STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 24, AFL-CIO, Complainant, vs. THE STATE OF WISCONSIN, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, Respondent.	Case IV No. 16879 PP(S)-15 Decision No. 11979-B

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.
Mr. Gene Vernon, Attorney at Law, Department of Administration, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint and an amended complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent committed unfair labor practices within the meaning of Section 111.84(1)(a) and (1)(f) of the State Employment Labor Relations Act; and a hearing in the matter having been held at Madison, Wisconsin, on August 20 and September 26, 1973, before Examiner Herman Torosian; and prior to any further action by the Examiner, the Commission on August 25, 1975 having set aside the Appointment of Examiner and transferred the instant case to the Commission; 1/ and the Commission having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the American Federation of State, County and Municipal Employees (AFSCME), Council 24, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with its offices at 148 East Johnson Street, Madison, Wisconsin.

2. That the State of Wisconsin, per its agency, the Department of Industry, Labor and Human Relations, hereinafter referred to as the Respondent, is an employer with its offices at 201 East Washington Avenue, Madison, Wisconsin.

3. That prior to July 1, 1969, the Commission certified the Complainant as the exclusive bargaining representative for all regular full-time and all regular part-time classified employes of the Respondent Department of Industry, Labor and Human Relations, excluding super-

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1/ Mr. Torosian became a member of the Commission on January 4, 1975.

visors, and those attorneys who were previously classified as Attorney-Examiners I and II. 2/

4. That following said certification, Complainant and Respondent negotiated a collective bargaining agreement dated July 1, 1969, which was to terminate on June 30, 1970, but which was extended to June 30, 1973.

5. That said agreement authorized dues deductions by the Respondent in favor of the Complainant from the pay checks of employes in the aforesaid unit, upon receipt of a voluntary written individual order therefore executed by employes; that pursuant to the collective bargaining agreement such orders directing dues check-off were to ". . . be terminable at the end of at least any year of their life by the employe giving at least thirty (30) days' written notice of such termination to the Employer and the Union."

6. That the individual employes orders appearing on cards provided by the Complainant authorizing the Respondent to deduct union dues included the following language:

> "It is understood that this authorization shall begin on the first payroll period following this date and shall continue for one year from the date hereof, and shall thereafter continue for successive periods of one year unless thirty days prior to the end of any year of its life I give written notice of termination to my employer and to said organization."

7. That during April and May, 1973, Duane Sallstrom, Personnel Director, Department of Industry, Labor and Human Relations, received inquiries from several employes as to whether dues deductions would be continued once the collective bargaining agreement expired; that one such inquiry was made by Frank Marques, a Steward and Grievance Representative for one of the Locals affiliated with Complainant, who told Sallstrom that he should issue a memo to employes to the effect that they can cease their dues deductions once the collective bargaining agreement expired; and that he himself, Marques, desired to have his dues deductions ended upon expiration of the agreement.

8. That on or about June 6, 1973, Sallstrom, pursuant to the aforementioned inquiries, prepared and distributed to employes a document concerning "Union Dues Deductions", which contained the following language pertinent to the instant dispute:

> "The present agreement between DILHR and the WSEU dated July 1, 1969 expires as of June 30 this year. Employes, serving in positions <u>not</u> listed above, may elect to stop their dues deductions as of July 1, 1973 by so notifying the DILHR Personnel Office. Dues deductions will not be stopped unless we receive an employe's request to stop them."

that prior to distributing the June 6 document, Sallstrom contacted Al Hunsicker, Employe Relations Specialist, Department of Administration, and informed Hunsicker of the contents of said document and that Hunsicker did not object to the contents nor the distribution thereof.

9. That at the time said document was sent to the employes, there were 371 employes checking off dues; that subsequent to the June 30, 1973 expiration of the collective bargaining agreement between Respondent and Complainant, the Respondent ceased deducting union

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2/ Decision No. 8346-A.

dues from the pay checks of certain employes, pursuant to their written requests to cancel their dues check-off authorization, some of which requests were not timely made in accordance with the terms of the individually executed check-off authorizations.

10. That at least one employe requested revocation of her dues check-off authorization as a result of Respondent's statements appearing in the document concerning "Union Dues Deductions" quoted in pertinent part in paragraph eight, supra.

11. That at the time Respondent prepared and distributed the aforesaid document, i.e., on or about June 6, 1973, Complainant had on file and pending before the Commission certain "Petition(s) for Election" in at least two state-wide statutorily created bargaining units: (1) Clerical and Related, and (2) Professional-Social Services, relating to employes classified as Manpower Specialists, Social Workers, Clerks, Stenographer and Typist; and that the aforementioned document was distributed to individuals in said units.

12. That Complainant filed a complaint on June 8, 1973 which alleged the following:

> "1. Complaint [sic] is a 'labor organization' as defined in Section 111.81(9), Wis. Stats. (1971); its president is Mr. Lawrence Grennier, its Director is Mr. Paul Simms, and its business offices are located at 148 East Johnson Street, Madison, Wisconsin.
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> 2. At all times material hereto AFSCME was certified to exclusively represent all 'employe[s]', as used in Section 111.81 (15), Wis. Stats. (1971), occupying civil service classifications contained in the following statutorily defined bargaining units:
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> (a) Blue Collar and nonbuilding trades;
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> (b) Security and public safety; and
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> (c) Technical.
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> 3. Many 'employe[s]' occupying classifications in the bargaining units above described in addition to other statutorily defined bargaining units have authorized Respondent, pursuant to individual order, to deduct labor organization dues from their earnings on a periodic basis; many of said 'employe[s]' are situated and working for Respondent in its Department of Industry, Labor and Human Relations.
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> 4. Respondent State of Wisconsin, Department of Industry, Labor and Human Relations, hereinafter abbreviated and referred to as State, is an 'employer' within the meaning of Section 111.81(16), Wis. Stats. (1971); its Director of Employment Relations is John F. Kitzke, 1 West Wilson Street, Madison, Wisconsin; the Commissioners of the Department of Industry, Labor and Human Relations are Philip Lerman, John Zinos, and William Johnson, whose business address is 201 East Washington Avenue, Madison, Wisconsin.
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> 5. On or about June 6, 1973, the State caused a certain document to be distributed with the payroll salary checks of certain employees in its employ, a copy of which is attached hereto as Complainant's Exhibit A, the terms of which are expressly incorporated herein by reference to have the same force and effect as though set out at length.

6. The action of Respondent as described in the immediately preceding paragraphs is in violation of Section 111.84(1)(a) and (1)(f), Wis. Stat. (1971)."

13. That on June 27, 1973, the Commission issued an Order Appointing Examiner authorizing Herman Torosian to conduct a hearing on the matter; that by separate letter to the Complainant and its attorneys also dated June 27, 1973, Examiner Torosian advised Complainant that hearing had been set for August 20, 1973; that subsequently on or about July 6, 1973, the Commission sent copies of the Order Appointing Examiner, a copy of the notice setting hearing, and the verified complaint to Respondent; and that Respondent filed no answer to said complaint prior to hearing on August 20, 1973 at which time it admitted paragraph one through five and denied paragraph six of the complaint.

On the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That Respondent, State of Wisconsin, Department of Industry, Labor and Human Relations, by failing to file an answer to the instant complaint prior to the hearing did not admit the allegations of paragraph six of the complaint and thus Complainant, American Federation of State, County and Municipal Employees, Council 24, AFL-CIO will not be granted judgment on its prayer for relief by reason of Respondent's failure to answer.

2. That Respondent, State of Wisconsin, Department of Industry, Labor and Human Relations, by Duane Sallstrom, by distributing a letter on or about June 6, 1973 to certain professional and clerical employes employed by DILHR while a petition for election for said employes was pending before the Wisconsin Employment Relations Commission, advising said employes that their collective bargaining agreement would expire as of June 30, 1973, and that they could cease their union dues deductions as of July 1, 1973, and by ceasing to deduct dues of certain professional and clerical employes after July 1, 1973 pursuant to their untimely request, interfered with the free choice of its employes in exercising their rights contained in Section 111.82 and in violation of Section 111.84(1)(a).

3. That Respondent, State of Wisconsin, Department of Industry, Labor and Human Relations, by ceasing to deduct dues of certain professional and clerical employes pursuant to their request after July 1, 1973 did not and is not violating Section 111.84(1)(f) of the Wisconsin Statutes.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that Respondent State of Wisconsin, Department of Industry, Labor and Human Relations shall immediately:

1. Cease and desist from interferring with the rights of its employes under the State Employment Labor Relations Act by misinforming said employes regarding their right to authorize or revoke dues deductions.

2. Reimburse Complainant American Federation of State, County and Municipal Employees, Council 24, AFL-CIO, in the amount of all dues which employes who untimely revoked their dues

deductions because of Respondent's misinformation would have paid between the date of their untimely revocation and the date on which revocation of their dues deduction would have been timely pursuant to their individual dues deduction authorization card executed and submitted to the Respondent.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Howard S. Bellman, Commissioner

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Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PROCEDURAL ISSUE:

Complainant filed its complaint in this matter on June 8, 1973, and upon initial hearing requested and was granted leave to amend its complaint, doing so on August 23, 1973. By cover letter dated June 27, 1973, accompanying the Commission's Order Appointing Examiner of the same date, Examiner Torosian advised Mr. Graylow, counsel for Complainant, and Mr. Simms, Director of AFSCME, that the matter was set for hearing on August 20, 1973. A copy of this cover letter, the Order Appointing Examiner and the complaint were sent to Mr. Gene Vernon, counsel for the Respondent on July 6, 1973. No answer was made to the complaint until the first day of hearing, at which time Complainant interposed a motion based on Wisconsin Administrative Code Section ERB 22.03(6) that it be granted judgment on its prayer for relief by reason of Respondent's failure to answer. Section (6) of ERB 22.03 states in pertinent part: "If any party entitled to do so fails to file a timely answer, such failure shall constitute an admission of and a waiver by such party of a hearing so to the material facts alleged in the complaint."

It is Complainant's position that (6) of ERB 22.03 indicates that the failure to file an answer constitutes an admission of all the allegations in the complaint and a waiver by such party of a hearing. Complainant contends that paragraph six of its complaint, alleging that:

> "The action of Respondent as described in the immediately preceding paragraphs is in violation of Section 111.84(1)(a) and (1)(f), Wis. Stat. (1971)."

is a material fact alleged and by virtue of the Respondent's failure to answer, that such allegation is admitted and thus that judgment should issue for Complainant.

There is no issue with the factual allegations set forth in paragraphs one through five of the complaint since these allegations are not disputed by Respondent. Complainant's paragraph six is in dispute but the Commission concludes, contrary to Complainant's claim, that paragraph six does not allege "material facts" subject to the provisions of ERB 22.03(6). Rather, paragraph six essentially states a conclusion with respect to Complainant's view of the application of Section 111.84(1)(a) and (1)(f), Wisconsin Statutes, (1971) to the facts alleged in paragraphs one through five preceding, a conclusion which lies at the heart of the matter here contested and to which the parties are entitled to hearing pursuant to Chapter 227, Wisconsin Statutes. Therefore, Complainant's motion for judgment is hereby denied. Furthermore, the Commission has held that the failure to file a written answer prior to the hearing, absent a showing of prejudice, does not entitle a party to judgment based upon the complaint. 3/

3/ City of Milwaukee (8017) 5/67.

POSITION OF THE COMPLAINANT ON THE MERITS:

Complainant contends that the Respondent has committed unfair labor practices in violation of Section 111.84(1)(a) and (1)(f) 4/.

It is undisputed that an agent of the Respondent distributed to DILHR employes a document which, among other things, stated that as of the date the collective bargaining agreement between the Respondent and Complainant expired, employes not included in an attached list could elect to stop their dues deductions upon appropriate request to the Respondent's Personnel Office. Respondent would only cease dues deduction, the statement made clear, in the event of employe request. Upon Respondent's distribution of the described document, the Complainant charged a violation of Section 111.84(1)(a) and (1)(f), Wisconsin Statutes.

With respect to the Section 111.84(1)(a) violation alleged, Complainant argues that by distributing and implementing the terms of the document concerning "Union Dues Deduction", the Respondent has interfered, coerced and restrained its employes in the enjoyment of protected rights. Characterizing the document as a "unilateral invitation to cease dues deductions and eventually membership in the Local" Complainant charges that the document had a significant affect on Union membership; that it represented Employer meddling in internal Union affairs; that it did not apprise members of adverse consequences in the event dues were stopped; and that it was particularly coercive and intimidating, adding to employe confusion, because it was distributed at a time when election petitions were pending before the Commission.

With respect to the Section 111.84(1)(f) violation alleged, Complainant asserts that the check-off authorization cards furnished employes by the Union and on file with the Employer provide for automatic yearly renewal unless within 30 days of its anniversary date written notice to terminate is received by the Union and Employer. Complainant argues that certain dues check-off revocations of certain employes

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4/ Said sections provide the following:

"(1) It is an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82.

. . .

(f) To deduct labor organization dues from an employe's earnings, unless the state employer has been presented with an individual order therefore, signed by the state employe personally, and terminable by at least the end of any year of its life or earlier by the state employe giving at least 30 but not more than 120 days' written notice of such termination to the state employer and to the representative organization, except where there is a fair share agreement in effect. The Employer shall give notice to the union of receipt of such notice of termination."

were untimely under this interpretation, arguing that because renewal under these circumstances should have been automatic for another year, that Respondent's decision to honor untimely employe requests and stop dues check-off constituted interference, restraint and coercion of its employes.

POSITION OF THE RESPONDENT:

Respondent contends that distribution of "Exhibit A" concerning "Union Dues Deductions" was nothing more than an attempt to clarify and inform employes of their legal rights regarding deductions; that distribution of the document was in part a response to inquiry by employes, including Union officials; that several other notices were mailed to these employes from the Department of Administration, any one of which could have been the reason some employes chose to cancel their dues check-off authorizations; and that only one witness testified to relying on the document "Exhibit A" to cancel such authorization but that such reliance was doubtful in the face of the clear language of the document.

As its fundamental legal premise, Respondent argues that in the absence of a collective bargaining agreement providing for dues deduction, it was under no obligation to honor dues deduction authorizations. Respondent characterizes dues check-off as simply a form of union security which is not a condition of employment requiring bargaining to impasse and not intrinsically a right of state employment. Therefore, Respondent urges, when the existing collective bargaining agreement expired on June 30, 1973, it was justified in reverting to its previous practice of honoring dues check-off authorizations submitted by employes and cancelling such upon specific written request. To do otherwise, Respondent claims, particularly in the context of a pending representation election, would subject it to charges of unlawfully rendering assistance to the Complainant.

Respondent maintains that Section 111.84(1)(f), Wisconsin Statutes, does not apply in the instant proceeding, interpreting that section to mean that no unfair labor practice results if the employer chooses to deduct employe union dues provided the employer has the appropriate authorization and the employe has the opportunity to cancel such authorization at the end of any year of its life or earlier by giving at least 30 days but no more than 120 days' notice prior to the desired termination date. Respondent contends, in short, that both Section 111.84(1)(f) and Section 20.921(1), Wisconsin Statutes, are permissive in nature and neither require an employer to check-off dues in the absence of a specific contractual provision.

DISCUSSION:

It is undisputed that on or about June 6, 1973, the Respondent, by Duane Sallstrom, Personnel Director, Department of Industry, Labor and Human Relations, after inquiries from several employes, distributed a document concerning "Union Dues Deductions" to all employes employed in the blue collar, technical, clerical and professional classifications. Said employes were all covered by the terms and conditions of a collective bargaining agreement which was to expire on June 30, 1973.

The June 6 letter was distributed only after Sallstrom advised Al Hunsicker, of the Department of Administration, of the contents of said document.

That agreement in pertinent part provided that the Employer, upon receipt of voluntary written individual orders from employes on forms provided by the Union would deduct dues in an amount equal to membership dues of Complainant Union and remit same to the Union. Pursuant to

said provision, a number of employes submitted cards to the Employer authorizing dues deductions and further agreed that such authorizations:

> ". . . shall continue for one year from the date hereof, and shall thereafter continue for successive periods of one year unless thirty days prior to the end of any year of its life I give written notice of termination to my employer and to said organization."

The record indicates that, at least in part, Sallstrom's memo was the result of a request by Frank Marques, a Steward and Grievance Representative for one of the Locals affiliated with Complainant; that Sallstrom informed all employes regarding their ability to end their dues deductions upon the expiration of the bargaining agreement. On its face, this fact might raise an inference that the Complainant could conceivably have waived its ability to effectively allege that said memo constituted interference. However, Marques' low level position within the Complainant and his professed desire to have his dues deductions ended both preclude any finding that Marques in any way represented Complainant when making his request.

The first part of the June 6 letter was directed to employes in the blue collar and technical units and informed said employes that as of May 27, 1973, all said employes "will pay union dues or 'fair-share' to WSEU." The Employer further advised said employes that beginning with the June 21 paycheck said employes would have their dues deducted. The last paragraph of said letter was directed to clerical and professional employes who, effective July 1, 1973, would no longer be part of the existing collective bargaining unit. 5/ Said employes were advised that the agreement between DILHR and WSEU dated July 1, 1969 was to expire June 30, 1973. They were further advised that they "may elect to stop their dues deductions as of July 1, 1973 by so notifying the DILHR Personnel Officer". Sallstrom further stated in said letter that "dues deductions will not be stopped unless we receive an employe's request to stop them."

There is no dispute that the Respondent, in fact, ceased deducting dues from the paychecks of certain employes subsequent to the expiration of the collective bargaining agreement, but that this was only done upon individual written request by the particular employe involved.

The above-mentioned inquiries, the letter, the subsequent cessation of dues deductions pursuant to employe request was the totality of Respondent conduct in regard to dues deductions. By said conduct, Complainant alleges Respondent violated Section 111.84(1)(a) and (f) of the State Employment Labor Relations Act.

The Commission concludes that the Employer, while advising its employes of their right to revoke their dues check-off, incorrectly informed them of the timeliness of such revocation. Respondent, in its letter dated June 6, stated that employes who would no longer be

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5/ The legislature in 1971 statutorily created 14 appropriate units on a state-wide basis. Both clerical and professional employes employed in social services were designated as separate apparent collective bargaining units.

in the appropriate unit that they were presently in, could, as of July 1, 1973, after the expiration of the collective bargaining agreement elect to stop dues deductions. Said information, however, completely ignored the commitment contained in the dues check-off authorization cards executed by said employes and the fact that even without a collective bargaining agreement, state employes have a statutory right, as specified in ERB 20.921(1), 6/ to have dues deducted. For said reason, the Commission concludes the distribution of the June 6 letter constitutes interference within the meaning of Section 111.84(1)(f).

While Respondent contends the Commission lacks jurisdiction to construe or enforce the provisions of Section 20.921(1), the Commission at least to the extent of the reference in that section to deductions for dues to employe organizations, concludes otherwise. Certainly, where termination of employe authorization for dues deductions is at issue, the notice requirements of Section 111.84(1)(f) expressly brought into Section 20.921(1) precludes our ignoring the impact of Section 20.921(1) in the instant dispute.

The Commission concludes the provisions of Section 20.921(1), though optional with the employe, create an obligation on the part of the State Employer to honor dues deductions even in the absence of the collective bargaining agreement provided the State Employer is presented with a request in writing that a specified part of his or her salary be deducted and paid by the State to the employe organization designated. In the instant case, such requests were made by employes on forms provided by the Union and executed by said employes. Therefore, unlike the private sector, it is incorrect to argue in this context, as the Respondent does, that check-off is purely and simply a form of union security having nothing to do with the rights of State employes.

Section 20.921 further provides that "timely limits for withdrawal of payments of dues to employe organizations shall be as provided under Section 111.84(1)(f)." Section 111.84(1)(f) states that it is an unfair labor practice for an employer:

> "To deduct labor organization dues from an employe's earnings, unless the state employer has been presented with an individual order therefor, signed by the state employe personally, and terminable by at least the end of any year of its life or earlier by the state employe giving at least

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6/ Said section provides the following:

> "20.921 Deductions from salaries. (1) OPTIONAL DEDUCTIONS. (a) Any state officer or employe may request in writing through the state agency in which he is employed that a specified part of his salary be deducted and paid by the state to a payee designated in such request for any of the following purposes:
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> . . .
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> 2. Payment of dues to employe organizations.
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> . . .
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> (b) The request shall be made to the state agency in such form and manner and contain such directions and information as is prescribed by each state agency. The request may be withdrawn or the amount paid to the payee may be changed by notifying the state agency to that effect, but no such withdrawal or change shall affect a payroll certification already prepared. However, time limits for withdrawal of payment of dues to employe organizations shall be as provided under s. 111.84(1)(f).'

30 but not more than 120 days' written notice of such termination to the state employer and to the representative organization, except where there is a fair-share agreement in effect."

The authorization cards executed by employes for dues deductions provides that said authorization continues for one year and thereafter for periods of one year unless 30 days prior to any year of its life, notice of termination is given to the employer and the union.

The Union contends the reference to "30 days' notice" contained therein means notice within 30 days and not at least 30 days. The Commission, after reviewing the statutory language of Section 111.84(1)(f) and the language of Article 2, Sections 3 and 10 of the collective bargaining agreement, both of which provide for "at least 30 days' notice", the Commission concludes the most reasonable interpretation of "30 days prior" means at least 30 days' notice.

The Commission recognizes that the Respondent did not intentionally misinform employes regarding their ability to revoke their authorization of dues deductions. However, if Respondent's misinformation interfered with the rights of employes under Section 111.82, the Respondent's lack of intent becomes irrelevant. Inasmuch as the Commission concludes that Respondent's June 6 letter did interfere with the right of the majority of employes, through their legal representative, to have their concerted activity supported by duly authorized dues check-off, Respondent must be found to have violated Section 111.82(1)(a).

This conclusion is not based upon evidence in the record which indicates that employe Virginia Pease revoked authorized dues deductions because she thought she was so instructed by the June 6 letter. The Commission finds that Pease's interpretation was not a reasonable one, as the letter stated that dues deductions would not be stopped except upon employe request and did not direct employes to take such action. While the June 6 letter does not instruct employes to cease their dues deductions, the letter nevertheless was misleading in that it informed employes they could cease said deductions thereby encouraging employes to terminate their committment contrary to their individual dues authorization cards executed and submitted to the Respondent. Nor is the Commission's conclusion based upon the fact that the letter was sent while an election petition concerning the affected professional and clerical employes was pending before the Commission. It is the content of said letter and not its timing which constitutes prohibited interference.

It is also the Union's position that Respondent, by actually ceasing to deduct dues, even though requested by its employes, violated Section 111.84(1)(f). Section 111.84(1)(f), however, is a section for the protection of employes. Said section declares it an unfair labor practice for the employer to deduct dues unless certain time periods for revocation are provided. Said section does not make it an unfair labor practice to not deduct dues and for said reason the Commission finds no violation of Section 111.84(1)(f) by Respondent as alleged.

Dated at Madison, Wisconsin this 19th day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Howard S. Bellman, Commissioner

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Herman Torosian, Commissioner