

STATE OF MINNESOTA

FILED

DISTRICT COURT

COUNTY OF HENNEPIN

08 AUG -3 AM 10:31

FOURTH JUDICIAL DISTRICT

Education Minnesota – OSSEO
and Education Minnesota – OSSEO-ESP,

DEPUTY
HENN CO. DISTRICT
ADMINISTRATOR

Plaintiffs,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER FOR
JUDGMENT**

vs.

Independent School District 279, Osseo
Area Schools, Maple Grove, Minnesota,
and Rich Melvin, in his Capacity as
Assistant Superintendent, Human Resources
of I.S.D. No. 279,

Court File No. 27-CV-05-7743

Defendants.

This matter came on before the Honorable William R. Howard, Judge of District Court. The Respondents were represented by Stephen M. Knutson and Michelle D. Kenney, Knutson, Flynn & Deans, P.A., 1155 Centre Pointe Drive, Suite 10, Mendota Heights, MN 55120. The Petitioners were represented by Harley M. Ogata and Debra M. Corhouse, Education Minnesota, 41 Sherburne Avenue, St. Paul, MN 55103.

After a review of the arguments presented and the entire file herein, this Court makes the following:

FINDINGS OF FACT

- 1.) Plaintiffs Education Minnesota-OSSEO (EM-O) and Education Minnesota-OSSEO-ESP (EM-O-ESP) are the exclusive representatives of certain employees of Defendant School District.
- 2.) EM-O represents approximately 1600-1650 teachers, 40 nurses, and 60 Kidstop instructors. EM-O-ESP represents approximately 750 education support professionals.
- 3.) Each of these groups has a separate collective bargaining employment with the school concerning the employment of its members.

- 4.) This action began on May 19, 2005 with the service and filing of Plaintiff's Complaint on May 19, 2005. Plaintiffs then sought a Temporary Restraining Order, which was granted by the Court on May 31, 2005. On June 30, 2005, the parties were before the Court on Plaintiff's Motion for Temporary Injunction, which was granted by Judge Neville on July 1, 2005. Trial in this matter was held before the undersigned Judge of District Court on March 8-10, 15, and 17, 2006.
- 5.) The Plaintiff's seek an Order from the Court requiring Defendants to negotiate with the Plaintiff Unions over the number and selection of 403(b) supplemental retirement plan vendors.
- 6.) The School District first authorized employee participation in unmatched 403(b) supplemental retirement plans during the mid-1960's. At that time, the unmatched 403(b) plan was offered by only a single vendor. That single vendor was unilaterally selected by the School Board.
- 7.) In 1970, the School Board added a second vendor for the unmatched 403(b) plan. That vendor was unilaterally selected by the School Board.
- 8.) In 1970, an employee, Jeremy Hughes, requested to participate in a 403(b) supplemental retirement plan with a company other than the two presently approved by the school district. The request was unanimously denied by the School Board.
- 9.) During the negotiations surrounding the 1972-74 collective bargaining agreement between the Osseo Federation of Teacher (the predecessor to Education Minnesota – Osseo), the Teacher's Federation made a proposal to include language in the CBA allowing employees to participate in 403(b) plans with additional tax-sheltered annuity companies. The district refused to negotiate the proposal with the teachers, indicating it was not a mandatory subject of collective bargaining. The proposal was referred to the meet and confer process. The meet and confer process is an opportunity for parties to meet to discuss items were were not mandatory subjects of collective bargaining under PELRA. The final CBA for 1972-74 included no language regarding the unmatched 403(b) plans.

- 10.) The issue of the unmatched 403(b) plans was addressed in a meet and confer session on November 27, 1973. It was discussed that information may be sent to all interested vendors and responses would be brought back to the meet and confer process. It was noted that two or three vendors may be added.
- 11.) The subject of the unmatched 403(b) supplemental retirement plan was again discussed at a meet and confer session on March 7, 1974. The list of vendors who received literature on the annuity program was discussed at this meeting.
- 12.) The CBA for 1974-75 between the School District and OFT was finalized on June 7, 1974. The agreement contained no language regarding unmatched 403(b) supplemental retirement plans.
- 13.) The issue of increasing the number of vendors available for unmatched 403(b) supplemental retirement plans was again discussed on September 4, 1974, at a School Board meeting. The School District indicated it wished to make the unmatched 403(b) plans more attractive to employees of the School District and thus it was adopting a resolution that it would accept new unmatched 403(b) vendors provided the vendor could enroll twenty or more participants. This resolution was adopted by the School Board at its own discretion. There is no evidence this was negotiated with any employee group.
- 14.) After adopting the new resolution, the School District circulated a memorandum concerning the recent School Board action regarding the "District No. 279 Tax Sheltered Annuity Program." At this time, the School District administration also developed the "Tax Sheltered Annuity Program Guidelines" ("Guidelines"). The Guidelines addressed all of the particulars for the unmatched 403(b) supplemental retirement plan, including what was needed for a new vendor to be approved by the School Board.
- 15.) No language regarding the unmatched 403(b) supplemental retirement plans was proposed or included in the collective bargaining agreements for the subsequent contract years of 1975-77, 1977-79, 1979-81 and 1981-83.

16.) During the negotiations of the 1983-85 CBA, the OFT proposed the addition of language concerning the unmatched 403(b) plan to the agreement. The proposed language read as follows:

Tax Sheltered Annuity purchases will be limited to companies which have ten or more employees enrolled in a TSA program. An employee new to the District who has a TSA contract that is not on the District's "approved" list, will be allowed to continue his/her contribution.

The School District responded to the OFT's proposal by refusing to negotiate the matter because it was not a mandatory subject of negotiation. Robert Olson, the Director of Personnel for the School District, testified that he referred the matter to the meet and confer process.

17.) The 1983-85 CBA between the School District and the OFT was signed on October 5, 1983. It contained no language concerning the unmatched 403(b) plans.

18.) A meet and confer session was held on December 7, 1983. At that meeting, the School District and the OFT discussed initial enrollment dates for the unmatched 403(b) supplemental retirement plans. The OFT requested a change in the initial enrollment date from August to October. That request was denied.

19.) On December 31, 1985, the School Board unilaterally decided to waive its twenty participant requirement and allow three new vendors to be added to the list of vendors for unmatched 403(b) plans. Those investors were Fidelity Investment Group, Twentieth Century Investment Group and Northwestern Mutual Life Insurance Company.

20.) During the negotiations of the 1985-87, 1987-89, 1989-91 and 1991-93 contracts, no proposals were made concerning the unmatched 403(b) plans and no language was added into the contracts regarding them.

21.) In 1988, the Legislature amended the law to provide that a School District could make a matching contribution to a 457 deferred compensation plan under the Minnesota State Deferred Compensation program (MSDCP). The School District did negotiate with the OFT concerning the employee eligibility requirements and the amount of the matching contribution to the 457 deferred compensation plan. The negotiated terms were included in the 1989-91 contract.

The School Board unilaterally chose the vendor for the matched 457 deferred compensation plan.

- 22.) The 457 deferred compensation plan is a separate plan from the unmatched 403(b) supplemental retirement plans.
- 23.) Sometime between December 31, 1985 and July 7, 1992, the School District reduced the participation requirement for new vendors for the unmatched 403(b) plans from twenty participants to ten participants. No evidence was introduced indicating that this change in number of vendors was ever negotiated with any employee group.
- 24.) In June of 1992, Stan Mack was hired by the School District to replace Robert Olson. Mack's duties included acting as co-chair of the District's negotiating team.
- 25.) In 1992, the Legislature amended Minn. Stat. § 356.24, to provide that employees could participate in a 403(b) supplemental retirement plan approved by the State Board of Investment with a dollar for dollar matching contribution from the School District. Under the legislation, the selection and identity of the vendors was left to the sole discretion of the SBI, which was to approve up to ten vendors. The legislation limited the amount of the matching contribution to \$2,000 per year. The legislation contained a provision allowing the School District to limit at its discretion the number of SBI approved vendors it would offer. At that time, the statute required that particular limitation to be included in the collective bargaining agreement.
- 26.) On January 27, 1993, in response to the changes to the Minnesota State Deferred Compensation Program under Minn. Stat. § 356.24, Stan Mack issued a memorandum indicating which vendors listed as qualified by the SBI would be approved for use by the School District employees. The memorandum included a list of the nine companies listed as approved qualified companies by the SBI with asterisks next to those companies which were already on the School District's list of approved tax shelter annuity plan providers. The five approved companies were Great West, Aetna, Investors Diversified Services, Valic, and Equitable.

- 27.) The OFT's proposal for the 1993-95 collective bargaining agreement was submitted on June 9, 1993. The proposal included a "Supplemental Retirement Program" which provided the School District would make a matching contribution to an employee's 403(b) supplemental retirement plan.
- 28.) A revised proposal for the 1993-95 CBA was submitted by the OFT on October 14, 1993. That proposal indicated a single vendor, Great West, would be authorized to accept the matching contributions.
- 29.) The Proposed Final Settlement by the School Board for the 1993-95 CBA provided that the School District would contribute the same matching funds for a supplemental retirement plan under 403(b) as it would for a tax sheltered annuity plan "if the plan is approved by the State Board of Investment" and "has met the school district's guidelines for approval." EM-O contends that at the time of the negotiation, the guidelines in effect for vendors for the unmatched 403(b) plans were that any vendor that had at least ten enrollees would be permitted to be on the approved list and in addition, new employees were allowed to continue in any 403(b) program they were participating in prior to beginning employment with the School District. These guidelines had never been included in any collective bargaining agreement between the parties.
- 30.) The 1993-95 CBA between the School District and the OFT was signed by Stan Mack on November 2, 1993. The language concerning the District's matching contribution to a 403(b) supplemental retirement plan was identical to the language contained in the School Board's proposed final settlement document dated October 14, 1993.
- 31.) The 1993-95 CBA was the first time language specific to 403(b) supplemental retirement plans was included in a collective bargaining agreement between the School District and EM-O and EM-O-ESP.
- 32.) The language in the 1993-95 CBA concerning matched 403(b) plans was also used in the 1995-97 and 1997-99 collective bargaining agreements.
- 33.) By the time negotiations were under way on the 1999-2001 CBA, the OFT had changed its name to Education Minnesota – Osseo (EMO). During the 1999-2001 negotiations, EM-O proposed to include language relating to 403(b)

supplemental retirement plans which would allow "any financial plan that has at least 10 district employee participants." The School District, specifically Stan Mack, indicated it would refuse to negotiate any language on this issue because it was not a mandatory subject of negotiation.

- 34.) EM-O then submitted another proposal for the 1999-2001 CBA on November 15, 1999, entitled "Unresolved Areas." One of the unresolved areas listed was the 403(b) supplemental retirement plans.
- 35.) By the end of the 1999 calendar year, the parties had been unable to reach an agreement on the CBA for the 1999-2001 contract term and were scheduled for mediation on December 30, 1999. At the time, the law contained a January 15 settlement deadline for teacher contracts. The law provided for a \$25 per pupil penalty against the School Districts if the contract was not settled by the deadline. Failure to settle the 1999-2001 collective bargaining agreement between the School District and the teachers would have cost the School District approximately \$675,000.
- 36.) During the mediation session on December 30, 1999, the mediator from the Bureau of mediation Services put pressure on the School District to draft a letter as requested by EM-O to communicate that the items contained in the letter were unresolved issues from the round of negotiation. The letter from Stan Mack read:

"The District agrees to continue its current practices, with respect to the following matters, subject to the ability to make changes only through the collective bargaining processes of PELRA:...Tax Sheltered Annuity Plans..."

This letter was not intended by the School District as an admission that the items addressed therein were mandatory subjects of negotiation. It was the District's position that the purpose of the letter was to communicate items that were unresolved issues from that round of negotiation, some of which were mandatory subjects of negotiation, some of which were not. The memorandum was not signed by representatives from either the School Board or EM-O and was not intended as an agreement that those practices were mandatory subjects of negotiation.

- 37.) On October 1, 2000, the School District hired Richard Melvin as the Assistant Superintendent of Human Resources, to replace Stan Mack, who left the District's employment in September of 2000.
- 38.) In 2000, the Legislature Amended Minn. Stat. 356.24, deleting the requirement that the matching could only be placed in a 403(b) supplemental retirement plan that was approved by the SBI. In addition, the revisions granted specific authority to school boards to establish limits on the number of vendors it would make available for 403(b) contributions. The specific language in the statute read:
- “A personnel policy for unrepresented employees or a collective bargaining agreement or a school board may establish limits on the number of vendors that it will utilize...” Minn. Stat. 356.24, subd. 1(b).
- 39.) The 2000-02 collective bargaining agreement between the School District and EM-O-ESP was the first to include a School District matching contribution to a 403(b) supplemental retirement plan. There was never any discussion during the negotiation of that contract relative to how vendors for the matched 403(b) supplemental retirement plan would be selected other than the School District's discretion to do so. EM-O-ESP proposed to have the same 403(b) plan that EM-O had. The 2000-02 CBA between the School District and EM-O-ESP contained the same language as the EM-O CBA. The 2004
- 40.) As of July 19, 2001, the School District had approved a total of twenty-five 403(b) vendors, five of which it had also approved to receive a School District matching contribution.
- 41.) In preparation for the negotiations with EM-O on 2001-03 collective bargaining agreement, Rich Melvin and Kate Maguire, Director of Human Resources, developed a list of meet-and-confer understandings that had been developed over the years. It was their intention to review this list to determine which meet and confer understandings were still valid and which ones were no longer applicable. This list was to be reviewed during a housekeeping meeting with EM-O representatives on August 28, 2001.

- 42.) The housekeeping meeting was held on August 28, 2001 with representatives from the School District and EM-O. One of the meet and confer understandings on the list for discussion was the memorandum from Stan Mack dated December 30, 1999. During the meeting, the representatives from both parties discussed which items from that memorandum should be incorporated into a memorandum of understanding. The items from that December 30, 1999, memorandum which were agreed upon for inclusion in a memorandum of understanding were: Staff Use of School Buildings, Representation on Committee/Task forces, Staff Investigation Protocol, Transfer Licensed Staff and Building/Site or Program. The remaining items on that list were marked "delete." Among those items was "Tax Sheltered Annuity Plans." This item was not to be included into a subsequent Memorandum of Understanding as it was not a mandatory subject of negotiation.
- 43.) The language concerning 403(b) supplemental retirement plans in the 2001-03 collective bargaining agreement was changed to reflect the amendments to 356.24 enacted by the legislature in 2000. Since vendors no longer needed to be approved by the SBI the language in the CBA addressing the identity of vendors was removed. The only language remaining in the contract related to 403(b) plans was that it "meet the school district's guidelines for approval." The School District now had sole discretion for the selection of eligible 403(b) vendors.
- 44.) The language in regarding 403(b) supplemental retirement plans remained the same in the EM-O 2003-05 collective bargaining agreement.
- 45.) In 2004, the School District reduced the number of available 403(b) vendors for new employees to 13. This list included 5 vendors approved to receive a matching contribution from the School District. EM-O did not request a chance to negotiate or discuss this.
- 46.) In 2004, the School District initiated an audit of the School District's matched and unmatched 403(b) supplemental retirement plans. The audit was performed by Advanced Capital Group ("ACG"). ACG made some recommendations to the School District.

- 47.) During the audit it was discovered that the School District and its employees were paying both the employer and employee share of FICA tax on the employer matching contribution to 403(b) plans, which was unnecessary. After discovery of this error, the School District stopped paying the tax and tried to recoup some of the money on behalf of the School District and its employees.
- 48.) In January of 2005, an invitation was sent to members of the Insurance Advisory Committee to discuss the results of the ACG audit. The Insurance Advisory Committee contained members from each employee group in the School District. The meeting invitation indicated the purpose of the meeting was to discuss the concerns and recommendations provided by ACG, including potential implementation of the recommendation to move to a single 403(b) vendor. Members of the Insurance Advisory Committee were invited to be part of the new Investment Advisory Committee (IAC) or to have another individual represent their employee group.
- 49.) The first meeting of the IAC was held on January 24, 2005. Discussed at the meeting were the potential refund of FICA tax, and the concerns and recommendations of ACG, including the recommendation that the School District move a single 403(b) vendor. The representatives were informed that the single vendor would be chosen unilaterally by the School Board using a request for proposal process (RFP).
- 50.) Representatives from EM-O and EM-O-ESP strongly objected to the move to the proposal for a single 403(b) carrier. On January 26, 2005, the president of EM-O, Dick Rainville, sent a letter to Rich Melvin indicating that "EM-O does not support the proposal for one 403(b) carrier." The letter did not indicate the matter must be negotiated.
- 51.) Rich Melvin sent an email to the School Board members advising them of the ACG audit, the results, the formation of the IAC and the plan to move to a single 403(b) supplemental retirement plan vendor using an RFP process.
- 52.) The next meeting of the IAC occurred on February 2, 2005. A spreadsheet listing the current five 403(b) vendors approved for a District match along with the other eight current 403(b) vendors approved for the unmatched plans. The

spreadsheet also included a list of vendors approved for participation in the unmatched plans with employees hired prior to the 2004 reduction in 403(b) vendors. The spreadsheet contained a breakdown of the number of employees in each group participating with each vendor.

- 53.) There was a discussion during the February 2 meeting regarding which 403(b) supplemental retirement plan vendors would be asked to submit proposals to the RFP. After the meeting, the RFP was sent to twenty vendors. Nine vendors responded to the RFP. The responses received from vendors included proposals from AIG VALIC, ESI Financial/EFS, Great West, ING, Equitable, MetLife, Prudential, Lincoln and Wells Fargo.
- 54.) The IAC met again on March 2, 2005 and reviewed the proposals in detail. The committee invited MetLife, Lincoln, Great West and AIG VALIC to give individual presentation to the IAC.
- 55.) Advocates from EM-O strongly advocated to have one of the four finalists replaced by EFS and to expand the final list to five to include EFS. The School District declined to add EFS to the list of finalists, indicating the other employee groups did not feel EFS' proposal warranted it being a finalist.
- 56.) The four finalists were asked to provide a webinar¹ to interested IAC members so they could learn more about the companies.
- 57.) After the March 2 meeting, the number of proposed vendors was to be reduced. IAC favored MetLife and EM-O favored Great West. These two vendors were asked to submit a last best proposal.
- 58.) Upon reviewing the last best proposals from Metlife and Great West, IAC continued to favor MetLife and EM-O continued to favor Great West.
- 59.) The administration recommended to the School Board that MetLife be approved as the single 403(b) vendor for the School District.
- 60.) On March 11, 2005, another letter was sent from EM-O to the School Board stating its strong objection to the proposal to move to a single 403(b) plan carrier.

¹ A webinar is a presentation/demonstration regarding the operation of the various vendors' websites.

- 61.) On March 15, 2005, the School Board appointed MetLife as the single 403(b) vendor for the School District.
- 62.) At the time the Plaintiffs initiated these proceedings, there were 24 approved vendors for the 403(b) plans. According to District records, \$5,000,000 was deposited as voluntary employee contributions to 403(b) plans in 2004-05. There was \$800,000 paid into the employer's matching fund program in 2004-05, \$400,000 of which were the employee contributions.

CONCLUSIONS OF LAW

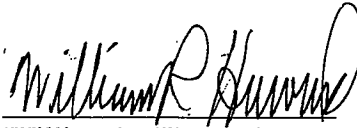
- 1.) Both unmatched and matched 403(b) supplemental retirement plans are retirement contributions or benefits for the purposes of PELRA.
- 2.) Neither unmatched nor matched 403(b) supplemental retirement plans are mandatory subjects of collective bargaining.
- 3.) Unmatched and matched 403(b) plans are, at best, permissible subjects of collective bargaining.
- 4.) The School District and EM-O did not have a history of negotiating such matters.
- 5.) The past practices of the parties regarding unmatched and matched 403(b) plans are not sufficient to convert this issue into a mandatory subject of negotiation.
- 6.) The past practice of the parties with regards to unmatched and matched 403(b) plans is that the School District retains sole discretion to choose the number and identity of such vendors.
- 7.) The unilateral change to a single vendor and selection of MetLife as that vendor did not constitute an unfair labor practice by the School District.

IT IS HEREBY ORDERED:

- 1.) The Temporary Restraining Order signed by Judge Neville is **VACATED**.
- 2.) The Plaintiffs' Motion for a Permanent Restraining Order is **DENIED**.
- 3.) The following memorandum is hereby incorporated as part of this order.

Dated: 8/2/06

BY THE COURT:

By: 
William R. Howard

MEMORANDUM

I. The number of 403(b) plan vendors is not a mandatory subject of negotiation

EM-O and EM-O-ESP claim the School District engaged in an unfair labor practice by unilaterally changing a term of condition of employment when it reduced the number of 403(b) supplemental retirement plan vendors to one and unilaterally chose that single vendor. EM-O and EM-O-ESP argue this unilateral change was in violation of the Public Employment Labor Relations Act (PELRA). EM-O and EM-O-ESP have alleged the School District refused to meet and negotiate in good faith with the representatives of its employees and interfered with, restrained or coerced employees in the exercise of rights...in violation of Minn. Stat. § 179A.13, subd. 2(1) and (5). EM-O and EM-O-ESP are seeking the right to meet and negotiate regarding number of 403(b) vendors offered.

A. 403(b) plans are not terms and conditions of employment

PELRA governs the relationship between public employers and public employees in the State of Minnesota. PELRA requires public employers and public employees to negotiate over “terms and conditions of employment.” “Terms and conditions of employment are defined in relevant part as “the hours of employment, the compensation therefore 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...” PELRA 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). Unilateral changes that “deprive a union of its right to negotiate a mandatory subject of bargaining” constitute an unfair labor practice. Foley Educ. Assn. v. Indep. Sch. Dist. No. 51, 353 N.W. 2d 917, 921 (Minn. 1984). Consequently, because the duty to bargain exists only when the matter concerns a term or condition of employment, it is not unlawful for an employer to make unilateral changes when the subject is not a “mandatory” bargaining term. Id. There can be no unfair labor practice if the subject does not concern a “term or condition of employment.”

B. Retirement contributions or benefits are excluded from “terms and conditions of employment” under PELRA

The issue before the Court is whether the selection and number of unmatched and matched 403(b) supplemental retirement plan vendors is a mandatory subject of negotiation. EM-O and EM-O-ESP contend that 403(b) supplemental retirement plans are fringe benefits or compensation, not retirement contributions, and are therefore, subject to the requirements of PELRA. In AFSCME Councils 6, 14, 65 and 96 v. Sundquist the Minnesota Supreme Court concluded that pension plans constituted a “retirement contribution or benefit.” In *Sundquist* the issue before the Court was a 1982 legislative act which provided for a two percent increase in government employee contributions to state pension plans. The union, on behalf of the employees, objected to the unilateral change as an unfair labor practice because it believed pension contributions were a mandatory subject of negotiation under PELRA. In putting on its case, the union conceded that the express exclusion of “retirement contributions or benefits” from the “terms and conditions of employment” under PELRA meant employee pension contributions were not mandatory subjects of collective bargaining. The *Sundquist* Court rejected the union’s arguments and stated “PELRA’s express exclusion of pension consideration from the definition of terms and conditions of employment was established to take all pension issues completely out of the scope of permissible bargaining...” *Id.* at 24. The *Sundquist* Court cited the legislative history of PELRA as further support for the conclusion that pension contributions were never intended to be a permissible subject of negotiation.

Following the *Sundquist* decision, the Court of Appeals had the opportunity to determine the proper interpretation of “retirement contributions or benefits” in relation to the issue of health insurance benefits for retired persons in Minnesota Teamsters Public and Law Enforcement Employees v. County of Washington. 413 N.W. 2d 245 (Minn. App. 1987). Prior to 1985, Washington County had been in the practice of providing health insurance for its retired employees. That practice was limited in 1985 over the objection of the union. The union demanded to negotiate the issue and the County refused. The Court of Appeals based its analysis on the decision in *Sundquist*, noting that *Sundquist* dealt only with pension contributions. The Court noted that while *Sundquist*

made broad references to “all pension issues,” it did not reach the issue of whether health insurance for retired persons is a pension issue. *Id.* The Court of Appeals determined that health insurance benefits for retired persons were to be considered as retirement benefits and thus were not mandatory subjects of collective bargaining. 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.”

This decision makes it clear that the definition of “terms and conditions of employment” excludes “all retirement contributions and benefits,” not just the public pension issues initially addressed by the Supreme Court in *Sundquist*.

In 1988, the legislature once again took a look at the issue of retiree health insurance benefits. The legislature decided to remove retiree insurance benefits from the “retirement contributions and benefits” exception to “terms and conditions of employment.” The legislature enacted legislation making retiree insurance benefits a term and condition of employment subject to mandatory negotiation. The express exclusion of retiree insurance benefits from the definition of “retirement benefits and contributions” supports the position that the exception for “retirement contributions and benefits” from “terms and conditions of employment” was meant to include *all* retirement, otherwise the legislature would have no reason to specifically remove retiree insurance benefits from that category. The current status of PELRA excludes all retirement benefits, except health insurance benefits for retirees, from the definition of “terms and conditions of employment.” This includes 403(b) supplemental retirement plans.

C. 403(b) plans are retirement contributions or benefits

EM-O and EM-O-ESP argue that the matched 403(b) plans are fringe benefits and the unmatched plans are a voluntary use of compensation and as such, both of these plans can be considered terms and conditions of employment. EM-O and EM-O-ESP cite the ability of employees to borrow against the funds and withdraw early by paying a penalty fee as support for their position. EM-O views the unmatched 403(b) plan as a voluntary use of compensation and feels it should be treated as compensation. Their argument is that these voluntary unmatched contributions are money employees could be taking home

as compensation and compensation is subject to PELRA. There is no question that a 403(b) plan, whether matched or unmatched, constitutes a “retirement contribution or benefit.” The fact that both matched and unmatched 403(b) plans have the flexibility of offering a participant the ability of withdrawing funds prior to retirement does not make them any less a retirement benefit. While it is true that early withdrawals may be made under certain hardship circumstances, those circumstances cited by Plaintiffs would impose a 10% penalty or would require repayment. Distribution of the funds may not be made penalty-free until the plan owner reaches the age of 59 ½. The imposition of a penalty fee or a payback requirement for early withdrawal would seem to support the conclusion that 403(b) plans are retirement plans and are intended as such. 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. There is substantial evidence in the record to support the position that 403(b) plans, both matched and unmatched, are retirement benefits. As retirement benefits such plans are not subject to mandatory negotiation as a “term or condition of employment” under PELRA. Since 403(b) supplemental retirement plans are considered “terms or conditions of employment,” it is not unlawful for a school district to make unilateral changes to such plans. The unilateral reduction in the number of 403(b) vendors by the School District was not an unfair labor practice because the number and selection of 403(b) supplemental retirement plan vendors is not a mandatory subject of bargaining under PELRA.

EM- also cites to the requirement that the School District 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 as support for its position that 403(b) plans should be mandatory subjects of negotiation in the interest of fairness. The union cites to West St. Paul Federation of Teachers v. Independent School District No. 197 for this premise. 2006 WL 997868 (Minn. App. 2006). EM-O notes that 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.* EM-O argues the situation regarding the 403(b) plan vendors is analogous to the group health insurance plans. EM-O argues the identity of the vendors under 403(b) plans is just as important as the amount of money

that will be matched by the employer just as in group health insurance plans the group health plan's provider network is just as important as the amount of money an employer will contribute to the premiums for the plan. This argument is flawed. The issue in *West St. Paul* surrounds employee health insurance. Employee health insurance is a term or condition of employment under PELRA and as such is subject to mandatory negotiation. PELRA does not contain an express exclusion for employee health insurance like it does for retirement benefits or contributions. In addition employee health insurance is governed by a specific statute which expressly requires negotiation when the "aggregate value of benefits" is reduced.² No such statute exists regarding 403(b) supplemental retirement plans. The Court's ruling in *West St. Paul* is not applicable to the issue at hand.

II. Public employers are not required to negotiate over permissible subjects of collective bargaining

EM-O and EM-O-ESP argue that even if 403(b) plans are not mandatory subjects of collective bargaining they are at least permissible subjects of collective bargaining and fairness requires they be negotiated. The union contends that 403(b) plans are matters of inherent managerial policy and as such are permissible subjects of collective bargaining. 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 District Council 96, Am. Fed. Of State, County, Mun. Employees v. St. Louis County, 290 N.W. 2d 608, 611 (Minn. 1980). A public employer is allowed to negotiate such issues if it chooses to do so voluntarily. *Id.* It should be noted that while the law allows for such matters to be negotiated, it in no way requires employers to do so. The School District made the decision that it would not negotiate matters relating to 403(b) plans and it had the right to make such a refusal. The Court will not question that decision.

The Court notes that PELRA can also designate prohibited subjects of collective bargaining. Sundquist at 575. The Court in *Sundquist* determined pension benefits are impermissible subjects for collective bargaining. *Id.* The Court agrees there may be differences between pension plans and 403(b) plans and therefore determines this

² See *Sundquist*

particular ruling of *Sundquist* may not be persuasive in this case. However this Court does not need to rule on the issue of whether 403(b) plans are prohibited subjects of collective bargaining. The Court has already determined that at best 403(b) plans are permissive subjects for collective bargaining and as such public employers are not required to negotiate such issues. As previously noted, the School District refused to negotiate regarding 403(b) plans and it had every right to make such a refusal because 403(b) plans are not mandatory subjects of collective bargaining. The issue of whether such negotiations are prohibited need not be reached for purposes of this decision.

III. The School District did not have a past practice of negotiating issues relating to 403(b) plans.

The final issue the Court must deal with is whether an issue that is not normally a bargaining issue can become a bargaining issue through pattern and practice and whether the parties had a past pattern of negotiating the relevant issue. In *Foley Education Association*, the Supreme Court noted that “since only unilateral *changes* are prohibited, an unfair labor practice will not lie if the ‘change’ is consistent with the past practices of the parties.” *Foley Educ. Assn.* at 921. Even if this Court were to assume that 403(b) supplemental retirement plans were “terms and conditions or employment” under PELRA, it would still find that an unfair labor practice did not result from the unilateral change in the number of 403(b) vendors in this case. If the parties’ past practice is supportive of the unilateral change, then no unfair labor practice had occurred. In completing this analysis, the Court must first determine if a past practice exists. A past practice is “a prior course of conduct which is consistently made in response to a recurring situation and regarded as a correct and required response under the circumstances.” Ramsey County v. American Fed’n of State, County and Mun. Employees, Council 91, Local 8, 309 N.W. 2d. 785, 788, n. 3 (Minn. 1981). If the Court finds a consistent past practice exists, it must then determine whether a change took place that was inconsistent with the past practice. The parties in this case have different opinions on what the consistent past practice was. EM-O contends the past practice between the parties was that any 403(b) supplemental retirement plan vendor with at least ten employee participants was approved by the School Board. They further contend that although the list of approved vendors changed over time unilaterally, all that really

happened is that the existing ten participant guideline was applied and additional companies were eligible for inclusion. Their argument is that the guidelines themselves did not ever change. The School District claims the past practice was that the School District had the sole discretion to determine the number and identity of 403(b) supplemental retirement plan vendors.

There is ample evidence in the record to support that the past practice between the parties was sole discretion of the School District to choose the number and identity of 403(b) plan vendors. It is uncontested that the criteria used by the School District to select and appoint 403(b) plan vendors changed over the years. When unmatched 403(b) supplemental retirement plans were first offered by the School District in 1967, the School District chose a single vendor to administer those plans. The number of vendors was later changed unilaterally by the School District to allow for any vendors with twenty or more participants. Sometime between 1985 and 1992, the School District again unilaterally changed the number of available 403(b) supplemental retirement plan vendors to allow for vendors who had at least ten participants. The School District also unilaterally reduced the number of 403(b) plan vendors for new employees at the beginning of the 2004-05 school year. It appears that while the guideline for inclusion as a 403(b) plan vendor was once ten or more participants, that was not the long-standing past practice. That supposed "guideline" was merely one of the criteria used by the School District over the years to select 403(b) vendors and was unilaterally changed by the School District. EM-O's argument that the guideline itself did not change over time is without merit. The evidence as a whole supports the School District's position that it has consistently retained discretion over the selection and number of 403(b) vendors since the plans were first offered in 1967 and has never bargained over such selections. The decision in 2005 by the School Board to move to a single 403(b) supplemental retirement plan was consistent with its past practice to maintain sole discretion over the number and identity of 403(b) supplemental retirement plan vendors.

EM-Os final argument in support of its position is that the number and identity of 403(b) supplemental retirement plans vendors became a bargaining issue by pattern and practice. EM-O argues the parties have a history of negotiating on issues relating to 403(b) supplemental retirement plans and this pattern of negotiation requires that issues

relating to 403(b) supplemental retirement plans must now be considered mandatory subjects of collective bargaining. This argument is unsupported by the record. The record contains no evidence that the number and selection of 403(b) vendors has ever been negotiated by the parties. Nor has it ever been included in any of the collective bargaining agreements between the parties. EM-O tried to negotiate the issue of unmatched 403(b) plans in 1972 and again in 1983 and was rebuffed by the School District both times because 403(b) plans were not mandatory subjects of collective bargaining. The issue of the matched 403(b) plans has only been negotiated by the School on two occasions. The first negotiation with regard to the matched plans occurred after the legislature authorized school districts to make matching contributions to 403(b) plans in 1992. At that time, the School District negotiated with EM-O in regards to the eligibility criteria for participation in the plan, the amount of the match and the limitation on the number of vendors. The number of vendors was limited by the criteria "and has met the school district's guidelines for approval." After the amendment to Minn. Stat. 356.24 in 2000, negotiation was consistently limited to the eligibility criteria and the amount of the match. The School District refused to negotiate on the issue of the number of vendors, requiring that the language continue to read "and has met the school district's guidelines for approval." These negotiations are not sufficient to form a pattern of negotiation regarding the issue of the number and selection of 403(b) vendors. EM-O cites the December 30, 1999, memorandum from Stan Mack in support of its contention that the number and selection of 403(b) had previously been negotiated. This Court has already determined that the purpose of that memorandum was to recite the list of a practices that were unresolved during the negotiations of the 1999-2001 collective bargaining agreement. The purpose of the letter was to communicate the message that the items included in the list were unresolved issues from that round of bargaining and they needed to be further addressed in order to reach a settlement and avoid any potential penalty fees. The memorandum was not intended as a promise to negotiate such issues. The School District had refused to negotiate on 403(b) plan language before the memorandum was issued and it continued to do so following the distribution of the memorandum. The record is void of any substantial evidence supporting EM-O's contention that a history of negotiation existed between the itself and the School District regarding 403(b) plan language.

It is evident to this Court that the School district consistently reserved its discretion to unilaterally determine the number and identity of both matched and unmatched 403(b) supplemental retirement plan vendors. As such, the School District did not engage in an unfair labor practice when it unilaterally reduced the number of 403(b) plans members to one and selected MetLife to be the single vendor for the School District's plans.

WR. Penn
8/2/06