MINNESOTA STATE LAW LIBRARY

CASE NO. A06-1989

STATE OF MINNESOTA
IN COURT OF APPEALS

EDUCATION MINNESOTA – OSSEO and EDUCATION MINNESOTA – OSSEO-ESP,

Appellants,

v.

INDEPENDENT SCHOOL DISTRICT NO. 279, OSSEO AREA SCHOOLS, MAPLE GROVE, MINNESOTA, and RICH MELVIN, IN HIS CAPACITY AS ASSISTANT SUPERINTENDENT OF HUMAN RESOURCES OF I.S.D. 279,

Respondents.

APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 1

FACTS 2

ARGUMENT 6

A. Standard Of Review 6
B. Introduction 6

CONCLUSION 23

LIST OF APPENDICES 24

TABLE OF AUTHORITIES

Cases

Am. Fed. of State, County, Mun. Employees v. Sundquist, 338 N.W.2d 560 (Minn. 1983) 1, 13, 20

Education Minnesota-Greenway, Local 1330 v. Indep. Sch. Dist. No. 316, 673 N.W.2d 843 (Minn. App. 2004) 1, 8

Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51, 353 N.W.2d 917 (Minn. 1984) 1, 8

General Drivers Local 346 v. Independent Sch. Dist. No. 704, 283 N.W.2d 524 (Minn. 1979) 10

International Bhd. of Teamsters, Local 320 v. City of Minneapolis, 225 N.W.2d 254 (Minn. 1975) 14

Law Enforcement Labor Servs., Inc. v. Sherburne County, 695 N.W.2d 630 (Minn. App. 2005) 10

Minnesota Arrowhead Respondent Council 96, Am. Fed of State, County, Mun. Employees v. St. Louis County, 290 N.W.2d 608 (Minn. 1980) 13

Reserve Mining v. Herbst, 256 N.W.2d 808 (Minn. 1971) 6

West St. Paul Federation of Teachers v. Independent School District No. 197, West St. Paul, 713 N.W.2d 366 (Minn. App. 2006) 1, 8, 10, 15

Statutes

Minn. Stat. § 123B.02 ..... 1, 13, 16

Minn. Stat. § 179A.01 11

Minn. Stat. § 179A.03 12

Minn. Stat. § 179A.07 ..... 1, 11, 12

Minn. Stat. § 179A.13 ..... 8, 21

Minn. Stat. § 352.96 ..... 1, 16, 17

Minn. Stat. § 354.42 20

Minn. Stat. § 356.24 ..... passim

STATEMENT OF THE ISSUES

1. Whether an employer matched 403(b) deferred compensation plan is a mandatory subject of bargaining.

   The trial court held in the negative.

2. Whether an unmatched deferral of an employee's compensation to a 403(b) plan is a mandatory subject of bargaining.

   The trial court held in the negative.

Apposite cases:

West St. Paul Federation of Teachers v. Independent School District No. 197, West St. Paul, 713 N.W.2d 366 (Minn. App. 2006);

Education Minnesota-Greenway, Local 1330 v. Indep. Sch. Dist. No. 316, 673 N.W.2d 843 (Minn. App. 2004) *pet. for rev. denied (Minn. April 20,2004)*;

Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51, 353 N.W.2d 917 (Minn. 1984)

Am. Fed. of State, County, Mun. Employees v. Sundquist, 338 N.W.2d 560 (Minn. 1983)

Apposite statutes:

Minn. Stat. § 123B.02

Minn. Stat. § 179A.07

Minn. Stat. § 352.96

Minn. Stat. § 356.24

STATEMENT OF THE CASE

This lawsuit began with the service and filing of Appellants' Complaint on May 19, 2005. Appellants first appeared before the district court on their Motion

for a Temporary Restraining Order, which was heard on May 23, 2005. The Court granted the Motion by Order dated May 31, 2005. The second appearance of the parties before that Court was for a hearing on the Appellants' Motion for a Temporary Injunction, heard June 30, 2005. Judge Neville granted that Motion by Order and Memorandum dated July 1, 2005.

Appellants then moved the Court for an order granting summary judgment on the merits. After a hearing on October 31, 2005, that motion was denied by an Order and Memorandum dated January 3, 2006. The parties then appeared before Judge Howard in trial on March 8-10, 15, and 17, 2006.

Judge Howard issued Findings of Fact, Conclusions of Law and Order for Judgment dated August 3, 2006. On September 19, 2006, Judge Howard issued Amended Findings of Fact, Conclusions of Law and Order for Judgment which ordered the Court Administrator to enter the judgment. This appeal ensued by Appellant filing and serving a Notice of Appeal dated October 18, 2006.

FACTS

Appellants Education Minnesota-OSSEO (EM-O) and Education Minnesota– OSSEO-ESP (EM-O-ESP) are the exclusive representatives of certain employees of Respondents. EM-O represents approximately 1600-1650 teachers, 40 nurses, and 60 Kidstop instructors. T.[1] 64. Each of these groups

[1] "T." refers to the transcript from the trial.

has a separate collective bargaining agreement (CBA). EM-O-ESP represents approximately 750 educational support professionals. T. 191.

Appellants' CBAs with Respondents call for Respondents to match certain contributions made to either the Minnesota State Deferred Compensation Program or an approved 403(b) plan (which are tax-sheltered plans for the deferral of income) ("the matched plan"). Jt. Ex.[2] 23 at 11; Jt. Ex. 24 at 9; Jt. Ex. 25 at 12; Pl. Ex.[3] 11 at 9; T. 67. In addition to the match, employees are free to contribute before-tax dollars to those plans up to an amount established by the Internal Revenue Code ("the unmatched plan"). Jt. Ex. 25 at 13. The 2003-05 CBA between the Respondent and EM-O (which was the current agreement at the time of the instant dispute) states in Article VII (Extra Compensation):

> Section 8. Deferred Compensation Programs. In accordance with Section 457 or 403b of the Internal Revenue Code and M.S. 356.24, the school board will match the contribution of an eligible teacher according to the following schedules towards either the Minnesota State Deferred Compensation Program (Section 457) or an approved 403b tax sheltered annuity plan. The plan must meet the School District's guidelines for approval. The contribution and match are forwarded each pay period.

Id. at 12. After detailing the precise amount of the match for different employee categories, it provides:

> Teachers may defer more than the match. Federal law determines the maximum amount an individual can contribute annually.
>
> Subd. 2. Eligibility. To be eligible for this provision, full and part-time teachers must have attained Step 5 status or above on Salary

[2] "Jt. Ex." refers to a Joint Exhibit entered into evidence at trial.
[3] "P. Ex." refers to an exhibit introduced by Appellants at trial.

> Schedule A or B. Participation in the plan will be voluntary and will be governed by the policies and guidelines as defined in the Minnesota State Deferred Compensation Program (Section 457) or Section 403b of the Internal Revenue Code.

Id. at 13.

At the time in question, there were 24 approved 403(b) vendors to which employees could contribute money. D. Ex. 124. According to Respondents, $5,000,000 was deposited as voluntary employee contributions in 2004-05 while only $400,000 came from an employer's contribution in the match program. D. Ex. 90 (Melvin email, 1/31/05); T. 540. This resulted in a total of $5,400,000 in employee payments and $400,000 in Respondents' payments outside of employee salary. Id.

During the 2004-2005 school year, Respondents unilaterally determined that they would eliminate all of the 24 vendors currently used by employees and replace them with one new vendor that the employees had never used. EM-O and EM-O-ESP objected to the plan to go to one vendor but participated in the advisory discussions that ensued on this issue in an attempt to keep their members informed. T. 114. Appellants' position was that Respondents could only change the number of vendors through the collective bargaining process.

The Respondent School Board took action on March 15, 2005, by passing a resolution that stated: "Be it resolved that the School Board of Independent School District No. 279 authorizes administration to implement the change to a

single 403(b) vendor." Jt. Ex. 30 at 7. There was no mention in the Board's discussion about negotiations with either Appellants' exclusive representatives or of any guidelines that the existing companies no longer met. The Board took no action to change the guidelines. Id.

On March 21, 2005, one of EM-O's attorneys, Debra Corhouse, sent the District's Interim Superintendent, Dr. James L. Smith, a letter putting Respondents on notice that the Union was demanding to bargain over the issue of the unilateral change to the 403(b) plan providers available to its members. (Jt. Ex. 31). EM-O also put Respondents on notice that it considered Respondents' actions to constitute an unfair labor practice. Id. The Board passed a motion at its April 19, 2005, meeting to "award the District's 403(b) single vendor contract to MetLife." Jt. Ex. 33 at 9. Representatives clarified this single vendor contract to indicate that employees would also no longer be able to transfer money out of the plan (under the 90-24 transfer provisions). T. 301.

On May 5, 2005, one of EM-O-ESP's attorneys, Debra Corhouse, sent the District's Interim Superintendent James L. Smith, a letter putting Respondents on notice that the Union was demanding to bargain over the issue of the unilateral change to the 403(b) plan providers available to its members. Jt. Ex. 34. The Union also put Respondents on notice that it considered its actions to constitute an unfair labor practice. Id. On May 16, 2005, Respondents' attorney Stephen Knutson reiterated his argument that he believed the Respondents had retained

the discretion to determine which 403(b) vendors would be available to its employees. D. Ex. 106. Respondents never responded to the Unions' demands to bargain, so Appellants brought this unfair labor practice lawsuit.

ARGUMENT

A.

Standard Of Review

The standard of review in cases where an interpretation of statutes is called for is well settled in Minnesota. In cases where the question is one of law, the appellate court reviews the issue de novo and need not defer to the trial court's conclusions. Reserve Mining v. Herbst, 256 N.W.2d 808 (Minn. 1971).

B.

Introduction

The fundamental error in the court's decision below concerns its legal conclusion that both matched and unmatched 403(b) plans are not mandatory subjects of bargaining. Further the court erred in holding that the 403(b) plans are, at best, permissive subjects of bargaining. In applying the case law to the issue of 403(b) plans, this Court should find that a 403(b) plan is either a mandatory subject of bargaining or it is an excluded, illegal subject.

First, there should be little question that employer contributions and employee compensation deferrals would normally be considered terms and conditions of employment. Both are fundamental pay or compensation issues. If

they are terms and conditions of employment, they are mandatory subjects of bargaining unless specifically excluded from that definition.

If the 403(b) plans are specifically excluded by statute from what would otherwise be considered a term and condition, then the subject would be an illegal subject of bargaining. Here, the trial erred fundamentally when it held that the issue is, at best, a permissive subject.

PELRA defines terms and conditions as "the compensation therefore including fringe benefits" but goes on to specifically exclude "retirement contributions or benefits" from that definition. This appeal centers on the unique question of whether employer contributions and employee deferrals constitute "retirement contributions or benefits" and therefore excluded from what would normally be considered a term and condition of employment.

If 403(b) plans are mandatory subjects of bargaining, the district court's decision must be reversed because Respondents would then have committed an unfair labor practice.

I. The failure of Respondents to meet and negotiate with their Unions regarding terms and conditions of employment is an unfair labor practice.

The Public Employment Labor Relations Act (PELRA), Ch. 179A, states that a public employer commits an unfair labor practice by "refusing to meet and negotiate in good faith with the exclusive representative of its employees in an

appropriate unit." Minn. Stat. § 179A.13, subd. 2(5) (2004). Unilaterally imposing a change to a term and condition of employment is a refusal to bargain; a principle that was most recently reiterated in West St. Paul Federation of Teachers v. Independent School District No. 197, West St. Paul, 713 N.W.2d 366, (Minn. App. 2006). See also Education Minnesota-Greenway, Local 1330 v. Indep. Sch. Dist. No. 316, 673 N.W.2d 843, 851 (Minn. App. 2004), *pet. for rev. denied* (Minn. April 20, 2004), and Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51, 353 N.W.2d 917, 920-21 (Minn. 1984). Unilateral changes that "deprived the union of its right to negotiate a subject of mandatory bargaining" are unfair labor practices. Foley at 921. There is no dispute here that Respondents' action in restricting vendor choice was unilateral.

Furthermore, PELRA also prohibits "interfering, restraining, or coercing employees in the exercise of the rights guaranteed in [PELRA]." Minn. Stat. § 179A.13, subd. 2(1) (2004). The Respondents' failure to bargain before taking Board action to replace the list of 24 403(b) providers with one new vendor interfered with the Unions' right to bargain under PELRA.

Appellants are only seeking the minimal right to meet and negotiate over the issue with the employer—only the right to have some input in this big financial decision. Notably, they are not seeking court intervention to allow them to choose the vendors.

II. Respondents made unlawful unilateral changes to the collective bargaining agreements in effect between the parties.

It is undisputed that Respondents acted unilaterally in eliminating all of the available 403(b) vendors and requiring that 403(b) participants use a new vendor. The three CBAs covering employees represented by EM-O state that the employer will match an employee contribution (up to a limit), but the "the plan must meet the School District's guidelines for approval." (Jt. Ex. 25 at 12; Jt. Ex. 23 at 11; and Pl. Ex. 11 at 9). The EM-O-ESP CBA states: "Any selected plan must meet the District's guidelines." (Jt. Ex. 24 at 9).

At the time each of the parties negotiated their individual contract provisions, the guidelines undisputedly required that a new vendor be added if ten or more subscribers petitioned Respondents for the addition, or a new employee arrived with a plan not already on the list. Although Respondents claim that along the way the list of approved vendors was changed unilaterally, all that really happened is that the existing guidelines were applied and additional companies were eligible for inclusion. The *guidelines*, however, did not change, unilaterally or otherwise.

Finally, there is nothing in any of the CBAs that grants the Employer the right to select the vendor. "Any waiver of the statutory right to bargain over mandatory subjects of bargaining must be in clear and unmistakable language." General Drivers Local 346 v. Independent Sch. Dist. No. 704, 283 N.W.2d 524,

527 (Minn. 1979). See also, West St. Paul Fed. of Teachers, at *5 See also, Law Enforcement Labor Servs., Inc. v. Sherburne County, 695 N.W.2d 630, 638 (Minn. App. 2005). If the Employer had retained discretion as it argues, the language would have read: "the plan must meet the School District's guidelines for approval." The language, however, specifically incorporated the existing guidelines and did not allow unfettered discretion.

Respondents have demonstrated that they know how to negotiate language that would provide discretion, if, indeed, the parties had agreed to the language. For example, each of the CBAs between Appellant Unions and Respondents grant the authority to the Employer to select the vendor for the group health plan available to the unit. See Jt. Ex. 25 at 14: "The School Board will make the selection of insurance carriers and policies. Education Minnesota-OSSEO will have representation on the School District Insurance Advisory Committee."; and Jt. Ex. 23 at 9, Jt. Ex. 24 at 10, and Pl. Ex. 11 at 6 (each providing): "The selection of insurance carriers and policies will be made by the School Board." No such authority is granted the Employer as to the selection of the 403(b) vendors and therefore, the Union has not waived or granted that right to the Employer.

III. Under the law, the subject is either a mandatory, permissive or prohibited subject for bargaining.

PELRA was enacted to "promote orderly and constructive relationships between all public employers and their employees" ... and because "[t]he

relationships between the public, public employees, and employer governing bodies involve responsibilities to the public and a need for cooperation and employment protection which are different from those found in the private sector." Minn. Stat. § 179A.01 (2004). Furthermore, "[u]nresolved disputes between the public employer and its employees are injurious to the public as well as to the parties. Adequate means must be established for minimizing them and providing for their resolution." Id. Therefore, the law,

> (2) requir[es] public employers to meet and negotiate with public employees in an appropriate bargaining unit and provid[es] that the result of bargaining be in written agreements; and (3) establish[es] special rights, responsibilities, procedures, and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer, and the public at large. ...

Id.

PELRA goes on to implement that public policy by explaining which items constitute mandatory subjects of bargaining. "Terms and conditions" of employment (in addition to grievance procedures) are mandatory subjects for collective bargaining. Minn. Stat. § 179A.07, subd. 2(a) (2004). PELRA then defines "terms and conditions" as:

> "Terms and conditions of employment" means the hours of employment, the *compensation* therefor including *fringe benefits* except retirement contributions or benefits other than employer payment of, or contributions to, premiums for group insurance coverage of retired employees or severance pay, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean

> educational policies of a school district. "Terms and conditions of employment" is subject to section 179A.07.

Minn. Stat. § 179A.03, subd. 19 (2004) (emphasis added). Because the matched 403(b) plan is a fringe benefit for employees and the unmatched plan is simply a voluntary use of compensation, these plans are both terms and conditions of employment.

In addition to requiring negotiation over terms and conditions of employment, PELRA specifically states that public employers are not required to meet and negotiate over matters of inherent managerial policy. Minn. Stat. § 179A.07, subd. 1 (2004). The Supreme Court noted that because PELRA provides only that employers are "not required" to bargain over these issues, they are not prohibited from doing so. Minnesota Arrowhead Respondent Council 96, Am. Fed of State, County, Mun. Employees v. St. Louis County, 290 N.W.2d 608, 611(Minn. 1980). The Arrowhead Court held: "Since there is no provision to the contrary in PELRA, a public employer should be able to negotiate even matters of inherent managerial policy if it does so voluntarily." Id.

PELRA can also designate prohibited subjects of bargaining. One of these impermissible subjects is pension benefits. Am. Fed. of State, County, Mun. Employees v. Sundquist, 338 N.W.2d 560, 575-76 (Minn. 1983). As is discussed below, 403(b) plans are not pension plans as addressed by Sundquist.

A. 403(b) plans are terms and conditions of employment, and therefore, are mandatory subjects of bargaining.

There should be little question that the identity and selection of vendors for a 403(b) plan is a term and condition of employment, and therefore, a mandatory subject of bargaining, unless specifically excluded by that definition. This is the fundamental error of the court below.

The Minnesota Supreme Court reasoned that because PELRA restricted the right to strike, the "legislature intended the scope of the mandatory bargaining area to be broadly construed so that the purpose of resolving labor disputes through negotiation could best be served." International Bhd. of Teamsters, Local 320 v. City of Minneapolis, 225 N.W.2d 254, 257 (Minn. 1975). PELRA, Minnesota Statutes §§ 356.24 (2004), and 123B.02 (2004) all point to 403(b) plans as mandatory subjects of bargaining. Because the selection of 403(b) vendors is integral to the plan, it too is a mandatory subject.

1. The identity of the 403(b) vendor has value for the employees and should be irrelevant to Respondents.

The identity of the vendor under such a plan is as fundamental as the amount of money that will be matched by the employer. It has value both in the amount of investment income one can earn and in retaining a relationship with a trusted financial advisor.

By analogy, the group health plan's provider network and the benefits contained in the plan are just as important as the amount of money an employer will contribute to the premiums for the plan. There is no question that the

employer is obligated to bargain over the provider network and plan structure of a group health insurance plan unless the union gives that authority away through bargaining. See West St. Paul Fed. of Teachers, at *6 (holding that unilateral changes to the available providers and benefit set constituted an unfair labor practice). The Court in West St. Paul specifically determined that the value of the health plan extended beyond the monetary benefits to the provider network. Id. at *4. The Court also found it significant that the "professional relationship [was] built on trust and confidence." Id. Similarly, there is no question that the Respondents here must also bargain over the identity of providers and the structure of the 403(b) plan, which have value for the employees.

The issue of provider choice is essential, where, as here, employees have decades long relationships with their 403(b) vendors. Understanding the underlying programs and how they operate is essential to planning for the future. The EM-O President testified that he "was extremely upset that it [the plan to move to one vendor] completely ignored existing relationships between people's financial planners and the employees." (T. 251). He also noted that he got responses from his membership about the Respondents' plan, indicating that they were upset by "the potential loss of their relationship that they had with their own personal financial planner, the loss of choice, and the idea that the District was, in fact, just imposing this as opposed to negotiating it." (T. 254).

Respondents do not gain or lose financially through investments; this is all employee money. The Respondents' only obligation is to make its contribution (which has been bargained). Any investment and administrative fees are borne completely by the employees. (T. 285; and Jt. Ex. 30 at 7). Respondents' contribution increases by the 7.65% FICA requirement if the employee chooses the 457 plan, but there are no other increases to Respondents' contribution based on vendor choice of a 403(b). (T. 231).

2. Unmatched 403(b) plans are compensation, and therefore, vendor selection for these plans is a mandatory subject of negotiation.

The purchase of a TSA (403(b)) comes out of an employee's compensation:

> Subd. 15. **Annuity contract; payroll allocation.** At the request of an employee and *as part of the employee's compensation arrangement*, the board may purchase an individual annuity contract for an employee for retirement or other purposes and may make payroll allocations in accordance with such arrangement for the purpose of paying the entire premium due and to become due under such contract. The allocation must be made in a manner which will qualify the annuity premiums, or a portion thereof, for the benefit afforded under section 403(b) of the current Federal Internal Revenue Code or any equivalent provision of subsequent federal income tax law. The employee shall own such contract and the employee's rights under the contract shall be nonforfeitable except for failure to pay premiums. Section 122A.40 shall not be applicable hereto and the board shall have no liability thereunder because of its purchase of any individual annuity contracts. This statute shall be applied in a nondiscriminatory manner to employees of the school district.

Minn. Stat. § 123B.02, subd. 15 (emphasis added). The employees' non-matched contributions are simply compensation that they choose to direct in a certain way. An individual can currently invest up to $15,000 (without the catch-up) in "elective deferrals for the employee's contribution withheld out of their paychecks." (T. 229). These salary deferrals cannot be considered Respondents' contributions of any sort. Even though Respondents compensate the employee, it is the employee who chooses whether to take it as taxable salary or to salary reduce it into the 403(b) (or 457) tax-deferred/tax-sheltered account. Furthermore, because these voluntary employee tax-sheltering payments are not employer "contributions," they do not fit within PELRA's exclusion for "retirement contributions or benefits" (discussed below).

Moreover, the enabling legislation allowing for the unmatched contribution to a 403(b) also specifically labels the contribution as a deferral of the employee's *compensation.*

> **Entitlement to defer compensation**. At the request of an officer or employee of the state, an officer or employee of a political subdivision, or an employee covered by a retirement fund in section 356.20, subdivision 2, the appointing authority shall by payroll deduction defer the payment of part of the compensation of the officer or employee. The amount to be deferred must be as provided in a written agreement between the officer or employee and the employing unit....

Minn. Stat. § 352.96, subd. 1 (2004).

Finally, there is no statutory authority to limit the scope of bargaining over compensation. The scope is open, and therefore, the issue of vendor identity is subject to mandatory bargaining without restriction. Because a salary-reduced contribution made by the employee is simply the deferral of his/her own compensation and not an additional retirement contribution by the employer, the vendors who work with that compensation are thus a mandatory subject of bargaining.

3. Under Minnesota Statutes § 356.24, the match must be bargained.

If school boards exercise their authority to establish a 403(b) plan, it must be done through collective bargaining, pursuant to Minnesota Statutes § 356.24, subdivision 1(5):

> It is unlawful for a school district or other governmental subdivision or state agency to levy taxes for, or to contribute public funds to a supplemental pension or deferred compensation plan that is established, maintained, and operated in addition to a primary pension program for the benefit of the governmental subdivision employees other than: ...(5) for employees other than personnel employed by the Board of Trustees of the Minnesota State Colleges and Universities and covered under the Higher Education Supplemental Retirement Plan under chapter 354C, if the supplemental *plan coverage* is provided for in a personnel policy of the public employer or *in the collective bargaining agreement between the public employer and the exclusive representative of public employees in an appropriate unit*, in an amount matching employee contributions on a dollar for dollar basis, but not to exceed an employer contribution of $2,000 a year per employee; (i) to the state of Minnesota deferred compensation plan under section 352.96; or (ii) in payment of the applicable portion of the contribution made to any investment eligible under section 403(b) of the Internal Revenue Code...

(Emphasis added). The parties here agree that they have negotiated other components of the 403(b) plan in addition to the amount of the match: 1) the eligibility criteria to receive the match: 2) when the payments will be made; and 3) in what form the payment will be paid (severance, etc). (T. 546; Jt. Ex. 25 at 11-13; Jt. Ex. 24 at 9; Jt. Ex. 23 at 11; and Pl. Ex. 11 at 9).

4. In the matched plan, both the amount contributed and vendor identity are mandatory subjects of bargaining.

The identity of the vendor is so closely tied to the value of Respondents' contribution (and the employee's matching contribution) that they are too interrelated to separate. It would be absurd to require the amount to be negotiated pursuant to Minn. Stat. § 356.24, subd. 1(5), but then allow that contribution to be placed with a vendor at sole discretion of districts when districts have no financial stake in how the investments perform or how much of the investment is reduced by fees. Since the amount of the contribution is clearly mandatory, the vendor identity is as well, as part of the plan's implementation. The vendor impacts the value of the plan and must be included in the negotiation of this fringe benefit.

B. 403(b) plans are not "retirement contributions or benefits;" therefore, they are not prohibited or illegal subjects of bargaining.

Respondents argue, and the trial court held, that PELRA's definition of "terms and conditions of employment" excludes 403(b) plans because they are "retirement contributions or benefits." In order for Respondents to prevail on their claim, this Court would have to hold that the negotiation of 403(b) plans is a

prohibited or illegal subject of bargaining. That is not supported either by the law or the Respondents' behavior.

First of all, there are no "contributions" regarding the unmatched plan, so this analysis is inapplicable to the vast majority of money at issue here.[4] Secondly, if the matched plans truly constituted retirement contributions, they would not only be excluded, they would be illegal subjects of bargaining. See Sundquist, at 575, n. 24:

> However, we conclude that PELRA's express exclusion of pension considerations from the definition of terms and conditions of employment was established to take all pension issues completely out of the scope of permissible bargaining, and that it is consequently illegal to agree to provisions, express or implied, which purport to restrict the Legislature's freedom to act with respect to such issues.

Respondents have repeatedly negotiated over various parts of the 403(b) plan: the amount of the match; the eligibility criteria for the match; the timing of the deposits; the number of enrollees necessary for a company to be added, etc. Never have Respondents claimed that they were prohibited from discussing those subjects.

Although Respondents relied on Sundquist, that case addresses the fact that a public *pension* program is outside the scope of permissible bargaining. Id. at 576. The Sundquist Court did not address the issue of other types of benefits that may provide additional income in retirement. The Court cited the legislative

[4] The trial court concluded that $5,000,000 has been deposited as employee contributions while only $400,000 has been deposited as employer contributions. Trial Court Findings of Fact ¶ 62

history to support the fact that when adding the "retirement contributions or benefits" language to PELRA, the Legislature was focusing on the pension system alone; a system that they intended to administer so that there were not a series of different plans.[5] On the contrary, the Legislature does not require that all Respondents even offer 403(b) plans, much less administer them in the same way, or provide each employee with the same contribution. But see the Teachers Retirement Association (TRA) requirement that each employee and each employer contribute five percent (5%) of salary into the pension system. "The contribution must be made by deduction from salary." Minn. Stat. § 354.42, subds. 2 & 3 (2004). Because, unlike the pension system, the Legislature has delegated the entire administration of 403(b) plans to the respondents, once the plans are in that context, they must be bargained.

Furthermore, Respondents admit that at no time did they refuse to bargain over the various 403(b) issues as *illegal* subjects of bargaining. All four CBAs at issue here contain negotiated language about the 403(b) guidelines, the 403(b) payment schedule, qualification for the 403(b) benefit, etc.

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[5] "The author of the amendment [to PELRA], Representative Donald Moe, explained the purpose of the exclusion when he offered the amendment before the House Committee on Governmental Operations: 'The purpose of the amendment is to take the negotiation of pension benefits out of the bill and preserve the present situation with regard to pension benefits and that is to keep them within the realm of the legislature.' Statement of Rep. Donald Moe, House Committee on Governmental Operations, March 13, 1973. Representative Moe went on to explain that the exclusion was necessary to prevent the decentralized and discordant administration of public pensions, and to maintain legislative discretion over significant matters of budgetary policy *Id.*" Sundquist, at 576.

Since Minnesota Statutes § 356.24 specifically addresses the negotiation of a limited District contribution to a 403(b) plan (as discussed above), there is a precise legislative requirement to negotiate over that benefit.

IV. Minnesota Statutes § 356.24 provides that the 403(b) vendors should be negotiated.

Under Minn. Stat. § 356.24, not only is the number of vendors for the match plan a mandatory subject, but the identity of the matched vendor(s) and the number and identity of unmatched vendors are mandatory subjects of bargaining. The question is whether Minn. Stat. § 356.24, subd. 1, allows Districts the ability to unilaterally limit the number of vendors to one and/or the unilateral right to determine the identity of that vendor to one of its own choice for either the matched or unmatched plans without bargaining with the unions over the issue. If the answer to any of those questions is no, then Respondents have committed an unfair labor practice as defined in Minn. Stat. § 179A.13, subd. 2(1) and (5).

Even if it is true that Minn. Stat. § 356.24 allows the District to reduce the number of vendors for matching purposes, it does not allow the same for contributions that are not matched. Indeed, Respondents' own exhibits and affidavits show that historically, there has always been a limitation on the number of vendors that were approved for the match, but the majority of the vendors so authorized were not authorized for the match. Respondents have no authority to

limit the vendors available for nonmatching contributions without negotiating with the unions first.

Furthermore, even if the Court determines that the trial court's interpretation of Minn. Stat. § 356.24, subd. 1b, allows districts to unilaterally limit the number of 403(b) vendors, districts could certainly be permitted to determine the number of match vendors while still being required to negotiate over the identity of the vendor. Respondents' argument that it must have the authority to dictate the identity of the one provider because they have twenty employee groups is misplaced. There is no practical reason that each bargaining unit cannot have a different match vendor of choice (they still have one as Respondents wish). Second, there is nothing to prevent Respondents from making it worthwhile for all units to agree to the same match vendor. Finally, Respondents' convenience does not supersede the legal bargaining rights of Appellants.

Therefore, because this statute does not address the unmatched plans, and provides no limits whatsoever on the unions' rights to bargain over the identity of the vendors, this Court should find that these issues are mandatory subjects of negotiation.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this court reverse the judgment of the court below.

Dated: January 17, 2007.

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