STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Referendum Agreement between AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO and MILWAUKEE AREA VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT	Case XXIX No. 17118 MR(I)-22 Decision No. 12121-A

ORDER DENYING OBJECTIONS TO REFERENDUM AND CERTIFICATION OF RESULTS OF REFERENDUM

Pursuant to a stipulation filed by the American Federation of Teachers, Local 212, WFT, AFL-CIO, herein Local 212, and the Milwaukee Area Vocational Technical and Adult Education District, herein the District, the Wisconsin Employment Relations Commission conducted a referendum on September 11, 1973, among the Employers' "all regular full-time teaching personnel and all regular part-time teaching personnel having a 50% or more teaching load, but excluding teaching personnel having less than a 50% load, supervisory personnel, having less than a 50% load, supervisory personnel, (including but not limited to Deans, Associated Deans, Assistant Deans and Assistant Directors), and excluding all other administrative managerial, and confidential personnel," for the purpose of determining whether a majority of the aforementioned employes actually voting favored the implementation of a fair share agreement between Local 212 and the District. The results of the referendum disclosed that of 562 eligible voters, 492 cast ballots, of which 258 voted in favor of a fair-share agreement, and 234 against; that, thereafter, the Milwaukee Area Technical College Faculty Association, herein the Association, filed objections to the conduct of the referendum in which it primarily contended that (1) employes were confused by last minute campaign literature; (2) Local 212 members and observers at the referendum wore buttons on the date of the referendum, reading "Vote Yes for Unity" (3) voters were not advised on how to vote by absentee ballots; and (4) that the results of the referendum be declared void because less than a majority of eligible voters in the unit voted in favor of the fair-share agreement. On September 18, 1973, the Wisconsin Education Association Council, herein the WEAC, filed a request to intervene with the Commission wherein it requested, inter alia, that the referendum results be set aside, since less than a majority of eligible voters in the unit voted in favor of the fair-share agreement. In response to the foregoing, Local 212 on September 21, 1973, filed a letter with the Commission in which it requested, inter alia, that the referendum results stand; and the Commission having reviewed the results of the referendum, the positions of the parties, being fully advised in the premises, and being satisfied that the objections to the referendum should be dismissed, and that the results of the referendum should be certified.

NOW, THEREFORE, it is

ORDERED

That the objections to the conduct of the referendum be, and the same hereby are, denied, and

NOW, THEREFORE, it is

CERTIFIED

That a majority of the employes voting, in the collective bargaining unit described above, as agreed upon by the American Federation of Teachers, Local 212, WFT, AFL-CIO and Milwaukee Area Vocational, Technical & Adult Education District, necessary to implement a fair-share agreement between said parties have voted in favor of said agreement.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

MEMORANDUM ACCOMPANYING
ORDER DENYING OBJECTIONS TO REFERENDUM
AND CERTIFICATION OF RESULTS OF REFERENDUM

As noted above, the Commission conducted a referendum in the unit herein, the results of which indicated that a majority of those voting - as opposed to a majority of those eligible to vote - favored a fair-share agreement between the District and Local 212. The Association claims that certain activity interfered with the conduct of the referendum and, further, that the results should not be certified because a majority of eligible employes in the unit did not favor the fair-share agreement. Before considering the substantive merits of these arguments, it is first necessary to dispose of several procedural issues which have been raised herein.

One such procedural issue advanced by Local 212 contends that the Commission has no jurisdiction to determine the objections, claiming, in essence, that Local 212 and the District agreed that the Commission would merely "conduct a secret ballot election and tabulate the votes." Ergo says Local 212, once the Commission fulfilled that limited role, it does not have the authority to pass on any matters pertaining to the referendum.

The resolution of this issue necessarily turns on what role the Commission played in the conduct of the referendum. We note in this regard (1) that both Local 212 and the District, on August 28, 1973, filed with the Commission a formal "Stipulation for Referendum seeking authorization to implement a fair share agreement involving municipal employees"; (2) that pursuant to said petition, the Commission on August 29, 1973 issued a formal "Direction of Referendum"; (3) that the Commission had provided the ballots and had printed and caused to be posted for employes a "Notice of Referendum"; (4) that two Commission representatives conducted the September 11, 1973 referendum; and (5) that at the conclusion thereof, said representatives executed the official tally sheet, which was also signed by the observers of Local 212 and the District.

In light of the foregoing, it is clear that the Commission played a most active role in direction and the conduct of the referendum, since the parties requested the Commission to give its official imprint to the referendum. Accordingly, once the Commission provided its requested services, the Commission was entrusted with the responsibility of ensuring that the referendum would be conducted in accordance with the same high standards of conduct which the Commission imposes in all referenda conducted by it. If parties do not choose to accept such standards in referenda seeking implementation of fair-share agreements in municipal employment, they, of course, have a ready alternative: they can have someone else conduct such a referendum. If, however, the Commission is requested to conduct it, there is no merit to any subsequent claim that the Commission cannot regulate the conduct surrounding the referendum to which the Commission has been asked to give its imprint. Accordingly, we find that the Commission is not precluded from asserting its jurisdiction with respect to the objections.

Local 212 also advances, as a procedural bar, the contention that the Association has no standing to file objections. Local 212 has taken no position as to whether the WEAC is precluded from intervening in this matter. In support of this position, Local 212 relies on the Commission's rule ERB 15.12(1) which provides inter alia "any party may file with the Commission objections. . ." (emphasis added).

In considering this issue, we first note that Commission Rule ERB

15.02(1) deals only with a stipulation for a referendum to implement a fair-share agreement. The question of who can file such a stipulation is of course an altogether different issue from the question of who can object to the conduct of a referendum once it has been held. Accordingly, we do not find that the language contained therein is dispositive of the issue here. Nonetheless, we do agree that the use of the word "party" in Rule ERB 15.12(1) does preclude the Association from having standing to file objections to the conduct of a referendum to which it, the Association, was not a "party". Lacking such standing to file the instant objections, we therefore deny the Association's objections which pertain to alleged "misconduct" surrounding the referendum.

Similarly, neither the Association nor the WEAC under ordinary circumstances have standing to seek recission of the referendum herein, as there is not before the Commission, as required under Section 111.70(2) of the Municipal Employment Relations Act, (MERA), a petition supported by at least 30% of the bargaining unit employes to the effect that they desire the fair-share agreement to be terminated. If such a petition is not filed, the Commission will not ordinarily consider the continuing validity of a fair-share agreement in question.

In this case, however, the Commission notes that Local 212 has not objected to the WEAC's request to intervene in this matter and more importantly, that the issue raised herein is of considerable importance to various municipal employers and unions throughout the state. Thus, in the peculiar facts here, the Commission deems it unwise to defer ruling on such an important matter until such time that such a petition, supra, has been filed. Accordingly, the Commission will rule on whether the instant referendum, which has been favored by a majority of those actually voting, authorizes the implementation of a fair-share agreement.

Arguing that it does not, the Association and the WEAC contend that Section 111.70(2) of MERA, and Rule ERB 15.11, provide that no fair-share agreement can be implemented until a majority of eligible voters first vote for its implementation. Here, this argument continues, only 258 voters voted for the fair-share agreement, which is less than the 282 needed to constitute a majority of eligible employes. It is argued, therefore, that the Commission cannot certify the results of the referendum, since less than a majority of eligible employes in the unit favored the implementation of the fair-share agreement.

This argument suffers from one major flaw which we deem dispositive of this issue: the fact that neither Section 111.70(2) of MERA, nor any other section in MERA, requires that a referendum be conducted prior to the implementation of a fair-share agreement in municipal employment. Thus, the only reference to such a referendum in MERA is the provision in Section 111.70 dealing with the termination of an existing fair-share agreement. The Act does not, however, require a referendum before a fair-share agreement can be implemented. In this respect, MERA is therefore different from the State Employment Labor Relations Act, which specifically states in Section 111.85, inter alia, that "(1) No fair-share agreement shall become effective unless authorized by referendum" and in Section 111.81 (13) "For a fair-share agreement to be effective, at least two thirds of the eligible employes voting in a referendum must vote in favor of the agreement." The provisions in MERA also differ from the provisions of the Employment Peace Act, which but for named exceptions, provides, inter alia, in Section 111.06(1)(c)1, that a referendum must be conducted before an all-union agreement can be implemented, and that it must carry by at least a majority of the employes in the

bargaining unit. As there are no similar such requirements in MERA, it is clear that there is no statutory bar which prevents a municipal employer and a union from agreeing to implement a fair-share agreement without a referendum.

Absent such a bar, it therefore follows that the parties can agree to fair-share agreement without any authorization by the employes involved. Similarly, if the parties agree to a referendum, something which they are not required to do under the statutory scheme, the parties can privately agree to whatever voting standard they wish, be it a majority of those eligible to vote, a majority of those actually voting or any other test, in determining whether a fair-share agreement be implemented.

It is in this context, then, that the phrase "required number of employes" is used in Rule ERB 15.11(2)(b), which provides:

> "Where the certification of the result of a referendum indicates that the required number of employes have authorized the implementation of, or the continuation of, the fair-share agreement, said fair-share agreement shall become effective, or continue to remain in effect, as the case may be."

The foregoing obviously contains no requirement that all referenda carry by a majority of those eligible to vote. Instead, because parties can lawfully agree to whatever voting standard they wish, and as such standards can vary from case to case, the above rule is loosely phrased so as to include within its coverage whatever varying standards are agreed to by the parties, as the "required number of employes" for the implementation of fair-share agreements.

Applying the foregoing analysis to the instant case, we conclude, pursuant to the joint standard agreed upon by Local 212 and the District, that "the required number of employes" have voted for the implementation of the fair-share agreement and, that said agreement can be lawfully implemented at this time. Accordingly, we have certified the results of the referendum to this effect.

In issuing our Certification, however, we wish to note how the certification in this case differs from those cases wherein a majority of eligible voters vote in favor of the implementation of, or the continuance of, a fair-share agreement.

In the latter situation, once a majority of eligible voters favor the implementation of, or the continuation of, a fair-share agreement and, but for "good cause shown", the Commission under Rule ERB 15.11(c), generally will not process a petition for a subsequent referendum unless it is filed within sixty days before the date set for the termination or reopening of the existing collective bargaining agreement involved and, provided, that the "results of the previous referendum has not been certified within six months preceding the commencement of said sixty day period". If a referendum is processed in accordance with these requirements, Section 111.70(2) of MERA provides that if "the continuation of the agreement is not supported by at least the majority of the eligible employes, it shall be deemed terminated." For the reasons discussed below, these same requirements are also binding in those situations where a municipal employer and union have voluntarily agreed to a fair-share agreement, provided that a majority of those employes eligible vote in favor of the fair-share agreement, the provisions of Rule ERB 15.11(c) are applicable on any subsequent petition which seeks to determine the continuation of the fair-share agreement, pursuant to the provisions of Section 111.70(2), supra.

If however, such a referendum has not been approved by a majority of those elibigle to vote, which is the case here, the time requirements in Rule ERB 15.11(c) are not applicable. This is so because there is a significant difference between those situations in which a majority of those eligible to vote favor a fair share agreement and those in which the parties have agreed to a lesser voting requirement. As to the former, Section 111.85(1) of the State Employment Labor Relations Act provides that:

> "If the continuation of the [initial] agreement is not supported in any referendum, it shall be deemed terminated at the termination of the collective bargaining agreement, or one year from the result of the referendum, whichever is earlier."

By giving continuing effect to such a fair-share agreement for this proscribed period, even though the employes have voted not in favor of continuing same, the foregoing language clearly manifests the view that stability in a collective bargaining relationship outweighs the immediate desire of the employes that the fair-share agreement be discontinued.

This deference to stability, however, does not exist in the analogous provision in MERA, for Section 111.70(2) provides in pertinent part:

> "Such fair-share agreement shall be subject to the right of the municipal employer or labor organization to petition the commission to conduct a referendum. Such petition must be supported by proof that at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement be terminated. Upon so finding the Commission shall conduct a referendum. If the continuation of the agreement is not supported by at least the majority of the eligible employes it shall be terminated." 1/

MERA contains no provision which permits a fair-share agreement to continue in effect for any period of time after it has not been supported by a majority of the eligible employes. In this respect, MERA is, therefore, significantly dissimilar from the State Employment Labor Relations Act, supra. This difference exists because the respective statutory schemes provide different methods by which fair-share agreements are implemented. Thus, in the State Employment Labor Relations Act, no fair-share agreement can be implemented unless two-thirds of the eligible employes voting authorize its implementation. If such a majority does vote for the implementation of a fair-share agreement, stability in collective bargaining dictates that such an agreement cannot be terminated at the conclusion of an "unfavorable" referendum, but rather, is given effect for a proscribed period. However, as no referendum is required for the implementation of a fair-share agreement in municipal employment this deference to stability is not applicable to situations where, as here, a fair-share agreement has been agreed upon without a majority of eligible voters having first voted for its implementation.

Accordingly, based on the above, there exists "good cause" why the time requirements for filing a petition to terminate a fair-share

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1/ Emphasis supplied.

agreement set forth in Rule ERB 15.11(c) are not applicable to situations where such an agreement has been implemented without a majority of eligible voters favoring a fair-share agreement. The Commission will, therefore, entertain a petition seeking to determine whether a majority of the eligible employes favor such an agreement at any time it is in effect. Therefore, if a majority of eligible voters subsequently do not favor the continuation of a fair-share agreement in the ensuing referendum, the fair-share agreement shall be terminated upon the certification of the results of such referendum. If such a majority does favor its continuation, however, the Commission will not entertain any subsequent termination petition unless it is filed within the time requirements of Rule ERB 15.11(c) as the principle of stability discussed above is then applicable.

Here, as there is no such a petition and concomitant referendum to terminate its existance, and since, pursuant to the stipulation of the parties, "the required number of employes" voted in favor of the fair share agreement involved, we shall certify the results of the September 11, 1973 referendum.

Dated at Madison, Wisconsin this 16th day of October, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Zel S. Rice II, Commissioner