1997-98 SESSION COMMITTEE HEARING RECORDS

Committee Name:

Senate Committee on Education(SC-Ed)

Sample:

Record of Comm. Proceedings ... RCP
- 05hrAC-EdR_RCP_pt01a
- 05hrAC-EdR_RCP_pt01b
- 05hrAC-EdR_RCP_pt02

- *Appointments* ... *Appt*
- **

- *Clearinghouse Rules* ... *CRule*
- **

- *Committee Hearings* ... *CH*
- **97hrSC-Ed_Misc_pt12**

- *Committee Reports* ... *CR*
- **

- *Executive Sessions* ... *ES*
- **

- *Hearing Records* ... *HR*
- **

- *Miscellaneous* ... *Misc*
- **

- *Record of Comm. Proceedings* ... *RCP*
- **

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

JAMES E. DOYLE
ATTORNEY GENERAL

Burneatta L. Bridge
Deputy Attorney General

December 19, 1997

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221

DEC 2 · 1997

The Honorable Charles Chvala
State Senator
119 Martin Luther King Jr. Blvd., Room 101
Madison, WI 53702

Dear Senator Chvala:

The Senate Committee on Organization has asked for my opinion regarding the need for legislative clarification of section 118.245(3), Stats. That section currently provides that no school district may provide to its nonrepresented professional employees an average increase of compensation and fringe benefits exceeding 3.8% of the average total cost per employee of compensation and fringe benefits provided to its nonrepresented professional employees or to its represented professional employees for the preceding twelve-month period.

You state that school districts have found themselves in a situation where additional supervisory duties require additional personnel. School districts currently have two options: (1) extend an existing employee's 230-day contract to 260 days or (2) hire an additional employee. You further state that hiring an additional professional employee would clearly be allowed under the law. That appears to be correct because section 118.245(3) does not limit the number of employees hired; it limits the average increase in total compensation per employee to 3.8% above the average cost per employee in the preceding year. You indicate that there is, however, a question of whether the 3.8% cap would apply to an increase in total compensation that results from extending an existing part-time employee's contract to cover more hours. Senate Bill 216 would address that issue by amending section 118.245(3) to clarify that "the increased cost of compensation and fringe benefits does not include any cost incurred due to an increase in hours for a nonrepresented professional employe who is employed less than full time on a weekly or annual basis but who subsequently becomes employed at a level that is not greater than full time on a weekly or annual basis."

The committee requests an opinion on whether the clarification in Senate Bill 216 is necessary. For the reasons given below, I am of the opinion that the question is sufficiently debatable that legislative clarification is advisable.

Section 118.245(3) prohibits increases in the "total cost" of compensation to employees. The reference to "total cost" of compensation, as opposed to rate of compensation, supports an interpretation that the statute applies to any increases in compensation, including ones due to increases in hours. There is, however, support for the contrary interpretation. Section 118.245(3) expressly provides that the "cost of compensation includes the cost of any increase in compensation due to a promotion or the attainment of increased professional qualifications." It does not mention increases in compensation due to increases in time worked. Thus, applying the expressio unius est exclusio alterius canon of construction, i.e., the canon that when a statute expressly mentions one matter, all matters not mentioned are excluded, may support a conclusion that section 118.245(3) does not apply to increases in compensation due to increases in time worked. Cf., Wis. Patients Compensation Fund v. WHCLIP, 200 Wis. 2d 599, 608-11, 547 N.W.2d 578 (1996) (recognizing the canon but limiting the circumstances in which it can be applied). In addition, statutes must be interpreted to avoid unreasonable results. Verdoljak v. Mosinee Paper Corp., 200 Wis. 2d 624, 636, 547 N.W.2d 602 (1996). As you point out, it appears that the law does not restrict a school district's ability to hire additional staff. In light of that, it is arguably unreasonable to interpret section 118.245(3) to restrict a school district's ability to increase the hours of existing part-time staff as an alternative to hiring additional staff.

For the above reasons, there are strong arguments that the compensation cap in section 118.245(3), as currently worded, does not apply to increases in compensation that are due to increases in hours worked. The question is, however, debatable in light of the reference to "total compensation" in section 118.245(3). Legislative clarification is, therefore, advisable.

Sincerely,

James E. Doyle
Attorney General

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SCHOOL DISTRICT OF FORT ATKINSON

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June 3, 1997

Representative David Ward
Wisconsin Assembly
State Capitol
PO Box 8953
Madison, Wisconsin 53708

Dear Representative Ward:

I urge your support of Senate Bill 216 which would make it easier for school districts to promote an administrator currently employed by the district.

Recently, Fort Atkinson had an opening for an elementary principal. In my opinion, the best candidate for this position is a person currently employed as an assistant principal. This promotion would mean an increase in responsibility and time for the assistant principal who currently has a 10 1/2 month contract. According to our attorney's interpretation of the current Statute, any additional compensation for this increase in responsibility and time would need to be absorbed within the 3.8 percent total pool for current administrators. Yet, under current Statutes, if we hired someone from outside the District we would be allowed to hire the individual outside of the 3.8% total salary pool. In my opinion, the current Statute prevents school districts from hiring the most qualified candidate and discourages them from promoting within--from identifying talent and helping administrators learn new jobs in their school districts and receive consideration for promotion when vacancies occur.

I encourage you to support legislation that would make it easier for school districts to promote qualified candidates from within their school systems rather than having to recruit administrators from outside their current administrative ranks because of financial implications. Please support Senate Bill 216.

Should you have questions, please contact me.

Sincerely,

Gerald R. McGowan, Ph.D.
District Administrator

School Administrator Compensation

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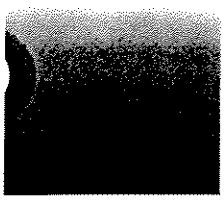
Lathrop & Clark is legal counsel to the WASB.

BY
Lathrop & Clark



The 1995 state budget amended the statutes governing school administrators' compensation. This Legal Comment discusses the revised statutory language, the costing methods mandated by the statute, and certain issues that have arisen in light of these amendments.

Statutory requirements. The recent amendments to the state statutes that govern administrator compensation provide as follows:

> "No school district may provide to its nonrepresented professional employes for any 12-month period ending on June 30 an average increase for all such employes in the total cost to the school district of compensation and fringe benefits for such employees having an average cost per employe exceeding 3.8% of the average total cost per employe of compensation and fringe benefits provided by the school district to its nonrepresented professional employes for the preceding 12-month period ending on June 30 or the average total percentage increased cost per employe of compensation and fringe benefits provided to its represented professional employes during the 12-month period ending on June 30 preceding the date that the increase becomes effective, whichever is greater. In this subsection, the cost of compensation includes the cost of any increase in compensation due to a promotion or the attainment of increased professional qualifications. For the purposes of this subsection, the average total percentage increased cost per employe of the compensation provided by a school district to its represented professional employes shall be determined in accordance with the method prescribed by the Employment Relations Commission under s.111.70(4)(cm)8s."[1]

The statute clearly covers school administrators, including school district administrators, business managers, school principals and assistants to these individuals.[2] However, the scope of the statute is broader, covering *all* "nonrepresented professional employes."

The term "professional employe" is defined by statute and typically consists of administrators and teachers.[3] A "nonrepresented professional employe" is a professional employee who is employed to perform services for a school district and whose position is not included in a collective bargaining unit.[4] In many districts, this might include the personnel and curriculum supervisors and the school psychologist, among others. Consequently, for costing purposes, a school board must consider all nonrepresented professional employees in any base year calculation and in calculating any increase in the total cost of compensation and fringe benefits for such employees.

Statutory compensation-limit alternatives. The statute authorizes school boards to choose one of two methods for increas-

"For costing purposes, a school board must consider all nonrepresented professional employees in any base year calculation and in calculating any increase in the total cost of compensation and fringe benefits for such employees."

ing nonrepresented professional employees' compensation and fringe benefits.

First, a school board may elect to provide an average increase for all its nonrepresented professional employees of 3.8 percent. The board must use the preceding 12-month period ending on June 30 as its base year and use the total cost to the school district of all such employees' compensation and fringe benefits provided during that period to arrive at a base year dollar figure. Compensation and fringe benefit increases granted to nonrepresented professional employees by the board may not exceed a 3.8 percent average cost per employee increase above this figure.

It should be noted, however, that compensation and fringe benefit increases for nonrepresented professional employees do not have to be uniform. The statute only prohibits boards from providing more than a 3.8 percent increase in the *average total cost per employee* for compensation and fringe benefits. Thus, school boards may provide for different compensation and fringe benefit increases within the nonrepresented professional employee group.

As an alternative, a school board may elect to increase its nonrepresented professional employees' compensation and fringe benefits up to the percentage increase given to its *represented* professional employees (the teachers' bargaining unit, for example) in the previous year. The statute expressly authorizes a school district to pay "the average total percentage increased cost per employee of compensation and fringe benefits provided to its represented professional employees during the 12-month period ending on June 30 preceding the date that the increase becomes effective."

If this option is selected, the statute specifically states that "the average total percentage increased cost per employee" for represented professional employees shall be determined in accordance with the method prescribed by the Wisconsin Employment Relations Commission. Therefore, only the costing method set forth in the forms prescribed by the WERC for teacher negotiations can be used to determine the percentage increase given nonrepresented professional employees.

Comparison with prior law. The new statute provides school boards with additional flexibility in assembling administrator compensation and fringe benefits packages.

Under the prior statute, school boards were limited to providing a maximum increase each year of 2.1 percent in compensation over the prior year's total cost of compensation and fringe benefits and a maximum total increased cost for fringe benefits of 1.7 percent over the total compensation and fringe benefits costs for all such employees who were employed in the previous year. In situations where the increased costs of fringe benefits exceeded the 1.7 percent amount, the costs in excess of 1.7 percent were offset against the funds that would otherwise have been available for compensation under the 2.1 percent figure.

In addition, school boards were required to maintain the same fringe benefits and to make the same contribution toward those benefits under the prior statute. Because the prior statute distinguished, but did not specifically define, the terms "compensation" and "fringe benefits," school boards had no clear road map for complying with it and were forced to make uncertain decisions as to which category particular expenditures made on behalf of employees should fall within.

Moreover, because the percentage limits established under the prior statute related to increases in compensation and fringe benefits for the entire administrative employee group, rather than individual employees, school boards' expenditure limits were difficult to interpret when changes in administrative staff levels occurred.

In contrast, the new statute combines all compensation and fringe benefits costs and simply allows for a 3.8 percent increase in the average cost per employee over the average total cost per employee in compensation and fringe benefits in the preceding year. As a result, school boards are not prejudiced by changes in administrative staff levels and do not have to draw fine, uncertain distinctions between "compensation" and "fringe benefits."

In addition, there is no longer any

Legal Comment is designed to provide authoritative general information, with commentary, as a service to WASB members. It should not be relied upon as legal advice. If legal advice is required, the services of competent legal counsel should be obtained.

"There is no longer any requirement that the same fringe benefits or the same level of contribution toward those benefits be maintained."

requirement that the same fringe benefits or the same level of contribution toward those benefits be maintained. Consequently, school boards have far greater flexibility in a number of respects to fashion compensation and fringe benefits packages for administrative employees.

While the statute creates new and arguably more flexible alternative statutory limits for administrator compensation and fringe benefit increases, however, it retains certain limits expressed in the prior statute and may be still less flexible than its predecessor in other respects.

For example, the statute continues to define the cost of compensation as including the cost of "any increase in compensation due to a promotion or the attainment of increased professional qualifications." As a result, school districts are more clearly prohibited from exempting dollars that have been paid for promotions or in recognition of professional achievement from the overall costing calculation and cannot treat such events as creating a new position or new hire for costing purposes.

In addition, as noted previously, if a school board chooses to grant compensation and fringe benefit increases to nonrepresented professional employees based on raises and benefits received by represented professional employees, the board must use the costing method prescribed by the WERC, even if for some reason that method was not used when represented professional employees' compensation and benefit increases were originally calculated.

The recent amendments to the statute that govern administrator compensation and fringe benefits have generated considerable discussion among school board members and school administrators. While not every question that has been raised concerning the meaning and application of the statute can be examined here, school officials' discussions often gravitate towards certain, common issues that bear close examination.

Applying different statutory compensation limits to the same contract. A school board does not have to use the same compensation option for both years of a two-year administrator contract. The statute provides that a school district may not exceed a 3.8 percent average cost per employee increase or the average total percentage increase given to represented professional employees "for any 12-month period ending on June 30." Thus, although administrator contracts may not exceed two years, (but a two-year contract may provide for one or more extensions of one year each),[5] the statute strongly indicates that a school board may make a different costing election for each 12-month period covered by a two-year administrator contract. However, the same method must be used for all covered employees in any given year.

Application to new employees. The statute specifically addresses the "average increase" in compensation and fringe benefits that school districts may provide to their nonrepresented professional employees. Since new employees do not receive an "increase" in compensation and benefits, it appears that such employees, in their first year of employment, are not subject to the statutory cost limitations that apply to the nonrepresented professional employee group generally. However, school boards must include these employees in the computation when calculating compensation and benefits increases in subsequent years.

Limitations placed on providing alternative forms of compensation and benefits. School boards often explore alternative means of compensation, including tax sheltered annuities and early retirement benefits. The utility of providing tax sheltered annuities to administrative employees is that the annuities provide a future benefit that is greater than their present cost. However, school boards should not treat the cost of such annuities as exempt from statutory costing mandates and further should not automatically assume that administrators can escape income tax liability in the year the benefits are purchased on their behalf.

Statutory costing mandates are based on "the total cost to the school district

"School boards should be certain to consult with counsel before finalizing compensation commitments."

of compensation and fringe benefits" in a particular year. Consequently, the purchase price of such a benefit must be costed as part of the cost of compensation and fringe benefits provided to nonrepresented professional employees. Because the statute is concerned with total cost, however, the appropriate value to assign to these benefits for costing purposes appears to be the actual cost incurred in the 12-month period being considered, rather than the future value of the benefit. Therefore, the actual cost of such benefits, if purchased, must be accounted for in costing nonrepresented professional employees' compensation increases and cannot be deferred until such time as the benefit is realized by the employee.

Early retirement benefits have also been used to provide deferred compensation for administrative employees. In all likelihood, such benefits must be treated differently than tax sheltered annuities under the statutory costing mandates. As a general matter, an early retirement benefit creates a conditional right to future compensation or benefits to encourage early retirement. Because such benefits may not result in any actual "cost" to the school district in the 12-month period under examination, it appears that such a benefit does not have to be costed in the year in which it is first agreed to.

Open Meetings Law requirements. For purposes of the Open Meetings Law, school boards should distinguish between discussions that concern an employee's performance and those that have to do with how much money should be allocated to compensate a general class of employees.

On the one hand, a governmental body may meet in closed session to consider employment, promotion, compensation, or performance evaluation data of its public employees.[6] The attorney general has concluded, however, that a board meeting to determine the overall budget increase to cover compensation increases for a general class of employees cannot be conducted in closed session.[7] Therefore, while school boards may properly meet in closed sessions to discuss employee performance and its relation, if any, to that individual employee's compensation, more general discussions concerning increased expenditures for entire groups of nonrepresented professional employees need to be conducted in open session.

Conclusion. School boards now have greater statutory flexibility to determine the maximum compensation increase allowed by law for nonrepresented professional employees. Less flexibility may exist, however, to characterize deferred compensation benefits as distinct from salary due to new requirements that compensation and fringe benefits be evaluated in terms of their combined total cost to the district. School boards should be certain to consult with counsel before finalizing compensation commitments, particularly when boards' costing options include the use of costing forms ordinarily applied to represented employees or if deferred compensation benefits are under consideration.

References

1. § 118.245(3), Wis. Stats.
2. § 118.24(1), Wis. Stats. *See* also, § 115.001(8), Wis. Stats.
3. § 111.70(1)(L).
4. § 118.245(1)(a).
5. §118.24(1), Wis. Stats.
6. § 19.85(1)(c), Wis. Stats.
7. Op. Att'y Gen. I-36-89, May 5, 1989.

Wisconsin Senate Assistant Republican Leader
Senator Brian D. Rude

SENATE COMMITTEE ON EDUCATION
JUNE 4, 1997

SENATE BILL 216

Senator Potter, committee members, thank you very much for your timely scheduling of Senate Bill 216. I appreciate the opportunity to be before the Education Committee this morning and am joined by Mr. Tom Ward, a representative of the West Salem School Board, and the person who originally brought this issue to my attention.

In January 1996, Mr. Ward contacted me to express his concern with the ability of the West Salem School District to extend the contracts of certain administrators. The contract extension was in question given the changes that occurred to the Wisconsin law regarding the 3.8% compensation package for administrators.

West Salem found themselves in a situation where additional supervisory duties required adding personnel. The district faced two options: extending a 9-month contract to 12 months or hiring a new part or full-time person.

The hiring of a new administrator would be allowed under current law. Extending an existing administrator's contract with a corresponding salary increase, would be difficult, if not impossible, to do within the 3.8% cap, and we received mixed messages

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as to the legality of doing so.

Following discussions my office had with the Legislative Fiscal Bureau and the Legislative Reference Bureau, it was determined that a change in law was necessary. Last session, I introduced Senate Bill 634, but time was not on my side as far as getting this bill through the process prior to the end of last year's session. Consequently, I introduced Senate Bill 216 to remedy the situation which Tom will now further describe.

Testimony of Tom Ward representing the School District of West Salem School Board on Senate Bill 216 - June 4, 1997.

The West Salem School District is a conservative rural school district with 3 schools (1 elementary, 1 middle school, and 1 high school) and 1475 students. In 1995 we were building a new elementary school, remodeling our high school and restructuring the makeup of our middle school.

In the spring of 1995, the Board, as part of our contract negotiations with administrators, was looking for ways to deal with the ever increasing administrative workload. There was considerable work to be accomplished, yet not enough recurring work to create a new administrative position. Both the School Board and the administration were receptive to extending the contracts of current administrators from 210 days to 240 days to deal with this growing workload. Both also agreed that compensation should be increased relative to the number of additional days worked.

This was the same time the state was modifying SS 118.24. Therefore, the School Board checked with its legal counsel to see if it could extend the principals' contracts outside of a 3.8% compensation package but within revenue limits. Our attorney advised that the statutes were not clear on this issue and that there was risk with such an approach.

Our district, again being a small conservative rural district, took the safe course of action. Based on this advice, we decided to extend administrative contracts over a period of three or four years while trying to live within the 3.8% limit. To date we have three principals and 3 other administrators with 235 day contracts.

In the fall of 1995, during a regional meeting between school district officials and legislators, I asked Senator Brian Rude to consider introducing legislation to clarify SS 118.24. All of the school officials in attendance indicated they would support such a change as did the other legislators who were present. I followed up this meeting with a formal written request in January 1996.

In researching this issue, Senator Rude's office contacted the Legislative Fiscal Bureau to determine their intent during the original drafting of SS 118.24. At that time the response we got was that they intended any extensions to live within the 3.8% cap. Yet, when we checked again this year we did not get the same answer. At this time there seemed to be a belief that extending contracts did not have to fall within the 3.8% limit. In addition, while I am unaware of any formal legal opinion, there does seem to be a difference of opinion between school legal counsels on this issue. Some believe extensions should be within the 3.8% limit while others believe that providing such extensions outside of the limit is defendable.

All of this makes Senate Bill 216 critical. It serves to remove ambiguity and provide clear guidance for schools while maintaining the concept of providing additional compensation for additional work. I respectfully request your support of Senate Bill 216.