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STATE OF MINNESOTA

IN COURT OF APPEALS

EDUCATION MINNESOTA-OSSEO AND
EDUCATION MINNESOTA-OSSEO-ESP,

Appellants,

vs.

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

Respondents.

RESPONDENTS' 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).

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STATEMENT OF THE ISSUES

1. Whether the Court of Appeals has jurisdiction to review the order vacating the temporary restraining order and denying the permanent restraining order because the appeal was not filed within sixty (60) days of the service of the notice of filing of order.

   The trial court did not rule.

   Apposite cases:

   Elsen v. State Farmers Mutual Ins. Co., 217 Minn. 564, 14 N.W.2d 859 (Minn. 1944)
   Western Meat, Inc. v. Wilson, 133 N.W.2d 631 (Minn. 1965)

   Apposite statutes:

   Minn.R.Civ.App.P. 103.03
   Minn.R.Civ.App.P. 104.01

2. Whether the Court of Appeals has jurisdiction over the appeal when the Appellants failed to transmit a copy of the order or judgment to the commissioner of the Bureau of Mediation Services within ten (10) days of the order or judgment as required by Minn. Stat. § 179A.13, subd. 1.

   The trial court did not rule.

   Apposite cases:

   Allen v. Hennepin County, 680 N.W.2d 560 (Minn. App. 2004)
   Lee v. Regents of the Univ. of Minn., 672 N.W.2d 366 (Minn. App. 2003)

   Apposite statutes:

   Minn. Stat. § 179A.13

3. Whether matched and unmatched 403(b) supplemental retirement plans constitute "retirement contributions or benefits" and, therefore, are not a "term and condition of employment" under the Public Employment Labor Relations Act.

   The trial court ruled in the affirmative.

Apposite cases:

Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51 , 353 N.W.2d 917 (Minn. 1984); *AFSCME Councils 6, 14, 65 and 96 v. Sundquist* , 338 N.W.2d 560 (Minn. 1983); *Minnesota Teamsters Pub. and Law Enforcement Employees v. County of Washington*, 413 N.W.2d 245 (Minn. App. 1987), *rev. granted* (Minn. 1987), *appeal dismissed* (Minn. 1998)

Apposite statutes:

Minn. Stat. § 123B.02
Minn. Stat. § 179A.03
Minn. Stat. § 356.24

STATEMENT OF THE CASE

The Appellants filed their Complaint on May 19, 2005. On May 31, 2005 a temporary restraining order was granted by Judge Cara Lee Neville enjoining the Respondent from proceeding with the implementation of a single vendor 403(b) supplemental retirement plan with regard to the Appellants. Subsequently, on July 1, 2005, Judge Neville granted the Appellants a temporary injunction.[1] The Appellants moved for summary judgment, which was denied by Judge Neville on January 3, 2006.

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[1] We note that the Appellants attach copies of Judge Neville's orders in their Appendix. The existence of those preliminary orders, however, has no effect upon any subsequent decisions of the trial court or this Court. *See Metropolitan Sports Facilities Comm'n v. Minnesota Twins Partnership*, 638 N.W.2d 214 (Minn. App. 2002) (the grant of a temporary injunction neither establishes the law of the case nor constitutes an adjudication of the issues on the merits); *see also Wakefield v. Anchor Bancorp, Inc.*, 416 N.W.2d 814 (Minn. App. 1987) (facts on which trial court acts when granting temporary injunction are, by nature of situation, provisional, and injunctive authority exercised will continue only until more scientific analysis of problem is made possible by trial on the merits).

A full evidentiary trial was held before Judge William R. Howard on March 8-10, 15 and 17, 2006. Findings of Fact, Conclusions of Law and Order for Judgment were filed in the Hennepin County District Court on August 3, 2006. The Order vacated the temporary injunction and denied the Appellants' motion for a permanent injunction. The Respondents served a Notice of Filing Court Order upon the Appellants on August 10, 2006.

Subsequently, Judge Howard, *sua sponte* issued Amended Findings of Fact, Conclusions of Law and Order for Judgment on September 19, 2006. Judgment was entered by the Hennepin County District Court on September 21, 2006.

The Appellants filed their Notice of Appeal on October 18, 2006 appealing the judgment entered on September 21, 2006.

STATEMENT OF FACTS

Beginning in the mid 1960's the Respondent Independent School District No. 279, Osseo, Minnesota ("Respondent School District" or "Respondent") first provided its employees with an opportunity to participate in an unmatched 403(b) supplemental retirement plan. (Findings of Fact, Conclusions of Law and Order for Judgment ("Findings") ¶ 6.) The Respondent School Board unilaterally selected the single vendor to receive employee contributions. (*Id.*)

The Respondent continued to exercise discretion with respect to the selection of vendors for its unmatched 403(b) supplemental retirement plan over the next forty-five (45) years. (Findings ¶¶ 7, 8, 13, 19 and 23). In this regard, the Respondent unilaterally selected

a second vendor for the plan and did not negotiate the change with any employee group. (Findings ¶ 7.) Later, the Respondent unilaterally allowed additional vendors to be added based upon employee participation with the particular vendor. For example, in 1974, the Respondent unilaterally amended the guidelines to provide for a new vendor to be added when the vendor could show enrollment of twenty (20) participants and did not negotiate the change with any employee group. (Findings ¶ 13.)

In furtherance of the School Board's resolution, the School District circulated a memorandum explaining the history and the recent unilateral School Board action regarding the "District No. 279 Tax Sheltered Annuity Program." (Jt. Ex. 5; Olson Tr. 320-21.) The School District administration also developed "Tax Sheltered Annuity Program Guidelines" ("Guidelines"). (Jt. Ex. 6, Findings ¶ 14.) The Guidelines addressed all of the particulars of the unmatched 403(b) supplemental retirement plan, including what was needed for a new vendor to be approved by the School Board. (*Id.*) The Guidelines were not negotiated with any employee group, including Appellants. (Olson Tr. 320.)

Subsequently, the Respondent unilaterally waived the twenty (20) participant requirement which allowed three new vendors to be added and did not negotiate the change with any employee group. (Findings ¶ 19.) Also, between December 1985 and July 1992, the Respondent unilaterally reduced the participation requirement for new vendors to ten (10) participants and did not negotiate the change with any employee group. (Findings ¶ 23.)

At times over those years the Appellants proposed language for the parties' collective bargaining agreement related to vendors for the unmatched 403(b) supplemental retirement plan and the Respondent refused to negotiate indicating that it was not a mandatory subject of bargaining. (Findings ¶¶ 9 and 16.) No language was ever placed into the parties' collective bargaining agreement regarding unmatched 403(b) supplemental retirement plans, including the "guidelines." (Findings ¶¶ 12, 15, 17, and 20.)

In 1992 the Legislature authorized school districts to make matching contributions to 403(b) supplemental retirement plans of employees by an amendment to Minnesota Statutes Section 356.24, subd. 1(4)(ii). (Findings ¶ 25.) Initially, the legislation limited the selection and identity of vendors to those approved by the State Board of Investment ("SBI") up to a total of ten (10). (Findings ¶ 26.) Ultimately, although the SBI approved a total of nine (9) qualified companies, the Respondent, in its discretion, unilaterally approved only five (5) of the approved SBI vendors, as they were previously approved by the Respondent, to receive employee contributions. (*Id.*) This approval was not negotiated with the Appellants or any employee group.

In accordance with the enabling statute, the 1993-95 collective bargaining agreement provided for a 403(b) supplemental retirement plan matching contribution. (Findings ¶ 29.) More specifically, the collective bargaining agreement provided that the Respondent would contribute the same matching amounts as it would for a Minnesota State Deferred Compensation Plan to a supplemental retirement plan under Section 403(b) "if the plan is

approved by the [SBI]" and "has met the school district's guidelines for approval." (Jt. Ex. 17, Findings ¶ 29.)[2] The same language appeared in the 1995-97 and 1997-99 Agreements.

Following a legislative change in 2000 removing the requirement that vendors be approved by the SBI, the only remaining language in the collective bargaining agreement was that the vendor "meet the school district's guidelines for approval." (Findings ¶ 43.) The intent was to give the Respondent sole discretion for the selection of 403(b) supplemental retirement plan vendors. (*Id.*)

In 2004, the Respondents unilaterally reduced the number of unmatched and matched 403(b) supplemental retirement plan vendors for new employees from twenty-four (24) to thirteen (13) without negotiating the change with any employee group. (Findings ¶ 45.) This included the five (5) vendors previously approved to receive a matching contribution from the Respondent. (*Id.*)

Also in 2004, the Respondent initiated an audit of the unmatched and matched 403(b) supplemental retirement plans. (Findings ¶ 46.) At the end of the audit, the Respondent was made aware of certain concerns and recommendations of the company that performed the

[2] The uncontroverted evidence during the trial was testimony that the reference to the "school district's guidelines for approval" was intended to continue the Respondent's discretion to place limitations on vendors and determine the number and identity of vendors. (Mack Tr. 480-81.)

audit, including the possible move to a single 403(b) supplemental retirement plan vendor. (Findings ¶ 48.)

In January 2005, the Respondent invited members of the Insurance Advisory Committee, which included representatives of all employee groups including the Appellants, to discuss the results of the audit. (Findings ¶ 48.) The group became the Investment Advisory Committee and conducted a Request for Proposal ("RFP") process to move toward a single vendor 403(b) supplemental retirement plan. (Findings ¶¶ 49, 51, 52, 53 and 54.) The Appellants' representatives strongly objected to moving to a single 403(b) vendor, but did not indicate that the matter must be negotiated. (Findings ¶ 50.)[3]

At the completion of the RFP process, the School District administration recommended to the Respondent School Board that MetLife be approved as the single 403(b) vendor for the Respondent. (Findings ¶ 59.) On March 15, 2005, the Respondent School Board appointed MetLife as the single 403(b) vendor. (Findings ¶ 61.)[4]

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[3] It was not until after the Respondent adopted the resolution authorizing the administration to implement the change to a single 403(b) vendor and approved MetLife as the single vendor that the Appellants challenged the Respondents' authority to do so absent negotiation. Even then, however, the Appellants only took the position that the "Respondents could only change the number of vendors through the collective bargaining process." (Appellants' Brief at 4; Jt. Ex. 31.) The Appellants never demanded to bargain on the issue of the selection of a particular vendor.

[4] The Appellants use the March 15, 2005 resolution to conclude that "[t]here 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" and "[t]he Board took no action to change the guidelines." (Appellants' Brief at 5.) The Appellants are pointing to an exhibit to prove facts not in evidence through the absence of those facts in the (continued...)

ARGUMENT

I. APPELLANTS' APPEAL WAS NOT TIMELY FILED AND SHOULD BE DISMISSED.

The Order initially issued in the present case was filed by the Hennepin County Court Administrator's Office on August 3, 2006. (*See* A1.) The Order issued by Judge Howard specifically provided:

> IT IS HEREBY ORDERED:
> (1) The Temporary Restraining Order signed by Judge Neville is VACATED;
> (2) The Plaintiff's Motion for a Permanent Restraining Order is DENIED;
> (3) The following memorandum is hereby incorporated as part of this order.

(*Id.* at A13.) No language was included in the Order with regard to the entry of judgment. The rules of appellate procedure provide that an appeal may be taken to the Court of Appeals from an order that "grants, refuses, dissolves, or refuses to dissolve an injunction." Minn.R.Civ.App.P. 103.03. Unquestionably, the trial court's order decided the merits of the case in its entirety and required no subsequent order or judgment to give it effect. *See Elsen v. State Farmers Mutual Ins. Co.*, 217 Minn. 564, 567, 14 N.W.2d 859, 861 (Minn. 1944). Consequently, the trial court's order filed on August 3, 2006 was an appealable final order.

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[4] (...continued)
exhibit. Nevertheless, the Respondents had no obligation to negotiate with the Appellants because the number and selection of unmatched and matched 403(b) supplemental retirement plan vendors was not a mandatory subject of negotiation. In addition, no reference to the guidelines was necessary because the Respondents acted within the discretion they reserved with respect to vendor number and selection.

The appeal period commences when a party serves written notice of filing court order upon the other party. Minn.R.Civ.App.P. 104.01, subd. 1 (an appeal may be taken from an appealable order within sixty (60) days after service by any party of written notice of its filing.) The Respondents served a Notice of Filing Court Order upon the Appellants on August 10, 2006. (*See* A23) Consequently, the Appellants had sixty (60) days after service by the Respondents on August 10, 2006, or until October 12, 2006 (allowing three (3) additional days for service by mail as provided by Minn.R.Civ.P. 60.5) in which to effectuate their appeal.

Subsequently, the trial court *sua sponte* issued Amended Findings of Fact, Conclusions of Law and Order for Judgment ("Amended Findings") on September 19, 2006. (*See* A27.) The only "amendment" was the addition of language "Let Judgment be Entered Immediately" following the order. (*Id.*) Thereafter the parties were notified that the Hennepin County Court Administrator entered judgment on September 21, 2006. (*See* A49.)

The Appellants filed and served their Notice of Appeal on October 18, 2006. (*See* A50.) This was sixty-nine (69) days after the date of service of the Notice of Filing Court Order and, therefore, untimely.

The Appellants may argue that the appeal time did not begin to run until the court administrator entered judgment. This argument is flawed in two respects. The subsequent Order for Judgment issued *sua sponte* by the trial court was neither required to effectuate the decision nor changed the outcome of the decision in any respect.

The Minnesota Supreme Court found that appellants who were not served with entry of judgment regarding the granting of summary judgment could appeal from the portion of the order that vacated a temporary injunction and could present issues raised by that part of the order. *Western Meat, Inc. v. Wilson*, 133 N.W.2d 631 (Minn. 1965). In *Western Meat, Inc.*, the district court granted summary judgment against the plaintiffs and vacated and discharged the temporary injunction on June 24, 1963. Judgment was entered against some, but not all of the plaintiffs. The plaintiffs against whom the judgment was not entered filed a notice of appeal from the judgment entered on July 29, 1963.

The Minnesota Supreme Court stated that the appeal was ineffective with respect to the judgment because it had not been entered against the appellants. *Id.* at 632. Although the reason for the ineffectiveness of the appeal was not specifically stated by the Court, the result follows the long line of cases that provide that an order granting summary judgment is an intermediate order which requires a subsequent judgment to give it effect. *See Johnson & Peterson, Inc. v. Toohey*, 289 Minn. 362, 184 N.W.2d 586 (Minn. 1971); *see also LeRoy v. Figure Skating Club of Minneapolis*, 281 Minn. 576, 162 N.W.2d 248 (Minn. 1968). The Court went on to say, however, that the order vacating the injunction was appealable by the appellants.

As set forth above, the Order issued by the trial court on August 3, 2006, which vacated the temporary injunction and denied the Appellants' motion for a permanent injunction, was a final appealable order. In accordance with the rules, the Respondents

served the Appellants with notice of the filing of the court order on August 10, 2006. The Appellants did not timely file their notice of appeal of the Order regarding injunctive relief. Therefore, their appeal should be dismissed.

Since the superfluous judgment did not give effect to the Order, the Appellants' appeal from the judgment is meaningless as there is nothing to appeal. At the time that the Appellants filed their notice of appeal the time for appealing the Order, which they claim by their appeal was improperly decided, had expired. Consequently, the Appellants appeal must be dismissed.

II. APPELLANTS' FAILURE TO COMPLY WITH JURISDICTIONAL REQUIREMENTS OF AN UNFAIR LABOR PRACTICE REQUIRE THAT THIS APPEAL BE DISMISSED.

The Public Employment Labor Relations Act (PELRA) includes certain jurisdictional requirements when an unfair labor practice is challenged in court. In this regard, Minnesota Statutes Section 179A.13, provides in pertinent part, as follows:

> A copy of any complaint alleging an unfair labor practice must be filed with the commissioner at the time it is brought in district court. The party bringing an unfair labor practice action in district court *shall also transmit to the commissioner any orders or judgments of the court within ten days of the order or judgment.*

Minn. Stat. § 179A.13, subd. 1 (2006) (emphasis added).

The reference to "commissioner" in the statute is to the Commissioner of the Bureau of Mediation Services ("BMS"). Minn. Stat. § 179A.03, subd. 5. Although the Appellants did file a copy of their complaint with the Commissioner of the BMS, the Appellants did not

timely file a copy of the order or judgment with the Commissioner of the BMS as required by the statute.

The requirements of a statute must be fully complied with in order to invoke the jurisdiction of the Court. *State ex rel. City of Minneapolis v. Boucher*, 171 Minn. 297, 299–300, 214 N.W. 30, 31 (1927). The Minnesota Court of Appeals has consistently held that "[f]iling of a copy of the complaint with the commissioner is a 'condition precedent to [bringing] a PELRA claim'" in the district court. *Allen v. Hennepin County*, 680 N.W.2d 560 (Minn.App. 2004) (rejecting appellant's unfair labor practice claim based on appellant's failure to file complaint with BMS); *Lee v. Regents of the Univ. of Minn.*, 672 N.W.2d 366, 373 (Minn.App. 2003). This Court has not had occasion to decide the issue of jurisdiction when the order or judgment was not timely filed with the Commissioner as required by the statute. The result, however, should be the same.

The statutory language clearly mandates that the party who brought the unfair labor action in the district court, the Appellants in the present case, "*shall also* transmit to the commissioner any orders or judgments of the court within ten days of the order or judgment." *See* Minn. Stat. § 179A.13, subd. 1 (emphasis added). The Legislature plainly used the mandatory words "must" and "shall" in the statute. The intent of the Legislature was that both the complaint and the order or judgment be filed with the commissioner. This Court has found the requirement of filing the complaint with the commissioner to be a condition precedent to bringing the PELRA claim in district court. The mandated filing of the order

or judgment with the commissioner should not be treated any differently. *See Johnson v. Winthrop Lab. Div. of Sterling Drug, Inc.*, 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971) (the jurisdictional prerequisite set by the Legislature may not be altered by the courts).

In the present case, the Findings were filed August 3, 2006, the Amended Findings were dated September 19, 2006, and the Notice of Entry of Judgment was Dated September 21, 2006. (*See* A1, A27, A49.) Only the Amended Findings were submitted to BMS on November 2, 2006. (*See* Aff. of Michelle D. Kenney (A51)). Even giving the Appellants the benefit of the doubt and using the latest entry of judgment date of September 21, 2006, their submission to the BMS was well beyond the ten (10) days required by Minnesota Statutes Section 179A.13, subd. 1. It is also noteworthy that the Respondents raised this issue in their Statement of the Case dated October 30, 2006. Obviously, upon receiving the Respondents' Statement of the Case, the Appellants realized their failure to comply with the statutory prerequisite and thereafter submitted the Amended Findings to this Court. Doing so on November 2, 2006, however, cannot cure the legislative condition precedent. Thus, the present appeal should be dismissed because the Appellants failed to comply with a statutory condition precedent to their appeal.

III. THE TRIAL COURT'S DECISION THAT 403(B) SUPPLEMENTAL RETIREMENT PLANS ARE NOT A TERM AND CONDITION OF EMPLOYMENT UNDER PELRA SHOULD BE AFFIRMED.

A. Standard of Review

The Appellants challenge the trial court's legal conclusions that both unmatched and matched 403(b) supplemental retirement plans are retirement contributions or benefits for the purposes of PELRA and, therefore, not mandatory subjects of collective bargaining. The trial court's conclusions were based upon evidence presented by the parties during the trial. In this regard, the Appellants consistently alleged that unmatched 403(b) supplemental retirement plans constituted "compensation" and matched 403(b) supplemental retirement plans constituted a "fringe benefit," rendering both plans terms and conditions of employment. The Respondents, on the other hand, consistently alleged that both unmatched and matched 403(b) supplemental retirement plans constituted a retirement contribution or benefit, excepted from the definition of terms and conditions of employment. Consequently, the Appellants challenge the conclusions drawn from the facts presented during trial. Thus, mixed questions of law and fact are present in this appeal.

The Minnesota Supreme Court has stated that where mixed questions of law and fact are present, the standard of review is as follows:

> In this situation, we will correct erroneous applications of the law, but accord the trial court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.

Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn. 1997) *citing Maxfield v. Maxfield*, 452 N.W.2d 219, 221 (Minn. 1990). The abuse of discretion standard carries a high burden and has been stated by the Court to mean:

> a discretion exercised to an end or purpose not justified by and clearly against reason and evidence; a clearly erroneous conclusion and judgment-one that is clearly against the logic and effect of such facts as are presented in support of the application, or against the reasonable and probable deductions to be drawn from the facts disclosed.

See Kucera v. Kucera, 275 Minn. 252, 146 N.W.2d 181 (Minn. 1966).

Thus, while erroneous applications of the law may be corrected, the trial court's conclusions must be given deference unless an abuse of discretion is demonstrated.

B. Introduction

The Appellants claim that the Respondents engaged in an unfair labor practice when they unilaterally reduced the number of 403(b) supplemental retirement plan vendors to one and selected MetLife as the single vendor. The trial court concluded that as a "retirement contribution or benefit," the Respondent's matched and unmatched 403(b) supplemental retirement plans did not constitute a "term and condition of employment" subject to mandatory negotiation. Consequently, the Respondent's unilateral conduct did not constitute an unfair labor practice.

The Appellants also appear to abandon the argument they made at trial that at the very least, unmatched and matched 403(b) supplemental retirement plans were permissive subjects of negotiation because they realize that the evidence did not support the conclusion that the

past practice of the parties converted the issue to a mandatory subject of negotiation. Instead, the Appellants now take an all or nothing approach. In this regard, they argue that the unmatched and matched 403(b) supplemental retirement plans are either mandatory or illegal. Additionally, the Appellants appear to go a step further to make the unfounded and circuitous claim that as the parties bargained over certain aspects of the matched 403(b) supplemental retirement plans, all components of both the unmatched and matched 403(b) supplemental retirement plans are not illegal subjects of bargaining and, therefore, are mandatory subjects of negotiation.

C. It Is Not Unlawful for an Employer to Make Unilateral Changes When the Subject of the Change Is Not a Mandatory Subject of Bargaining.

Although Minnesota law provides 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," the law equally provides that an employer's unilateral change does not amount to an unfair labor practice unless the change involves a "term and condition of employment."[5] According to the Minnesota Supreme Court, "because the duty to bargain exists only when the matter concerns a term and condition of employment, it is not unlawful for an employer to make unilateral changes when the subject

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[5] *See* Minn. Stat. § 179A.13, subd. 2(5) (2005). The Appellants also alleged that the Respondents committed an unfair labor practice by "interfering, restraining, or coercing employees in the exercise of the rights guaranteed in [PELRA]." Minn. Stat. § 179A.13, subd. 2(1) (2005). This allegation equally assumes that the Respondents' unilateral action involved a "term and condition of employment."

is not a 'mandatory' bargaining term." *Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51*, 353 N.W.2d 917, 921 (Minn. 1984). Consequently, unless the subject of the unilateral change concerns a "term and condition of employment," no unfair labor practice occurs.[6]

1. Unmatched and Matched 403(b) Supplemental Retirement Plans Are Retirement Benefits.

Overwhelming evidence produced during the trial demonstrated that both unmatched and matched 403(b) supplemental retirement plans are retirement benefits. In this respect, federal and state law, the courts, the Internal Revenue Service and the parties to this litigation all agreed that unmatched and matched 403(b) supplemental retirement plans constitute a retirement benefit. *See* Def. Ex. 74; Attachment A to Def. Post Trial Brief; Jt. Ex. 5, p. 2; Jt. Ex. 12; Melvin Tr. 538 and 563; and Def. Ex. 88. By the same token, the Appellants have consistently regarded both the unmatched and matched 403(b) supplement retirement plans as retirement benefits. More specifically, in their opening statement, the Appellants stated that "403(b)'s are for retirement." (Opening Tr. 13.) In addition, the individual who was

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[6] The Appellants appear to also make a past practice argument with respect to the collective bargaining agreement reference to the "guidelines." In this respect, the Appellants state: "[a]lthough 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" and "[t]he *guidelines*, however, did not change, unilaterally or otherwise." (Appellants' Brief at 9.) This argument contradicts the explicit findings made by the trial court that the Respondents made unilateral changes over the years. (Findings ¶¶ 6, 7, 13, 19, 21, 23, 26 and 45.) The Appellants made no allegation that the trial court abused its discretion in the referenced findings. Therefore, deference must be given to the findings of the trial court and the Appellants' argument cannot be considered by this Court on appeal.

present at the bargaining table in an ex-officio capacity and the research and data person during negotiations for the Appellants repeatedly conceded that all 403(b)'s, both matched and unmatched, were supplemental retirement plans. (Seavert Tr. 121, 134-137, 141, 145 and 166.) Thus, the uncontroverted evidence before the trial court was that both the unmatched and matched 403(b) supplemental retirement plans were retirement benefits. This was reflected in the trial court's memorandum that "[t]here is substantial evidence in the record to support the position that 403(b) plans, both matched and unmatched are retirement benefits." (Findings at 17.)

2. PELRA's Exception for Retirement Contributions or Benefits.

Only "terms and conditions of employment" as defined in PELRA constitute mandatory subjects of collective bargaining. "Terms and conditions of employment," as defined in PELRA, specifically excepts "retirement contributions or benefits," as follows:

> "Terms and conditions of employment" means the hours of employment, compensation therefore including fringe benefits except retirement contributions or benefits other than employer provision of, or contribution to, premiums for group insurance coverage of retired employees or severance pay. . . .

Minn. Stat. § 179A.03, subd. 19 (2005).

The Minnesota Supreme Court first interpreted the "retirement contributions or benefits" exception with regard to state pension contributions in *AFSCME Councils 6, 14, 65 and 96 v. Sundquist*, 338 N.W.2d 560 (Minn. 1983). AFSCME challenged 1982 legislation that, in part, provided for a two percent (2%) increase in public employee

contributions to their respective state pension plans. AFSCME argued that the Legislature committed an unfair labor practice by unilaterally changing the employee contribution levels which were a term and condition of employment and subject to collective bargaining. The *Sundquist* Court rejected AFSCME's argument relying on the exception of "retirement contributions and benefits" from the definition of "terms and conditions of employment." More specifically, the *Sundquist* Court stated, as follows:

> 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.

Sundquist at 575, fn. 24 (emphasis added).

As a result, the *Sundquist* Court determined that state pension plan contributions constituted "retirement contributions or benefits" and were not a mandatory subject of negotiation. Beyond this, the *Sundquist* Court ruled that all state pension issues were restricted to the authority of the Legislature and, therefore, public employers and public employee groups were prohibited from bargaining issues related to state pension plans. This prohibition was limited to state pension plan issues which were within the realm of Legislature and not "retirement contributions or benefits" in general.

Subsequently, the Minnesota Court of Appeals interpreted the "retirement contributions or benefits" exception to terms and conditions of employment with respect to the issue of health insurance benefits for retired persons. More specifically, Washington

County had a practice of providing health insurance for retired employees, but in 1985 modified and limited the practice. The union demanded negotiation over the issue and the County refused. The union commenced a declaratory judgment action claiming that medical insurance for retired employees was a mandatory subject of negotiation under PELRA, as a "term and condition of employment." *See Minnesota Teamsters Pub. and Law Enforcement Employees v. County of Washington*, 413 N.W.2d 245 (Minn. App. 1987), *rev. granted* (Minn. 1987), *appeal dismissed* (Minn. 1998) ("*Teamsters*").

The *Teamsters* Court began its analysis based upon the *Sundquist* decision and specifically noted that the *Sundquist* case "involved only pension contributions." *Id.* at 246. The Court noted that although the Supreme Court made broad references to "all pension issues," "it did not have occasion to consider whether health insurance for retired employees is a pension issue." *Id.*

While the *Teamsters* case was pending, and in response to the district court decision, legislation was proposed in 1987 to carve out retiree insurance benefits from the "retirement contributions or benefits" exception. The intent of the amendment was to carve out retiree insurance benefits from the exception for retirement contributions or benefits and make them a mandatory subject of collective bargaining. *Id.* at 247. During committee hearings on the 1987 proposed legislation, then Senator Moe, one of the authors of the original language in 1973, stated that "the intent in 1973 had been "to exclude from consideration *any* retirement

benefit," which would include insurance benefits for retirees.[7] *Id.* at 246-47. Additionally, referring to the district court decision in *Teamsters*, Senator Moe stated that "in my opinion, the Washington County [*Teamsters*] decision was appropriate." *Id.* at 247.

Ultimately, the Court of Appeals concluded in *Teamsters* that health insurance benefits for retired persons was a "retirement benefit" and, therefore, was excluded from the scope of mandatory bargaining in the public sector. More specifically, the Court stated:

> We reach this conclusion because the evidence on legislative intent demonstrates the purpose of *excluding all retirement benefits from the scope of collective bargaining*, and because the plain language of the statute reasonably supports the trial court's interpretation of the meaning of "retirement contributions and benefits."

Id. at 247 (emphasis added).

During the 1988 legislative session, the Legislature revisited the issue of retiree health insurance benefits in light of the *Teamsters* decision. In the end, the Legislature adopted an amendment to the definition of "terms and conditions of employment" which specifically removed retiree insurance benefits from the "retirement contributions and benefits" exception thereby making retiree health insurance benefits a mandatory subject of bargaining.[8] This

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[7] Senator Moe further commented "it was our intention at that time to exclude . . . from consideration any retirement benefit. I know we are very concerned about setting up *supplemental retirement plans* and so on." Statement of Senator Donald Moe, Senate Committee on Government Operations, (April 27, 1987) (*See* A-73) (emphasis added).

[8] Since 1988, Minnesota Statutes Section 179A.03, subdivision 19 has read: "except retirement contributions or benefits *other than employer provision of, or contribution to, premiums for group insurance coverage of retired employees. . . .*" *See* Minn. Stat. (continued...)

action by the Legislature recognized the broad interpretation intended for the exception "retirement contributions or benefits" from the scope of mandatory bargaining beyond state pension plans.

In the present case, the trial court found that the unmatched and matched 403(b) supplemental retirement plans were retirement contributions or benefits. As a result, the trial court found that the Respondents' unilateral actions did not constitute an unfair labor practice because they did not affect a "term and condition of employment" and, therefore, were not mandatory subjects of collective bargaining. The trial court's conclusions are supported by fact and law and should be affirmed by this Court.

3. Unmatched and Matched 403(b) Supplemental Retirement Plans Are Not Illegal or Prohibited Subjects of Bargaining.

The Appellants allege that if the unmatched and matched 403(b) supplemental retirement plans are excepted from the definition of "terms and conditions of employment" because they constitute a retirement contribution or benefit, then they are an "illegal" or "prohibited" subjects of bargaining. Here the Appellants take a turn from their arguments to the trial court. In this regard, the Appellants argued to the trial court that unmatched and matched 403(b) supplemental retirement plans were mandatory subjects of bargaining and, if not mandatory, they were, at least, permissive subjects of collective bargaining which became a part of the collective bargaining agreements by past practice. (Plaintiffs' Post-

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[8] (...continued)
§ 179A.03, subd. 19 (2005) (emphasis added).

Hearing Brief at 25-27.) Whether a past practice existed was solely a question of fact and the trial court found that the "past practice of the parties regarding unmatched and matched 403(b) plans are not sufficient to convert this issue into a mandatory subject of negotiation." (Conclusion ¶ 5.) Therefore, the Appellants would be required to meet the high burden that the trial court abused its discretion in reaching this conclusion. Obviously recognizing that they could not meet the abuse of discretion burden, the Appellants on appeal reshape their argument to claim the unmatched and matched 403(b) supplemental retirement plans are either mandatory or illegal subjects of bargaining to raise a question of law and receive *de novo* review.

In making their argument, the Appellants ignore the long recognized category of permissive subjects of collective bargaining and argue that unmatched and matched 403(b) supplemental retirement plans are either mandatory or illegal subjects of bargaining. An "illegal" subject of bargaining is one that is unlawful under the collective bargaining statute or other applicable statute. *See Detroit Police Officers Ass'n v. Detroit*, 391 Mich. 44, 54-55, n. 6, 214 N.W.2d 803 (1974). The Appellants argue that if not a mandatory subject of bargaining, then unmatched and matched 403(b) supplemental retirement plans must be illegal subjects of bargaining. From this flawed premise, the Appellants then argue that matched 403(b) supplemental retirement plans cannot be an illegal subject of bargaining because the Appellants and Respondents bargained certain components of a matched 403(b) supplemental retirement plan into the collective bargaining agreement. Consequently, the

Appellants argue that since the matched 403(b) supplemental retirement plan at issue was not an illegal subject of bargaining, because certain components of plan language were negotiated into the collective bargaining agreements, all aspects of both the unmatched and matched 403(b) supplemental retirement plans must be mandatory subjects of bargaining. This circular and twisted reasoning is simply ludicrous. Just because a term is not a mandatory subject of bargaining does not automatically mean that the term is then an illegal subject of bargaining. By the same token, just because a subject of bargaining is not illegal does not automatically mean that the term is a mandatory subject of bargaining.

No requirement exists for school districts to provide matched 403(b) supplemental retirement plans to their employees. If a school district chooses to do so, however, the law requires that the amount of the matching contribution must be included in a collective bargaining agreement. *See* Minn. Stat. § 356.24, subd. 1(5) (2005). Including the matching contribution in a collective bargaining agreement does not render the entire matched 403(b) supplemental retirement plan a mandatory subject of bargaining.

By the same token, no requirement exists for school districts to provide unmatched 403(b) supplemental retirement plans to their employees, although they may choose to do so in accordance with Minnesota Statutes Section 123B.02, subdivision 15. The enabling legislation with respect to unmatched 403(b) supplemental retirement plans, however, does not require any component of such plans to be included in a collective bargaining agreement. *See* Minn. Stat. § 123B.02, subd. 15 (2005).

In *Sundquist*, the Supreme Court's decision that public pension matters were illegal subjects of bargaining was confined to public pension benefits that are controlled by the Legislature. The Court's rationale for finding that public pension benefits are a prohibited subject of bargaining was because public pensions are within the realm of the Legislature. The *Sundquist* Court did not go so far as to say that all retirement contributions and benefits excepted from the definition of "terms and conditions of employment" are "illegal" or "prohibited" subjects of bargaining. This is supported by the subsequent decision of this Court in *Teamsters* where retiree health insurance benefits were found to be a "retirement contribution or benefit" and not a mandatory subject of bargaining. Consequently, the Appellants' argument must be rejected.

Presently, with the exception of health insurance benefits for retirees, all retirement benefits, including unmatched and matched 403(b) supplemental retirement plans, continue to be excluded from the definition of "terms and conditions of employment" under PELRA and do not constitute a mandatory subject of bargaining.[9] There is no question that the plain language of the statute and legislative history support the trial court's conclusion that "neither unmatched nor matched 403(b) supplemental retirement plans are mandatory subjects of collective bargaining." Therefore, the trial court's decision should be affirmed.

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[9] Since unmatched and matched 403(b) supplemental retirement plans are neither a mandatory nor prohibited subject of collective bargaining, they are, at best, permissive as the trial court found. (Findings, p. 12.)

4. Appellants' Arguments That Unmatched and Matched 403(b) Supplemental Retirement Plans are Mandatory Subjects of Bargaining Under PELRA are Unavailing.

Without alleging an abuse of discretion by the trial court, and contrary to the trial court's findings, the Appellants again argue that an unmatched 403(b) supplemental retirement plan is "simply a voluntary use of compensation" and the matched 403(b) supplemental retirement plan is a "fringe benefit." (Appellants' Brief at 12.)[10] Consequently, according to the Appellants, both unmatched and matched plans are mandatory subjects of negotiation.

a. Unmatched 403(b) Supplemental Retirement Plans Are Not Mandatory Subjects of Bargaining Under PELRA.

In support of their argument that unmatched 403(b) supplemental retirement plans are mandatory subjects of bargaining under PELRA, the Appellants rely upon the enabling statute for such plans. More specifically, Minnesota Statutes Section 123B.02, subd. 15, provides as follows:

> 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

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[10] The trial court expressly found "similarly unpersuasive is EM-O's argument that unmatched 403(b) contributions are not retirement contributions because they are voluntary and could otherwise be taken home as compensation." (Findings at 17.)

> 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 (2005).

Relying solely on that portion of the first sentence that provides "as part of the employee's compensation arrangement," the Appellants ignore the remaining portions of the statute that the unmatched 403(b) plan may be purchased "for an employee *for retirement* or other purposes" and that the contribution "must be made in a manner which will qualify the annuity premiums, . . . for the *benefit afforded under section 403(b) of the current Federal Internal Revenue Code.*" *Id.*[11] Consequently, the enabling statute specifically authorizes the Respondent School District to purchase an unmatched 403(b) supplemental retirement plan for retirement and in a manner that receives the benefit afforded under section 403(b) of the Internal Revenue Code. Therefore, the enabling statute provides greater support for the conclusion that an unmatched 403(b) supplemental retirement plan is a

[11] The Appellants' reference to Minnesota Statutes Section 352.96, subdivision 1 to support its position that unmatched 403(b) plans constitute compensation is not relevant as it was enacted in 1975 *after* Minnesota Statutes Section 123B.02, subdivision 15 which was enacted in 1963.

retirement benefit and excepted from PELRA's definition of terms and conditions of employment.

The Appellants also ignore the plain language of the definition of "terms and conditions of employment" as "compensation . . . including fringe benefits except retirement contributions or benefits. . . ." *See* Minn. Stat. § 179A.03, subd. 19 (2005). In this regard, the statutory language includes as a term and condition of employment "compensation" in general. The statutory language also provides that "fringe benefits" fall under the larger umbrella of compensation. Thus, utilizing general rules of grammar, the exception of "retirement contributions or benefits" applies to compensation in general, which includes fringe benefits. *See* Minn. Stat. § 645.08(1) (2005); *see also Governmental Research Bureau v. Borgen*, 224 Minn. 313, 28 N.W.2d 760 (Minn. 1947) (the language of a statute will be construed in harmony with ordinary rules of grammar unless such construction clearly violates legislative intent). Consequently, regardless of the fact that a term of employment may be broadly classified as "compensation" or more specifically, a "fringe benefit," it is not a term or condition of employment if it is a "retirement contribution or benefit."

Further support for the position that just because employees may voluntarily elect to contribute funds to an unmatched 403(b) supplemental retirement plan does not alter the conclusion that such plans are a retirement benefit excepted from PELRA's definition of "terms and conditions of employment" can be found in *Sundquist*, where the Supreme Court rejected the same argument being advanced by Appellants in the present case. In *Sundquist*,

the appellants also argued that the employee pension contribution constituted compensation and, therefore, was a mandatory subject of bargaining. In rejecting this argument, the *Sundquist* Court stated,

> This argument is essentially an attempt at an "end-run" around PELRA's exclusion of retirement benefits from negotiable terms and conditions of employment. Because we hold that the statutory exclusion bars negotiations regarding pension contributions, we also hold that the consequences upon net salaries which result from an exercise of legislative discretion over pension contributions are permissible as a necessary incident of the scope of the statutory exclusion.

Sundquist at 576, fn. 25.

Consequently, the Supreme Court refused to remove pension plans from the retirement contribution or benefit exception simply because the pension contribution had the effect of reducing the employees' overall compensation. Similarly, the fact that employees voluntary contribute a portion of their compensation to an unmatched 403(b) plan is a necessary incident to the retirement benefit and does not alter the scope of the statutory exclusion.

b. Matched 403(b) Supplemental Retirement Plans Are Not Mandatory Subjects of Bargaining Under PELRA.

The Appellants argue that the matched 403(b) supplemental retirement plan is a "fringe benefit" and, therefore, a mandatory subject of bargaining under PELRA. This argument was flatly rejected by the trial court, finding that matched 403(b) supplemental retirement plans are retirement contributions or benefits excepted from "terms and conditions of employment" under PELRA. The Appellants have not even attempted to argue that the

trial court abused its discretion in making this finding. Therefore, the trial court's decision on this matter must be affirmed.

The Appellants' "fringe benefit" argument also fails for the same reason as their "compensation" argument with respect to the unmatched 403(b) supplemental retirement plan. In this respect, the mere fact that a matched 403(b) supplemental retirement plan may constitute a "fringe benefit" does not alter the fact that it is excepted from the definition of "terms and conditions of employment" as a "retirement contribution or benefit." Therefore, the Appellants' argument must be rejected.

Alternatively, the Appellants argue that matched 403(b) supplemental retirement plans *as a whole*, including the number and selection of vendors, are a mandatory subject of bargaining because the Legislature has required that the matching contribution be included in a collective bargaining agreement with the exclusive representative of public employees. Minnesota Statutes Section 356.24 was first adopted by the Legislature in 1971. At the time of its initial adoption, it did not authorize school districts to contribute public funds to a supplemental retirement plan that was maintained in addition to a primary pension program for governmental employees. Legislation adopted in 1992 first gave school districts the authority to contribute public funds through matching contributions to either a state deferred compensation plan or a 403(b) supplemental retirement plan. (*See* A81.) More specifically, the statute provided that a school district could make:

> (ii) payment of the applicable portion of the premium on a tax sheltered annuity contract qualified under section 403(b) of the

> federal Internal Revenue Code, purchased from a qualified insurance company; if provided for in a personnel policy or in the collective bargaining agreement of the public employer with the exclusive representative of public employees 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;

Minn. Stat. § 356.24, subd. 1(4)(ii)(1992). The statute went on to provide that a collective bargaining agreement "*may* establish limits on the number of vendors." Minn. Stat. § 356.24, subd. 1(c) (1992) (emphasis added).[12]

Consequently, the statute only required that language regarding the actual matching contribution be included in a collective bargaining agreement, that the annuity contract be purchased from a qualified insurance company, and that the amount be matched on a dollar for dollar basis and not exceed an employer contribution of $2,000 per year per employee.

The statute did not require that a matching 403(b) supplemental retirement plan, in its entirety, be included in a collective bargaining agreement. Therefore, the Appellants' claim that the entire matching 403(b) supplemental retirement plan is a mandatory subject of negotiation is unfounded. By the same token, simply because the Respondents negotiated with the Appellants and included the statutory requirements in the collective bargaining agreement does not mandate that the matched 403(b) plan in its entirety be included in the collective bargaining agreement.

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[12] The statute, as amended in 1992, limited the identity of vendors to those approved by the SBI. (*See* A81–A82.)

Moreover, the law does not support the Appellants' purported conclusion that the identity and selection of vendors is a term and condition of employment subject to mandatory negotiation. In 2000 the Legislature amended Minnesota Statutes Section 356.24, removing the requirement that the vendors for the matching 403(b) supplemental retirement plan be approved by the SBI. (Findings ¶ 38.) The amendment also granted school boards the authority to establish limits on the number of vendors it would authorize to receive matching contributions. (*Id.*) In this regard, the statute was amended to read, as follows:

> Subd. 1b. **Vendor restrictions.** A personnel policy for unrepresented employees, a collective bargaining agreement for represented employees, *or a school board* may establish limits on the number of vendors of plans covered by the exceptions set forth in subdivision 1 that it will utilize and conditions under which those vendors may contact employees both during working hours and after working hours.

Minn. Stat. § 356.24, subd. 1b (2000) (emphasis added).[13]

Consequently, following the amendment to the statute, school boards had the authority to unilaterally establish limits on the number of vendors. The Appellants nevertheless claim that school districts should be required to negotiate over the identity of the vendor noting, "[t]here is no practical reason that each bargaining unit cannot have a different match vendor of choice (they still have one as Respondents wish)." (Appellants' Brief at 22.) To find that the Respondent School District has the unilateral right to determine the number of vendors,

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[13] In 2002, Minnesota Statutes Section 356.24, subdivision 1(b) was amended to clarify "a collective bargaining agreement for represented employees, or a school board for school district employees." 2002 Minn. Laws Ch. 392, Art. 11, § 14.

and then require it to negotiate the identity of that vendor would lead to an absurd result which is not intended by the Legislature. *See* Minn. Stat. § 645.17(1) (2005). Beyond this, nothing in the statute requires that vendor identity be negotiated. Since vendor identity is not expressly required by the statute to be included in a collective bargaining agreement, the subject is not a mandatory subject of negotiation.[14]

The Appellants then go on to argue that the absence of specific language in another statute granting school districts with the authority to unilaterally reduce or select vendors for unmatched 403(b) supplemental retirement plans, render the issues of number and identity of vendors are mandatory subjects of negotiation. This argument ignores the statutory language and presupposes that vendor number and identity are a term and condition of employment, which they are not.

Unmatched 403(b) supplemental pension plans are retirement benefits and not mandatory subjects of bargaining. Consequently, school districts cannot be required to offer such plans to their employees. If, however, a school district does decide to provide an unmatched 403(b) supplemental retirement plan to its employees, no statute requires that the school district include any component of the plan in a collective bargaining agreement. As a result, the school district has complete discretion and authority with regard to the plan and the number and selection of vendors.

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[14] The Appellants comment that "there is nothing to prevent Respondents from making it worthwhile for all units to agree to the same match vendor" is so outlandish that it does not dignify a response. (Appellants' Brief at 22.)

Beyond rendering a school district's decision to choose a single vendor impossible and interpreting a statute by rendering a portion of it meaningless, an implied requirement that vendor selection is subject to collective bargaining runs counter to other rules of statutory construction. More specifically, statutes relating to the same subject are to be read in *pari materia*. In this respect, "statutes relating to the same subject are presumed to be imbued with the same spirit and to have been passed with deliberation on the subject and regarded by the lawmakers as being parts of a connected whole." *See Kaljuste v. Hennepin County Sanatorium Comm'n*, 240 Minn. 407, 414, 61 N.W.2d 757, 762 (1953).

In the present case, two Minnesota statutes address school district employee participation in unmatched or matched 403(b) supplemental retirement plans. More specifically, Minnesota Statutes Section 123B.02, subdivision 15, with respect to unmatched plans, and Minnesota Statutes Section 356.24, with respect to matched plans. Thus, the two statutes in question address the same subject: tax sheltered annuity/403(b) plans for school district employees.

Minnesota Statutes Section 123B.02, subdivision 15, granted school boards the authority to purchase retirement annuities for employees and, with the employee's consent, reduce the employee's compensation to pay the premiums therefor. The statute contains no language requiring that the number or selection of vendors receiving the contribution was subject to collective bargaining.

In 1992 the Legislature amended Minnesota Statutes Section 356.24, subdivision 1(a)(4) to authorize school districts to make a matching contribution to an employee's 403(b) account in an amount not to exceed $2,000 per year.[15] This subdivision only required that if a plan was offered, the matching amount be included in a collective bargaining agreement.[16]

The legislative amendment of Minnesota Statutes Section 356.24 was made consistent with Minnesota Statutes Section 123B.02, subdivision 15. Obviously recognizing that the earlier statute made no reference to collective bargaining, the Legislature specifically included the requirement that the plan be provided for in the collective bargaining agreement and that the amount of the matching contribution could be collectively bargained. No provision was included requiring collective bargaining regarding the number or selection vendors. Thus, applying the rule of *pari materia* leads to the unmistakable conclusion that Minnesota Statutes Section 356.24 does not include a requirement that the selection of vendors be collectively bargained. If the Legislature intended for the number and selection of vendors to be collectively bargained, it could have not included a specific reference to "school districts" and simply provided that "a personnel policy for unrepresented employees

[15] Previously, school districts were only authorized to make matching contributions to the state deferred compensation plan on behalf of an employee.

[16] In this regard, the law provided for a contribution to be made "if provided for in a personnel policy or in the collective bargaining agreement of the public employer with the exclusive representative of public employees in the appropriate unit."

or a collective bargaining agreement for represented employees may establish limits." This, however, was not the language adopted by the Legislature.

Further support for the conclusion that the limitation and selection of vendors is not required to be collectively bargained under the statute is Senator Oliver's testimony in favor of the 2000 amendment to Minnesota Statutes Section 356.24, subdivision 1(b). In this regard, Senator Oliver stated that the amendment allowing school boards to limit vendors for school employees "opens up the matching plans to the same options that are available under the regular [123B.02, subdivision 15] 403(b) tax-sheltered annuity plans, and I think this is appropriate" that a "school board may choose to establish a limit on the number of vendors under this bill." (*See* A85–A86.) Further, Howard Bicker, Director of the SBI, testified: "The school district still can control how many vendors are available in each district, and I think that's important." (*See* A90.)

The clear language of Minnesota Statutes Section 123B.02, subdivision 15 and Minnesota Statutes Section 356.24, subdivision 1(b) unequivocally grants school boards with the authority and discretion to place limits on and select 403(b) vendors for all employees. Even assuming for the sake of argument the statutory language in and of itself was not clear, the rules of statutory interpretation also lead to the same conclusion. Thus, the trial court's decision should be affirmed.

c. Value Is Irrelevant to the Present Proceeding.

Finally, the Appellants claim that there is "value" in the identity of the vendor and, therefore, the identity of the vendor is a term and condition of employment. At the outset the Appellants' argument must be rejected under *Sundquist* and *Teamsters* because the unmatched and matched 403(b) supplemental retirement plans are retirement contributions or benefits and excluded from the definition of terms and conditions of employment.

Although rejected by the trial court, the Appellants again seek to utilize a decision related to health and hospitalization insurance to create their "value" as a term and condition of employment. The decision issued by this Court in *West St. Paul Fed'n of Teachers v. Independent Sch. Dist. No. 197, West St. Paul*, 713 N.W.2d 366 (Minn. App. 2006) remains irrelevant to the present proceeding. Employee health insurance is a term and condition of employment under PELRA and is subject to mandatory negotiation. The issue in *West St. Paul* involved changes to employee health insurance which is governed by a specific statute that expressly requires negotiation when the "aggregate value of benefits" is reduced.[17] *See* Minn. Stat. § 471.6161, subd. 5 (2005). This Court found that the "aggregate value of benefits" was reduced when the school district unilaterally changed providers and benefit options. Neither Minnesota Statutes Section 471.6161, subdivision 5 nor the decision in *West St. Paul* apply to unmatched or matched 403(b) supplemental retirement plans.

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[17] In this respect, the statute provides "the aggregate value of benefits provided by a group insurance contract for employees covered by a collective agreement shall not be reduced, unless . . . [the public employer and the union] agree to a reduction in benefits." Minn. Stat. § 471.6161, subd. 5 (2005).

Consequently, the Appellants' arguments related to "vendor choice" and "value" in personal relationships have no application to the present case. The trial court was correct when it stated that "the Court's ruling in *West St. Paul* is not applicable to the issue at hand." Thus, the Appellants' arguments must be rejected.

CONCLUSION

The Appellants failed to timely file their Notice of Appeal in the present case from the Notice of Filing Court Order. For this reason alone, their appeal should be dismissed.

The Appellants failed to comply with the statutory prerequisite to file a copy of the order or judgment with the commissioner of the BMS within ten (10) days thereof. Therefore, the appeal should be dismissed.

It was not unlawful for the Respondent School District to make unilateral changes to the unmatched and matched 403(b) supplemental retirement plans because they are not a term and condition of employment or a mandatory subject of bargaining. The unmatched and matched 403(b) supplemental retirement plans are not a mandatory subject of bargaining because they constitute a "retirement contribution or benefit" and are excepted from the definition of "term and condition of employment."

The Appellants arguments that unmatched 403(b) supplemental retirement plans constitute "compensation" and matched 403(b) supplemental retirement plans constitute "fringe benefits" were not supported by the evidence or the law. In fact, the law supports the Respondents in that even if the Appellants were correct, their arguments fail to take into

consideration the exception for "retirement contributions or benefits" from the definition of "terms and conditions of employment" in PELRA. Moreover, the Appellants' rely upon a decision involving group health insurance benefits which has no applicability to the present case.

The trial court correctly concluded that the Respondents did not engage in an unfair labor practice by unilaterally reducing the number of 403(b) supplemental retirement plan vendors to one and selecting that vendor. Therefore, the Respondents respectfully request that the trial court decision be affirmed.

Dated: February 20, 2007

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