, QEO 2, Lanes/Promotions _____
18. Calculate your Step 17 cost as a percentage of your Step 11 total QEO 1 cost. Enter the result here _____

Proceed to the qualified economic offer instruction form C.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FORM B

This Form and Form A must be provided by the district to the labor organization 60 days prior to contract expiration, or whenever a qualified economic offer is made, whichever is earlier.¹

<u>Salary</u>	<u>Base Year</u>	<u>QEO1²</u>	<u>QEO2²</u>
Salary Scheduled (For the base year, include base year step costs but don't include new lane costs incurred during the base year)	_____	_____ ³	_____ ⁴
Additional QEO Salary Schedule Cost	_____ xxx	_____	_____
Additional Step Advancement	_____ xxx	_____	_____
Additional Lane Advancement/Promotions	_____	_____	_____
Salary Subtotal	_____	_____	_____
Longevity (include here if not on salary schedule)	_____	_____	_____
Extended Contracts	_____	_____	_____
Co-Curricular Pay	_____	_____	_____
Extra Duty Pay	_____	_____	_____
Athletic Events	_____	_____	_____
Department Head	_____	_____	_____
Curricular Work	_____	_____	_____
Overload Pay	_____	_____	_____
M-Team	_____	_____	_____
IEP	_____	_____	_____
Supervision	_____	_____	_____
Other	_____	_____	_____
Total Extra Duty Pay	_____	_____	_____
Summer School	_____	_____	_____
Severance Pay	_____	_____	_____
Sick Leave Payout	_____	_____	_____
Other _____	_____	_____	_____
Total Salary Cost	_____	_____	_____

EMPLOYMENT RELATIONS COMMISSION

	<u>Base Year</u>	<u>QE01</u>	<u>QE02</u>
Fringe Benefit Costs			
Credit Reimbursement ⁵	_____	_____	_____
Social Security	_____	_____	_____
Retirement	_____	_____	_____
Health Insurance			
No. S _____ No. F _____	_____	_____	_____
Employer % Contribution			
Level S _____ F _____	_____	_____	_____
Dental Insurance			
No. S _____ No. F _____	_____	_____	_____
Employer % Contribution			
Level S _____ F _____	_____	_____	_____
Vision Insurance			
No. S _____ No. F _____	_____	_____	_____
Employer % Contribution			
Level S _____ F _____	_____	_____	_____
Life Insurance			
Employer % Contribution			
Level _____	_____	_____	_____
Disability Insurance			
Employer % Contribution			
Level _____	_____	_____	_____
Long-Term Care Insurance			
Employer % Contribution			
Level _____	_____	_____	_____
Other _____	_____	_____	_____
Total Fringe Benefit Cost	_____	_____	_____
Total Salary and Fringe Benefit Cost	_____	_____	_____
QE01 Increased/decreased salary cost as a percentage of base year total salary and fringe benefit cost		_____	
QE01 Increased/decreased fringe benefit cost as a percentage of base year total salary and fringe benefit cost		_____	
QE02 Increased/decreased salary cost as a percentage of QE01 total salary and fringe benefit cost			_____
QE02 Increased/decreased fringe benefit cost as a percentage of QE01 total salary and fringe benefit cost			_____

Attach a chart identifying the number of base year employees at each step and lane on any existing salary schedule
 We swear that we completed this form in as accurate a manner as possible.

Superintendent/ Business Manager	Date
Treasurer	Date

¹If the base year salary and fringe benefit costs cannot be established because the parties have not reached voluntary agreement for the period prior to July 1, 1993, or have not submitted single ultimate final offers for the period prior to July 1, 1993, then Forms A and B must be provided to the labor organization within 60 days of the voluntary agreement or the commission's certification of results of investigation. If the parties have submitted single ultimate final offers, Forms A and B shall be completed for each offer.

²The QEO1 and 2 salary costs will remain the same as the base year costs for lane advancement/promotions, longevity (if not a step), extended contracts, co-curricular pay, extra duty pay, summer school, severance pay, sick leave payout, etc. unless the rate of compensation increases due to an increase in the salary schedule or an additional year of service entitles base year employe(s) to additional compensation.

³Enter base year salary subtotal.

⁴Enter QEO1 salary subtotal.

⁵The QEO1 and QEO2 credit reimbursement costs will remain the same as the base year costs unless the rate of reimbursement increases due to an increase in the salary schedule.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
QUALIFIED ECONOMIC OFFER INSTRUCTIONS

FORM C

Utilize the following instructions to determine the components of a minimum qualified economic offer.¹

Note: If payment of any appropriate salary increase would raise your fringe benefit costs (due to resultant social security and retirement cost increases) above 1.7% of the step 3 (base cost), then reduce the salary increase in the amount necessary to keep the combined cost of fringe benefits, steps, lanes/promotions, and average salary increase at 3.8% of the step 3 (base cost).

When calculating any appropriate salary increase or decrease, include any increased or decreased salary cost in extended contracts, co-curricular pay, extra duty pay, etc., which is produced by salary schedule increases or decreases or payment of steps or lanes.

1. Complete Forms A and B.
2. Using the information on Form A, determine how the law requires you to proceed by identifying the cost combination which applies to the first 12-month period of your offer. If your contract has a duration of less than 12 months, you may need to prorate any salary increases or decreases.
 - A. If the cost identified by Step 6 (fringe benefits) is 1.7% or less than Step 3 (base cost) and the cost identified by Steps 8 (steps) and 10 (promotions/lanes) are less than 2.1% of Step 3 (base cost), you must do the following for all employees who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.
 1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.
 2. Pay all eligible employees any salary increase to which they are entitled by virtue of an additional year of service on the salary schedule. Include longevity payments if they are part of the salary schedule.
 3. Pay all eligible employees any salary increase to which they are entitled by virtue of a promotion or additional professional qualifications.
 4. Pay an average salary increase to all employees in an amount determined by the difference between 2.1% of Step 3 (base cost) and the combined cost of Steps 8 (steps) and 10 (promotions/lanes) and in a manner which does not alter the relationship between steps and lanes in your existing salary structure. The options available for distribution of the general salary increase are a uniform dollar amount increase on each salary cell; or a uniform % increase to each salary cell; or an increase in the base which increases each cell in accordance with the existing salary structure. Use the option which does not alter your existing salary structure as reflected by the existing relationship between steps and lanes.
 - B. If the cost identified by Step 6 (fringe benefits) is more than 1.7% of the Step 3 (base cost) but the combined cost identified by Steps 6 (fringe benefits), 8 (steps) and 10 (promotions/lanes) is less than 3.8% of the Step 3 (base cost), you must do the following for all employees who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.
 1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.
 2. Pay all eligible employees any salary increase to which they are entitled by virtue of an additional year of service on the salary schedule. Include longevity payments if they are part of the salary schedule.
 3. Pay all eligible employees any salary increase to which they are entitled by virtue of a promotion or additional professional qualifications.
 4. Pay an average salary increase to all employees in an amount determined by the difference between 3.8% of Step 3 (base cost) and the combined cost of Steps 6 (fringe benefits), 8 (steps) and 10 (promotions/lanes) and in a manner which does not alter the relationship between steps and lanes in your existing salary structure. The options available for distribution of the general salary increase are a uniform dollar amount increase on each salary cell; or a uniform % increase to each salary cell; or an increase in the base which increases each cell in accordance with the existing salary structure. Use the option which does not alter your existing salary structure as reflected by the existing relationship between steps and lanes.
 - C. If the combined cost identified by Steps 6 (fringe benefits), 8 (steps) and 10 (promotions/lanes) is 3.8% or less than Step 3 (base cost) and the cost identified by Step 8 (steps) is less than 2.1% of Step 3 (base cost) and the cost of Steps 8 (steps) and 10 (promotions/lanes) is 2.1% of Step 3 (base cost), you must do the following for all employees who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.
 1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.

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2. Pay all eligible employes any salary increase to which they are entitled by virtue of an additional year of service on the salary schedule. Include longevity payments if they are part of the salary schedule.
 3. Pay all eligible employes any salary increase to which they are entitled by virtue of a promotion or additional professional qualifications.
- D. If the cost identified by Step 6 (fringe benefits) is 1.7% or less than Step 3 (base cost), and the cost identified by Step 8 (steps) is less than 2.1% of Step 3 (base cost) but the cost identified by Steps 8 (steps) and 10 (promotions/lanes) is more than 2.1% of Step 3 (base cost), then you must do the following for all employes who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.
1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.
 2. Pay all eligible employes any salary increase to which they are entitled by virtue of an additional year of service on the salary schedule. Include longevity payments if they are part of the salary schedule.
 3. Calculate the prorated portion of Step 9 (promotions/lanes) which can be funded by 2.1% minus the cost identified in Step 8 (steps). To identify the proration percentage, identify the amount of money available to fund promotions/lanes and divide by the amount of money necessary to fully fund promotions/lanes.
- Pay the same prorated salary increase to all eligible employes entitled thereto by virtue of an additional promotion or the additional attainment of professional qualifications. For example, if the foregoing calculation would allow payment of one-half of the Step 9 (promotions/lanes) salary increase to eligible Step 1 employes, you must pay one-half of the salary increase to which your actual employes are entitled by virtue of promotions/additional qualifications during the first 12 months of your offer.
- E. If the cost identified by Step 6 (fringe benefits) is 1.7% or less than Step 3 (base cost) and the cost identified by Step 8 (steps) is 2.1% of Step 3 (base cost), you must do the following for all employes who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.
1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.
 2. Pay all eligible employes any salary increase to which they are entitled by virtue of an additional year of service on the salary schedule. Include longevity payments if they are part of the salary schedule.
- F. If the cost identified by Step 8 (steps) is more than 2.1% of Step 3 (base cost) or the combined costs identified by Steps 6 (fringe benefits) and 8 (steps) are more than 3.8% of Step 3 (base cost), then you must do the following for all employes who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.
1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.
 2. Calculate the prorated portion of the Step 7 (steps) increase which could be funded by the lesser of:
 - a. Step 7 cost (steps) minus the amount by which the Step 7 cost (steps) exceeds 2.1% of Step 3 (base costs).
 - or
 - b. 2.1% of Step 3 (base cost) minus the amount by which the Step 5 cost (fringe benefits) exceeds 1.7% of Step 3 (base cost).
- To identify the proration percentage, identify the amount of money available to fund steps and divide by the amount of money necessary to fund a full step for all eligible employes.
- Pay the same prorated salary increase to all eligible employes entitled thereto by virtue of an additional year of employment on the salary schedule. Include longevity payments if they are part of the salary schedule. For example, if the foregoing calculation would allow payment of half of the Step 7 (steps) salary increase to eligible Step 1 employes, you must pay one-half of the salary increase to which any of your actual employes are entitled by virtue of an additional year of service on the salary schedule during the first 12 months of your offer.
- G. If the cost identified by Step 6 (fringe benefits) is 3.8% of Step 3 (base cost), you must do the following for all employes who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.
1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.
- H. If the cost identified by Step 6 (fringe benefits) is more than 3.8% of Step 3 (base cost), then you must do the following for all employes who are actually represented by the labor organization for the purposes of collective bargaining and contract administration.

1. Maintain all fringe benefits identified on Form B and the district's percentage contribution toward the cost thereof.
2. You may decrease the salary of all employes in an amount determined by the difference between the cost identified by Step 6 (fringe benefits) and 3.8% of Step 3 (base cost) and in a manner which does not alter the relationship between steps and lanes on your existing salary structure. The options available for distribution of the average salary decrease are a uniform dollar amount decrease on each salary cell; or a uniform % decrease on each salary cell; or a decrease in the base which decreases each cell in accordance with the existing salary structure.

For the second year or portion thereof, repeat your evaluation of options a-h utilizing the costs identified in steps 13-18 of Form A.

WISCONSIN ADMINISTRATIVE CODE

FORM D

Pursuant to s. 111.70 (4) (cm) 8s, Stats., the municipal employer shall file a completed copy of this form with the Wisconsin employment relations commission and the labor organization as soon as possible after the effective date of any collective bargaining agreement covering school district professional employes for any period after June 30, 1993.

Name of school district _____

Name of labor organization _____

Date agreement became effective _____

Period after June 30, 1993 covered by the agreement _____

Total increased percentage salary cost for each 12-month period of the post-June 30, 1993 period¹ _____

Total increased percentage fringe benefit cost for each 12-month period of the post-June 30, 1993, period¹ _____

Dated this _____ day of _____, 199_____

By _____
@

¹Calculate these costs using the same method and employes used to complete commission Forms A and B.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

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Maureen McGlynn Flanagan
Assistant Attorney General
flanaganmm@doj.state.wi.us
608/266-1780
FAX 608/267-2223
TTY 608/267-8902

JUL 12 REC'D

JUL 12 REC'D

July 8, 1999

The Honorable Judith Robson
Co-Chair
Joint Committee for Review of Administrative Rules
15 South, State Capitol
Madison, WI 53702

The Honorable Glenn Grothman
Co-Chair
Joint Committee for Review of Administrative Rules
15 North, State Capitol
Madison, WI 53702

Re: Julie A. Goins v. Department of Health & Family Services
Case No. 99-CV-39
Service of Petition on JCRAR

Dear Senator Robson and Representative Grothman:

I represent the respondent Department of Health and Family Services in this Wis. Stat. ch. 227 review proceeding. Thank you for informing me that the Joint Committee has been served with a copy of the petition for review, now pending in the Richland County Circuit Court.

If you or any member of the committee has any questions about this particular case, please do not hesitate to call me.

Sincerely,

Maureen McGlynn Flanagan
Assistant Attorney General
State Bar #1013639

JUN 08 2000

WHYTE
HIRSCHBOECK
DUDEK S.C.



THERESA M. HOTTENROTH
DIRECT DIAL (608) 258-7128

June 8, 2000

HAND DELIVERY

State Senator Judith Robson, Co-Chair
Joint Committee on Review of Administrative Rules
State Capitol, Room, 15 South
Madison, WI 53707-7882

State Representative Glenn Grothman, Co-Chair
Joint Committee on Review of Administrative Rules
State Capitol, Room 15 North
Madison, WI 53708-8953

Re: Wisconsin Academy of Ophthalmology et al. v. Optometry Examining Board
Case No. 00 CV 1446

Dear Senator Robson and Representative Grothman:

You are undoubtedly aware of the fact that on May 12, 2000, the Optometry Examining Board adopted a motion holding that the performance of laser surgical procedures was within the statutory scope of practice of optometry as set forth in Chapter 449, Stats. You are also, no doubt, aware that following the Board's action the Wisconsin Academy of Ophthalmology ("WAO"), the American Academy of Ophthalmology ("AAO"), and the State Medical Society of Wisconsin ("SMS") filed the above-captioned action against the Optometry Examining Board, seeking both injunctive relief and a declaratory judgment as to the validity of the Board's action. Whyte Hirschboeck Dudek S.C. is representing the plaintiffs in this matter.

Because this action was brought pursuant to sec. 227.40, Stats., we are required to serve the Joint Committee on Administrative Rules ("JCRAR") with a copy of the petition filed by plaintiffs. Accordingly, with this letter plaintiffs are serving JCRAR with the enclosed petition. If JCRAR wishes to become a party to the action in order to have its position heard by the court,

50545.1

it has the right to do so with the approval of the joint committee on legislative organization. Sec. 227.40(5), Stats.

One element, although by no means the only element, of this petition is a request that the Court temporarily enjoin the May 12 declaration of the Optometry Examining Board from having any effect (i.e., from authorizing all optometrists to perform laser surgical procedures) during the legal proceedings and until the Court has completed action on the declaratory judgment portion of the case. On June 2, 2000, the Optometry Examining Board held a special meeting in which it voted to rescind its declaration of May 12 stating that laser surgery was within optometrists' statutory scope of practice, but also voted to begin the process of adopting administrative rules authorizing optometrists to perform laser surgery. We are currently seeking clarification from the Optometry Examining Board and from the Secretary of Regulation and Licensing as to the intent and effect of the June 2 actions: in particular, is it the position of the Board and/or the Department of Regulation and Licensing that optometrists may currently perform laser surgery? Depending on the answer to this question, the plaintiffs may withdraw our request for temporary injunctive relief.

If you have any questions or comments regarding this petition, or would like more information on the subject, please feel free to contact me, Laura Leitch, or Tom Springer of our office. Our general number is (608)255-4440, at which any of us can be reached.

Sincerely yours,



Theresa M. Hottenroth

Enclosure

cc: Members, Joint Committee on Review of Administrative Rules
Assistant Attorney General Bruce Olsen
Attorney Ronald Sklansky, Director, Administrative Rules Clearinghouse, Legislative Council

Service accepted: June 8, 2000.

By: _____

JUN 08 2000

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH _____

DANE COUNTY

WISCONSIN ACADEMY OF
OPHTHALMOLOGY, a Wisconsin
corporation, 10 West Phillip Road,
Suite 120, Vernon Hills, IL 60061-1730,

00CV1446

AMERICAN ACADEMY
OF OPTHALMOLOGY,
INC., a foreign corporation, 655 Beach
Street, San Francisco, CA 94109, and

Case No. _____

STATE MEDICAL SOCIETY OF
WISCONSIN, a Wisconsin corporation,
330 East Lakeside Street, Madison,
WI 53715,

Declaratory Judgment: 30701

Administrative Agency
Review: 30607

Plaintiffs

Other Injunction or Restraining
Order: 30704

v.

OPTOMETRY EXAMINING BOARD,

Defendant.

SUMMONS

**IF YOU REQUIRE THE ASSISTANCE OF AUXILIARY
AIDS OR SERVICES BECAUSE OF A DISABILITY,
CALL 266-4678 (TDD 266-9138) AND ASK FOR THE
COURT ADA COORDINATOR.**

PAUL B. HIGGINBOTHAM
CIRCUIT COURT BR 17
THIS IS AN AUTHENTICATED COPY OF THE ORIGINAL DOCUMENT FILED WITH THE DANF COUNTY CLERK OF CIRCUIT COURT.
JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

DANE COUNTY, WI
MAY 30 8 13 AM '00
CIRCUIT COURT

THE STATE OF WISCONSIN

To each person named above as a defendant:

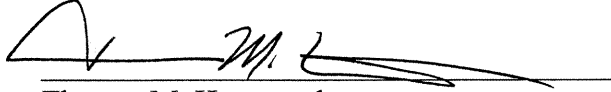
You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to Whyte Hirschboeck Dudek S.C., plaintiff's attorney, whose address is One East Main Street, Suite 300, Madison, Wisconsin 53703-3300. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated: May 30, 2000

WHYTE HIRSCHBOECK DUDEK S.C.



Theresa M. Hottenroth
State Bar I.D. No. 1025578
Thomas M. Pyper
State Bar I.D. No. 1019380
Laura J. Leitch
State Bar I.D. No.

Attorneys for Plaintiff

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P.O. Box 1109
Madison, WI 53701

James B. Lynch
Minnesota State Bar I.D. No. 125246
Dorsey & Whitney LLP
220 South Sixth Street
Minneapolis, MN 55402

WISCONSIN ACADEMY OF
OPHTHALMOLOGY, a Wisconsin
corporation, 10 West Phillip Road,
Suite 120, Vernon Hills, IL 60061-1730,

AMERICAN ACADEMY
OF OPTHALMOLOGY,
INC., a foreign corporation, 655 Beach
Street, San Francisco, CA 94109, and

STATE MEDICAL SOCIETY OF
WISCONSIN, a Wisconsin corporation,
330 East Lakeside Street, Madison,
WI 53715,

Plaintiffs

v.

OPTOMETRY EXAMINING BOARD,

Defendant.

00CV1446

Case No. _____

Declaratory Judgment: 30701

Administrative Agency
Review: 30607

Other Injunction or Restraining
Order: 30704

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANF
COUNTY CLERK OF CIRCUIT COURT.
JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

DANE COUNTY, WI
MAY 30 8 13 AM '00
CIRCUIT COURT

COMPLAINT

Plaintiffs, by their attorneys, Theresa M. Hottenroth, Thomas M. Pyper, and Laura J. Leitch, allege as follows:

1. Plaintiff, the Wisconsin Academy of Ophthalmology ("WAO"), is a Wisconsin not-for-profit corporation whose registered agent is Theresa M. Hottenroth, Whyte Hirschboeck Dudek S.C., One East Main Street, Madison, WI 53703, and whose administrative offices are located at 10 West Phillip Road, Suite 120, Vernon Hills, IL 60061-1730. Its members are

physicians who are licensed in Wisconsin to practice medicine and surgery pursuant to Chapter 448, Wis. Stats., and who specialize in the practice of ophthalmology, which involves the prevention, diagnosis, and medical and surgical treatment of diseases and disorders of the eye. The purpose of the Wisconsin Academy of Ophthalmology is to improve the health of the public, particularly as it relates to the human eye, to increase the knowledge and skills of its members in the profession of ophthalmology, and to promote and encourage education of the public regarding eye care.

2. Plaintiff, the American Academy of Ophthalmology (“AAO”), is a Minnesota not-for-profit corporation whose headquarters are located at 655 Beach Street, San Francisco, CA 94109. The American Academy of Ophthalmology is a membership organization of licensed physicians specializing in the practice of ophthalmology, which promotes and advances the science and art of medicine related to the eye and related structures, supports and enhances education in ophthalmology and in allied fields, and facilitates and improves prevention, diagnosis, and treatment of disorders affecting the eye and related structures. The AAO has member ophthalmologists nationwide, including member ophthalmologists in Wisconsin.

3. Plaintiff, the State Medical Society of Wisconsin (“SMS”), is a Wisconsin not-for-profit corporation whose corporate offices are located at 330 East Lakeside Street, Madison, WI 53715. Its members are physicians who are licensed in Wisconsin to practice medicine and surgery pursuant to Chapter 448, Wis. Stats., including physicians who specialize in ophthalmology. The purpose of the State Medical Society of Wisconsin is to advance the science and art of medicine and the health of the people of Wisconsin.

4. Defendant, the Optometry Examining Board, is a Wisconsin administrative agency created pursuant to sec. 15.405(8), Wis. Stats. Pursuant to sec. 440.035 and Chapter 449, Wis. Stats., the Optometry Examining Board is charged with the licensure and regulation of optometrists for the purpose of protecting the public health, safety and welfare.

5. This is an action for a declaratory judgment pursuant to secs. 227.40 and 806.04, Stats., and for preliminary and permanent injunctive relief.

I. FACTS

6. In the course of its meeting on May 12, 2000, the Optometry Examining Board adopted a motion declaring that the use of lasers to perform surgical procedures is within the current scope of practice of optometrists as that scope of practice is defined in Chapter 449, Wis. Stats.

7. A laser (“Light Amplification by Stimulated Emission of Radiation”) is a finely focused beam of light of uniform wavelength. Various lasers are currently certified as medical devices by the United States Food and Drug Administration (“FDA”) pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. sec. 301. Lasers used to treat various conditions of the eye include, but are not limited to, excimer lasers, argon lasers, and Neodymium Yttrium Aluminum Garnet (“Nd:YAG”) lasers. All lasers used to treat various conditions of the eye operate by using light as concentrated energy to penetrate, sever and permanently alter human tissue. It is undisputed that the use of a laser to treat a condition of the eye constitutes surgery.

8. Lasers are used to perform surgery on the eye and on surrounding tissues and structures for a wide range of conditions and disorders, including but not limited to surgical

procedures performed on healthy eyes to correct myopia, or nearsightedness; surgical treatment of open-angle glaucoma; surgical treatment of narrow-angle and angle closure glaucoma; surgery following cataract removal for correction of remaining haziness of vision; surgical procedures to treat blood vessel disorders of the retina including diabetic retinopathy, vein occlusions, and exudative macular degeneration; and surgical treatment of holes and tears in the retina.

9. Excimer lasers are used, among other things, to perform a surgical procedure known as Photorefractive Keratectomy (“PRK”), for the correction of myopia in healthy eyes. The PRK surgeon uses the excimer laser to remove corneal tissue from the eye in order to reshape the cornea. In the course of performing PRK, the outermost layer of the cornea, the epithelium, is removed, typically through the use of a surgical knife or blade. The excimer laser is then used to remove corneal tissues by breaking up the tissue bonds through concentration of energy, reshaping the cornea.

10. If PRK or another laser procedure to correct myopia, hyperopia, or other vision deficits in otherwise healthy eyes, is not performed properly, serious harm can be caused to the patient, including impairment or complete loss of vision and/or the discomfort, inconvenience, and costs of further corrective procedures.

11. Even if PRK or another laser surgical procedure to correct myopia is performed properly, complications can and do occur in some patients, resulting in the patient never being able to see as well after the surgery as he or she could see before the surgery, even with corrective lenses. Other potential complications include persistent haze or corneal scarring, the possibility of infection, abnormal epithelial healing, recurrent epithelial breakdown, corneal

ulceration, loss of corneal sensitivity, elevated intraocular pressure, diurnal fluctuation in vision, and damage to the tissues of the eye.

12. Nd:YAG lasers are used, among other things, to perform a surgical procedure known as peripheral iridotomy ("PI") in the treatment of narrow angle and angle closure glaucoma. In the most serious glaucoma cases, there is often a build-up of pressure behind the iris tending to push the iris forward. In the course of performing a PI, the surgeon uses the laser to create a tiny opening in the iris to allow for the proper drainage of aqueous fluid. The surgeon places this opening as close to the limbus as possible without burning the epithelium. The surgeon must activate the laser until the iris is broken through. The determination that the iris is broken through comes when iris pigment bursts from the epithelium or when the surgeon sees the anterior lens capsule. If the lens is accidentally hit with the laser beam, a traumatic cataract can immediately develop, necessitating cataract surgery. Significant complications of a PI include a spike in intraocular pressure, which can cause further eye damage, and closure of the iridectomy. Other complications include corneal burns, lens opacities, iris atrophy, hemorrhage, and retinal burns.

13. Nd:YAG lasers are also used to perform a surgical procedure known as a posterior capsulotomy. Following many cataract surgeries, a portion of the lens capsule, or membrane, is left in place to maintain the normal anatomic spaces of the eye and to serve as a support for the new intraocular lens implanted during cataract surgery. In up to one-third of such cases, the remaining lens membrane develops a haziness which causes vision problems similar to the original cataract. To treat this problem, the surgeon focuses the laser precisely on the opacified

membrane and vaporizes the membrane with the laser. If the procedure is not correctly performed, results may include damage to the cornea, iris or retina.

14. Argon lasers are used, among other things, to perform a surgical procedure known as a trabeculoplasty for the treatment of open angle glaucoma. When the use of medications does not adequately control the pressure buildup of glaucoma, the surgeon may perform a trabeculoplasty, using a laser to burn one or more openings into the trabecular meshwork of tissue inside the eye to allow fluids to flow more normally into and out of the eye, thereby reducing the fluid pressure in the eye. The procedure has been proven effective only with certain types of open angle glaucoma, especially capsular and pigmentary glaucomas. Risks and potential complications include postoperative infection, hemorrhaging, burns to other parts of the eye, and other risks and complications of any laser surgery.

15. Argon lasers may also be used for surgical treatment of blood vessel disorders of the retina including but not limited to diabetic retinopathy, vein occlusions, and macular degeneration. These diseases are directly related to overall disease of the human system but manifest themselves, in part, in damage to the retina. If left untreated or not properly treated, severe loss of vision or complete blindness may result. The surgeon uses a laser to perform photocoagulation, wherein a leaking blood vessel on the retina is sealed off and the tissue is converted into plasma by the laser.

16. Various ophthalmic lasers may be used in other procedures to treat glaucoma, including laser goniotomy, wherein the laser is used to contract and burn tissues at several spots around the circumference of the iris, severing tissues as necessary, thereby causing the iris to shrink away from the angle closure; and laser sclerectomy, wherein the laser is used to create a

hole through the sclera (the tissue under the cornea forming the outer envelope of the eye) and then to create an opening between the anterior chamber of the eye and the subconjunctival space. These procedures carry multiple risks of complications.

17. As with any surgery, there are contraindications to all laser surgery procedures and risks of complications and adverse reactions or results. There are also alternatives including other surgical procedures which may be performed only by a physician licensed to practice medicine and surgery. These contraindications, risks, and alternatives must be evaluated by the surgeon performing the procedure and explained to the patient prior to the surgery in order for the patient to make an informed decision regarding the surgery.

18. Potential complications of laser surgical procedures include medical problems which optometrists are not trained or licensed to diagnose or treat. Contraindications and risks of laser surgical procedures also include medical problems and conditions beyond the eye and the immediately surrounding tissues which optometrists are not trained or licensed to diagnose or treat.

19. If complications occurring in the course of the performance of a laser surgical procedure or in the recuperation period are not recognized, diagnosed, and treated properly, serious harm could be caused to the patient, including further impairment or loss of vision and/or the discomfort, inconvenience, and costs of further corrective procedures.

20. Ophthalmologists are medical doctors and doctors of osteopathic medicine who have invested great time, expense, and effort in medical education and training. Ophthalmologists must complete at least eight years of medical training, including four years of medical school following completion of college, a one-year internship, and three or more years of clinical

residency training in ophthalmology under the supervision of ophthalmologists. Many ophthalmologists also complete a one- or two-year fellowship in a sub-specialty of ophthalmology. An ophthalmologist's training includes substantial surgical training, including performing cataract surgery, laser surgery, and other forms of surgery on live human patients under the supervision of a teaching ophthalmologist.

21. Optometrists are not medical doctors or doctors of osteopathic medicine.

Optometrists typically receive four years of training at a school of optometry, which generally does not include any hands-on surgical training on live patients. They may also, but are not necessarily required to, complete college before entering a school of optometry. The permissible scope of practice of optometry in Wisconsin is set forth at sec. 449.01(1), Wis. Stats.

22. Since the Optometry Examining Board adopted its motion on May 12, 2000, declaring that the use of lasers to perform surgical procedures is within optometrists' scope of practice as established by sec. 449.01(1), Wis. Stats., optometrists have performed laser surgical procedures in Wisconsin, have advertised those services to the public, and continue to do so.

23. The performance of laser surgical procedures by optometrists creates a risk of serious harm to the citizens of Wisconsin because optometrists are not qualified to perform such surgical procedures; are not generally trained or experienced in surgical procedures; are not qualified to advise patients as to the risks, benefits, contraindications, and alternatives to particular laser surgical procedures, such that the patient may make an informed decision regarding the proposed procedure; and are not trained to recognize, diagnose, and treat properly complications which may occur in the course of laser surgical procedures and recuperation therefrom.

II. PETITION FOR DECLARATORY JUDGMENT

Plaintiffs, by their attorneys, and pursuant to secs. 227.40 and 806.04, Wis. Stats., hereby petition for judicial review of the action taken by the Optometry Examining Board on May 12, 2000, purporting to authorize optometrists to perform laser surgical procedures, and allege as follows:

22. The allegations set forth in paragraph nos. 1 through 21 are incorporated herein fully by reference.

23. Plaintiffs satisfy the requirement for standing under sec. 227.40, Wis. Stats., to challenge the validity of the action taken by the Optometry Examining Board. The performance of laser surgical procedures by optometrists, which is outside the scope of practice permitted to optometrists under Chapter 449, Stats., interferes with and impairs the legal rights and privileges of plaintiffs' members who are physicians duly licensed to practice medicine and surgery in Wisconsin under Chapter 448, Wis. Stats. The practice of medicine and surgery is a privilege reserved to those who meet the requirements set forth in Chapter 448, Wis. Stats., and the accompanying rules promulgated by the Medical Examining Board.

24. The action taken by the Optometry Examining Board declaring laser surgical procedures to be within the scope of practice of optometrists constitutes a rule pursuant to sec. 227.01(13), Wis. Stats., because it is a standard, statement of policy or general order of general application issued by an agency to implement, interpret or make specific Chapter 449, Stats., with respect to the scope of practice of optometry and permissible practices of optometrists, matters which are enforced or administered by the Optometry Examining Board.

25. Such rule is invalid because it exceeds the statutory authority of the Optometry Examining Board and because it violates sec. 227.10(2), Wis. Stats., which provides that no agency may promulgate a rule which conflicts with state law. Sec. 449.03(1), Wis. Stats., explicitly prohibits the Optometry Examining Board from making any rule which expands the scope of practice of optometry. The scope of practice of optometry is defined in sec. 449.01(1)(a), Wis. Stats., and pursuant to sec. 449.01(1)(b), Stats., the practice of optometry does not include surgery or medical treatment except as provided in sec. 449.01(1)(a). The performance of laser surgical procedures constitutes surgery outside the practice of optometry as set forth in sec. 449.01(1)(a).

26. Such rule is invalid because it has not been promulgated as an administrative rule pursuant to the requirements set forth in Subchapter II of Chapter 227, Stats., including but not limited to the requirements for notice, public hearings, and legislative review set forth at secs. 227.16 through 227.19, Wis. Stats.

27. Such rule is invalid because it violates the due process clauses of the United States and Wisconsin Constitutions, because the facts in the record do not show that the rule bears a reasonable relation to the legitimate governmental objective of protecting the public health and safety; to the contrary, the rule endangers the public health and safety.

28. The rule's invalidity by virtue of the fact that it exceeds the agency's statutory authority, and its invalidity by virtue of the agency's failure to comply with statutorily-required procedures for promulgating administrative rules, are questions of law which this court reviews de novo.

29. The standard of review for plaintiffs' claim that the rule violates constitutional requirements of due process is whether the facts in the agency's record support the agency's action as one which will effectuate the legitimate governmental objective of the agency.

30. There exists a substantial, present, and justiciable controversy between plaintiffs and defendant with respect to whether the action of the Optometry Examining Board is lawful and whether optometrists may lawfully perform laser surgical procedures, and the issuance of a declaratory judgment will terminate the controversy or remove any uncertainty giving rise to the proceeding.

III. PETITION FOR INJUNCTIVE RELIEF

31. The allegations set forth in paragraph nos. 1 through 30 are incorporated herein fully by reference.

32. Plaintiffs are entitled to a temporary injunction pursuant to sec. 813.02, Wis. Stats., to prevent the Optometry Examining Board's rule from having any effect, and to prevent optometrists from performing laser surgical procedures pursuant to the action of the Optometry Examining Board, during the pendency of these proceedings, for the following reasons:

- (a) Optometrists have announced that pursuant to the action of the Optometry Examining Board, they are performing and will continue to perform laser surgical procedures. A temporary injunction is necessary in order to preserve the status quo as to the qualifications required under law for the performance of laser surgical procedures.

- (b) The performance of laser surgical procedures by optometrists, who are not licensed to practice medicine and surgery under Chapter 448, Wis. Stats., poses an immediate threat of irreparable harm to patients who may undergo those procedures, in the form of surgical and post-surgical complications, contraindications for the procedure, and lack of information necessary for the patient to make an informed decision, for which there is no adequate remedy at law.
- (c) The performance of laser surgical procedures by optometrists, who are not licensed to practice medicine and surgery under Chapter 448, Wis. Stats., poses an immediate threat of irreparable harm to plaintiffs' members' right and privilege to practice medicine and surgery.
- (d) Plaintiffs have no adequate remedy at law to redress this harm.
- (e) Plaintiffs have a substantial likelihood of prevailing on the merits in this action.

33. Plaintiffs are entitled to a permanent injunction pursuant to sec. 813.01, Wis. Stats., to enjoin the Optometry Examining Board from authorizing or permitting optometrists to perform laser surgical procedures in the future, in violation of Chapters 448 and 449, Stats., for the following reasons:

- (a) There is a reasonable likelihood that in the absence of such an injunction, the Optometry Examining Board will continue to authorize or permit optometrists to perform laser surgical procedures in the future, even if the May 12, 2000, action of the Optometry Examining Board is declared invalid.

- (b) For the reasons set forth in paragraph no. 32 above, an active or tacit position on the part of the Optometry Examining Board allowing optometrists to perform laser surgery will cause irreparable injury to patients who may undergo such surgery and will cause irreparable injury to plaintiffs' members who are licensed under Chapter 448, Wis. Stats., to perform such surgical procedures.
- (c) There is no adequate remedy at law to compensate plaintiffs for such injury.

IV. RELIEF REQUESTED

WHEREFORE, plaintiffs request that the Court grant the following relief:

1. Declaring that the action of the Optometry Examining Board on May 12, 2000, declaring that the use of lasers to perform surgical procedures is within the scope of practice of optometry as set forth in Chapter 449, Wis. Stats., is invalid on the grounds that it constitutes a rule in excess of the Optometry Examining Board's statutory authority, that it constitutes a rule not properly promulgated pursuant to the requirements of Chapter 227, and that it violates the Constitutional requirements of due process by virtue of the absence of any facts in the agency's record showing a reasonable relation between the agency's action and any legitimate governmental objective;

2. Declaring that the performance of laser surgical procedures by optometrists constitutes the unauthorized practice of medicine and surgery;

3. Temporarily enjoining the Optometry Examining Board from authorizing optometrists to perform laser surgical procedures during the pendency of this proceeding, and directing the

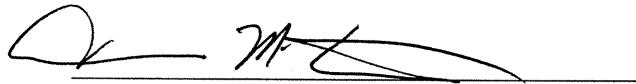
Optometry Examining Board to immediately inform its licensees that its action of May 12, 2000, is without force and effect;

4. Permanently enjoining the Optometry Examining Board from authorizing optometrists to perform laser surgical procedures whether by rulemaking, declarations of policy, or enforcement decisions;

5. Awarding such other legal and equitable relief as the Court deems appropriate.

Dated: May 30, 2000

WHYTE HIRSCHBOECK DUDEK S.C.



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Thomas M. Pyper
State Bar I.D. No. 1019380
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THERESA M. HOTTENROTH
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July 5, 2000

State Senator Judith Robson, Co-Chair
Joint Committee on Review of Administrative Rules
State Capitol, Room, 15 South
Madison, WI 53707-7882

State Representative Glenn Grothman, Co-Chair
Joint Committee on Review of Administrative Rules
State Capitol, Room 15 North
Madison, WI 53708-8953

Re: Wisconsin Academy of Ophthalmology et al. v. Optometry Examining Board
Case No. 00 CV 1446

Dear Senator Robson and Representative Grothman:

Enclosed are copies of the Amended Summons and First Amended Complaint in the above-referenced proceeding.

As noted in our previous letter concerning this action, because this action is brought pursuant to sec. 227.40, Stats., we were required to serve the Joint Committee on Review of Administrative Rules ("JCRAR") with a copy of the petition filed by the plaintiffs, which we did on June 8, 2000. While it may not be technically necessary to serve JCRAR formally with the amended complaint, we want to provide the amended complaint to you to keep you up to date on the action.

The amended complaint reflects the fact that the Optometry Examining Board ("OEB") "rescinded" its May 12 action after the Wisconsin Academy of Ophthalmology ("WAO") filed its initial complaint. The core issues remain the same. WAO is asking the court to determine whether the statute allows the OEB to authorize optometrists to perform laser surgery through

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WHYTE
HIRSCHBOECK
DUDEK S.C.

State Senator Judith Robson, Co-Chair
State Representative Glenn Grothman, Co-Chair
July 5, 2000
Page 2

administrative rules despite the statutory provision that prohibits the OEB from expanding the optometry scope of practice through rules. In addition, as in the original complaint, WAO is asking the court to determine whether the statute authorizes optometrists to decide what procedures are within their scope of practice and to perform those procedures.

Again, if you have any questions or comments regarding this action or would like more information on the subject, please feel free to contact me, Laura Leitch, or Tom Springer of our office. Our general number is 608-255-4440, at which any of us can be reached.

Sincerely yours,



Theresa M. Hottenroth

Enclosure

cc: Members, Joint Committee on Review of Administrative Rules
Assistant Attorney General Bruce Olsen (w/out enclosure)
Attorney Ronald Sklansky, Director, Administrative Rules Clearinghouse, Legislative
Council

WISCONSIN ACADEMY OF
OPHTHALMOLOGY, a Wisconsin
corporation, 10 West Phillip Road,
Suite 120, Vernon Hills, IL 60061-1730,

AMERICAN ACADEMY
OF OPTHALMOLOGY,
INC., a Minnesota corporation, 655 Beach
Street, San Francisco, CA 94109,

STATE MEDICAL SOCIETY OF
WISCONSIN, a Wisconsin corporation,
330 East Lakeside Street, Madison,
WI 53715, and

AMERICAN MEDICAL ASSOCIATION,
an Illinois corporation, 515 North State
Street, Chicago, IL 60610,

Plaintiffs,

v.

STATE OF WISCONSIN OPTOMETRY
EXAMINING BOARD, and CHRIS HUBBELL, O.D.,
LEON D. GRIFFIN, O.D., LYNNE M. LECOUNT,
JEFF SARAZEN, O.D., KERRY L. GRIEBENOW, O.D.,
and HEATHER M. HINSON, O.D., in their capacity as
MEMBERS of the OPTOMETRY EXAMINING BOARD,

CHARLOTTE L. BURNS, O.D.,
W10726 Highway V, Lodi, WI 53555,

JOHN D. BONSETT-VEAL, O.D.,
1546 Trusler Circle, Oregon, WI 53575

SCOTT A. JENS, O.D.,
6 Boulder Creek Circle, Madison, WI 53717,

and

Case No. 00 CV 1446

Declaratory Judgment: 30701

Administrative Agency
Review: 30607

Other Injunction or Restraining
Order: 30704

Other Extraordinary Writ: 30707

THIS IS AN AUTHENTICATED COPY OF THE
ORIGINAL DOCUMENT FILED WITH THE DANE
COUNTY CLERK OF CIRCUIT COURT.

JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

DANE COUNTY, WI
JUN 27 9 03 AM '00
CIRCUIT COURT

C. DOUGLAS STINE, O.D.,
205 Radtke, Schofield, WI 54476

Defendants.

AMENDED SUMMONS

**IF YOU REQUIRE THE ASSISTANCE OF AUXILIARY
AIDS OR SERVICES BECAUSE OF A DISABILITY,
CALL 266-4678 (TDD 266-9138) AND ASK FOR THE
COURT ADA COORDINATOR.**

THE STATE OF WISCONSIN

To each person named above as a defendant:

You are hereby notified that the plaintiff named above has filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

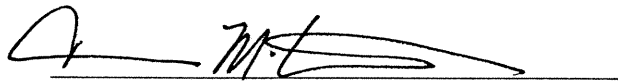
Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, and to Whyte Hirschboeck Dudek S.C., plaintiff's attorney, whose address is One East Main Street, Suite 300, Madison, Wisconsin 53703-3300. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against

any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated: June 26, 2000

WHYTE HIRSCHBOECK DUDEK S.C.



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Thomas M. Pyper
State Bar I.D. No. 1019380
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Illinois State Bar I.D. No. _____
American Medical Association
14th Floor
515 N. State Street
Chicago, IL 60610

WISCONSIN ACADEMY OF
OPHTHALMOLOGY, a Wisconsin
corporation, 10 West Phillip Road,
Suite 120, Vernon Hills, IL 60061-1730,

AMERICAN ACADEMY
OF OPTHALMOLOGY,
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STATE MEDICAL SOCIETY OF
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WI 53715, and

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6 Boulder Creek Circle, Madison, WI 53717,

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JUDITH A. COLEMAN
CLERK OF CIRCUIT COURT

DANE COUNTY, WI

JUN 27 9 04 AM '00

CIRCUIT COURT

and

C. DOUGLAS STINE, O.D.,
205 Radtke, Schofield, WI 54476

Defendants.

FIRST AMENDED COMPLAINT

Plaintiffs, by their attorneys, Theresa M. Hottenroth, Thomas M. Pyper, and Laura J. Leitch, allege as follows:

1. Plaintiff, the Wisconsin Academy of Ophthalmology (“WAO”), is a Wisconsin not-for-profit corporation whose registered agent is Theresa M. Hottenroth, Whyte Hirschboeck Dudek S.C., One East Main Street, Madison, WI 53703, and whose administrative offices are located at 10 West Phillip Road, Suite 120, Vernon Hills, IL 60061-1730. It appears as a representative of its members, who are physicians who are licensed in Wisconsin to practice medicine and surgery pursuant to Chapter 448, Wis. Stats., and who specialize in the practice of ophthalmology, which involves the prevention, diagnosis, and medical and surgical treatment of diseases and disorders of the eye. The purpose of the Wisconsin Academy of Ophthalmology is to improve the health of the public, particularly as it relates to the human eye, to increase the knowledge and skills of its members in the profession of ophthalmology, and to promote and encourage education of the public regarding eye care.

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4. Plaintiff, the American Medical Association ("AMA"), is an Illinois not-for-profit corporation whose corporate offices are located at 515 North State Street, Chicago, IL 60610. The AMA represents approximately 300,000 physicians who practice throughout the United States, including the State of Wisconsin. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. It is the largest medical society in the United States. The AMA appears as a representative of the Litigation Center of the American Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts. Forty-nine state

medical societies join the AMA as members of the Litigation Center. The member organizations, in addition to the AMA, are: Medical Association of the State of Alabama, Alaska State Medical Association, Arizona Medical Association, Arkansas Medical Society, California Medical Association, Colorado Medical Society, Connecticut State Medical Society, Medical Society of Delaware, Medical Society of the District of Columbia, Medical Association of Georgia, Hawaii Medical Association, Idaho Medical Association, Illinois State Medical Society, Indiana State Medical Association, Iowa Medical Society, Kansas Medical Society, Kentucky Medical Association, Louisiana State Medical Society, Maine Medical Association, MedChi, the Maryland State Medical Society, Massachusetts Medical Society, Michigan State Medical Society, Minnesota Medical Association, Mississippi State Medical Association, Missouri State Medical Association, Montana Medical Association, Nebraska Medical Association, Nevada State Medical Association, New Hampshire Medical Society, Medical Society of New Jersey, New Mexico Medical Society, Medical Society of the State of New York, North Carolina Medical Society, North Dakota Medical Association, Ohio State Medical Association, Oklahoma State Medical Association, Pennsylvania Medical Society, Rhode Island Medical Society, South Carolina Medical Association, South Dakota State Medical Association, Tennessee Medical Association, Texas Medical Association, Utah Medical Association, Vermont State Medical Society, Medical Society of Virginia, Washington State Medical Association, West Virginia State Medical Association, State Medical Society of Wisconsin, and Wyoming Medical Society.

5. Defendant, the Optometry Examining Board, is a Wisconsin administrative agency created pursuant to sec. 15.405(8), Wis. Stats. Pursuant to sec. 440.035 and Chapter 449, Wis. Stats., the Optometry Examining Board is charged with the licensure and regulation of

optometrists for the purpose of protecting the public health, safety and welfare. The Optometry Examining Board is administratively attached to the Department of Regulation and Licensing and is staffed entirely by personnel of the Department of Regulation and Licensing. Certain administrative rules regulating the practice of optometry and governing the conduct of optometrists are promulgated by the Optometry Examining Board ("the Board") and certain other such rules are promulgated by the Secretary of the Department of Regulation and Licensing. The Department of Regulation and Licensing is authorized by sec. 440.03(3m), Stats., to investigate complaints made against an optometrist licensed under ch. 449.

6. Defendant, Chris Hubbell, O.D., is a member of the Optometry Examining Board, appointed by the Governor and confirmed by the Senate pursuant to secs. 15.08 and 15.405(8), Stats., and serves as Chairperson of the Board.

7. Defendant, Leon D. Griffin, Jr., O.D., is a member of the Optometry Examining Board, appointed by the Governor and confirmed by the Senate pursuant to secs. 15.08 and 15.405(8), Stats., and currently serves as Vice Chairperson of the Board.

8. Defendant, Lynn M. LeCount, is a member of the Optometry Examining Board, appointed by the Governor and confirmed by the Senate pursuant to secs. 15.08 and 15.405(8), Stats., and currently serves as Secretary of the Board.

9. Defendant, Jeff M. Sarazen, O.D., is a member of the Optometry Examining Board, appointed by the Governor and confirmed by the Senate pursuant to secs. 15.08 and 15.405(8), Stats.

10. Defendant, Kerry L. Griebenow, O.D., is a member of the Optometry Examining Board, appointed by the Governor and confirmed by the Senate pursuant to secs. 15.08 and 15.406(8), Stats.

11. Defendant, Heather M. Hinson, O.D., is a member of the Optometry Examining Board, appointed by the Governor and confirmed by the Senate pursuant to secs. 15.08 and 15.405(8), Stats.

12. Defendant, Charlotte Burns, O.D., is an optometrist licensed to practice optometry in Wisconsin pursuant to Chapter 449, Stats.

13. Defendant, John D. Bonsett-Veal, O.D., is an optometrist licensed to practice optometry in Wisconsin pursuant to Chapter 449, Stats.

14. Defendant, Scott A. Jens, O.D., is an optometrist licensed to practice optometry in Wisconsin pursuant to Chapter 449, Stats.

15. Defendant, C. Douglas Stine, O.D., is an optometrist licensed to practice optometry in Wisconsin pursuant to Chapter 449, Stats.

16. This is an action for declaratory judgment pursuant to secs. 227.40 and 806.04, Stats., and for injunctive relief.

I. FACTS

17. In the course of the May 12, 2000, meeting of the Optometry Examining Board ("the Board"), the Board discussed a petition for emergency rulemaking submitted to the Board by the Wisconsin Optometric Association requesting that the Board issue emergency rules addressing the performance of laser surgical procedures by optometrists. Following extensive discussion among Board members, staff of the Department of Regulation and Licensing, and representatives

of the Wisconsin Optometric Association, the Optometry Examining Board voted to table the petition for emergency rulemaking . The Board then adopted a motion declaring that the use of lasers to perform surgical procedures is within the current scope of practice of optometrists as that scope of practice is defined in Chapter 449, Wis. Stats.

18. Prior to and during the May 12, 2000, meeting of the Optometry Examining Board, officers and agents of the Wisconsin Optometric Association represented to members of the Optometry Examining Board that, among other things, immediate action by the Optometry Examining Board authorizing the performance of laser surgical procedures was needed in order for several Wisconsin optometrists to perform such procedures upon live human patients in the very near future; that those optometrists had attended the training provided by one or more laser manufacturers which the manufacturers are required to provide to practitioners as one of a number of conditions and restrictions imposed on the sale and use of lasers as medical devices by the Food and Drug Administration; and that in order to complete or maintain their "certification" to perform a laser surgical procedure, those optometrists needed to independently perform that procedure upon a live human patient before the expiration of a pre-established time limit.

19. A laser (“Light Amplification by Stimulated Emission of Radiation”) is a finely focused beam of light of uniform wavelength. Various lasers are currently certified as medical devices by the United States Food and Drug Administration (“FDA”) pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. sec. 301. Lasers used to treat various conditions of the eye include, but are not limited to, excimer lasers, argon lasers, and Neodymium Yttrium Aluminum Garnet (“Nd:YAG”) lasers. All lasers used to treat various conditions of the eye

operate by using light as concentrated energy to penetrate, sever and permanently alter human tissue. It is undisputed that the use of a laser to treat a condition of the eye constitutes surgery.

20. Lasers are used to perform surgery on the eye and on surrounding tissues and structures for a wide range of conditions and disorders, including but not limited to surgical procedures performed on healthy eyes to correct myopia, or nearsightedness; surgical treatment of open-angle glaucoma; surgical treatment of narrow-angle and angle closure glaucoma; surgery following cataract removal for correction of remaining haziness of vision; surgical procedures to treat blood vessel disorders of the retina including diabetic retinopathy, vein occlusions, and exudative macular degeneration; and surgical treatment of holes and tears in the retina.

21. Excimer lasers are used, among other things, to perform a surgical procedure known as Photorefractive Keratectomy ("PRK"), for the correction of myopia in healthy eyes. The PRK surgeon uses the excimer laser to remove corneal tissue from the eye in order to reshape the cornea. In the course of performing PRK, the outermost layer of the cornea, the epithelium, is removed, typically through the use of a surgical knife or blade or in part by the laser. The excimer laser is then used to surgically remove corneal tissues by breaking up the tissue bonds through concentration of energy, reshaping the cornea.

22. If PRK, or another laser procedure to correct myopia, hyperopia, or other vision deficits in otherwise healthy eyes, is not performed properly, serious harm can be caused to the patient, including impairment or complete loss of vision and/or the discomfort, inconvenience, and costs of further corrective procedures.

23. Even if PRK is performed properly, complications can and do occur in some patients, resulting in the patient never being able to see as well after the surgery as he or she could see