STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MILWAUKEE AREA TECHNICAL COLLEGE FACULTY ASSOCIATION For a Referendum on the Question of Continuation of Fair-Share Agreement between MILWAUKEE AREA TECHNICAL COLLEGE and AMERICAN FEDERATION OF TEACHERS, LOCAL 212, WFT, AFL-CIO	Case XXX No. 17338 MR-(C) 25 Decision No. 12709

Appearances:

Perry & First, Attorneys at Law, by Mr. Richard Perry, appearing on behalf of the Petitioner.

Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. James A. Urdan, appearing on behalf of the Municipal Employer.

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., appearing on behalf of American Federation of Teachers, Local 212, WFT, AFL-CIO.

DIRECTION OF REFERENDUM

Milwaukee Area Technical College Faculty Association having petitioned the Wisconsin Employment Relations Commission to conduct a referendum pursuant to Section 111.70(2) of the Municipal Employment Relations Act among certain employes of Milwaukee Area Technical College; and a hearing on such petition having been held on January 7, 1974 at Milwaukee, Wisconsin, Marvin L. Schurke, Hearing Officer, being present; and the Commission having considered the evidence and arguments and being satisfied that a question of referendum has arisen concerning the continuation of a fair-share agreement between said Municipal Employer and American Federation of Teachers, Local 212, WFT, AFL-CIO;

NOW, THEREFORE, it is

DIRECTED

That a referendum by secret ballot shall be conducted under the direction of the Wisconsin Employment Relations Commission in the collective bargaining unit consisting of 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 (including but not limited to Deans, Associate Deans, Assistant Deans and Assistant Directors), and excluding all other administrative, managerial and confidential personnel in the employ of Milwaukee Area Board of Vocational, Technical & Adult Education on the date of this Direction, except such employes as may prior to the referendum quit their employment

or be discharged for cause, for the purpose of determining whether a majority of the eligible employes favor the continuation of an existing fair-share agreement between the Municipal Employer and American Federation of Teachers, Local 212, WFT, AFL-CIO.

Given under our hands and seal at the City of Madison, Wisconsin this 17th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Howard S. Bellman, Commissioner

MILWAUKEE AREA TECHNICAL COLLEGE, XXX, Decision No. 12709

MEMORANDUM ACCOMPANYING DIRECTION OF REFERENDUM

By virtue of a Certification of Representatives issued by this Commission on July 13, 1970, Milwaukee Vocational Teachers Union Local 212, AFT, AFL-CIO occupies status as the exclusive collective bargaining representative of 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 (including but not limited to Deans, Associate Deans, Assistant Deans and Assistant Directors), and excluding all other administrative, managerial and confidential personnel employed by District 9, Area Board of Vocational, Technical & Adult Education (otherwise known as Milwaukee Area Technical College.) On November 29, 1972, the same labor organization, operating at that time under the name of: "American Federation of Teachers, Local 212, WFT, AFL-CIO," and the Municipal Employer filed a stipulation with the Commission pursuant to Section ERB 15.02, Wisconsin Administrative Code, for a referendum seeking authorization to implement a fair-share agreement in the bargaining unit specified above. A referendum vote was conducted by the Commission on December 7, 1972, at which time 261 of 538 eligible employes voted in favor of implementation and 200 employes voted against implementation. On January 5, 1973, the Commission issued Certification of the results, indicating that the required number of employes (measured as a majority of those eligible) failed to vote in favor of implementation of the fair-share agreement. On August 28, 1973, the same labor organization, again operating under the name: American Federation of Teachers, Local 212, WFT, AFL-CIO, and the Municipal Employer filed a stipulation with the Commission wherein they requested the Commission to conduct a referendum for the purpose of determining whether a majority of the employes in the aforementioned bargaining unit actually voting in the referendum favored the implementation of a fair-share agreement between Local 212 and the Municipal Employer. A referendum vote was conducted by the Commission on September 11, 1973, at which time 258 of 562 eligible employes voted in favor of implementation and 234 employes voted against implementation.

Following the conduct of the latter referendum vote, the Petitioner herein filed objections to the conduct of the referendum and the Petitioner's affiliate, the Wisconsin Education Association Council, requested that the referendum results be set aside, since less than a majority of the eligible voters in the unit voted in favor of the implementation of the fair-share agreement. On October 16, 1973, the Commission issued its Order Denying Objections To Referendum and Certification of Results of Referendum, wherein we certified that the majority of the employes voting, as agreed upon by the parties as necessary to implement a fair-share agreement, had voted in favor of such implementation. In the Memorandum Accompanying that Order, the Commission stated:

> ". . . 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.
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> "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.

. . .

". . . 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.

. . .

"Accordingly, based on the above, there exists 'good cause' why the time requirements for filing a petition to terminate a fair-share 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. Milwaukee Area Vocational, Technical & Adult Education District (12121-A) 10/73."

Thereafter, and on November 12, 1973, the Milwaukee Area Technical College Faculty Association filed the petition initiating the instant proceeding before the Commission. Said petition was supported by documents, in the following form, containing the signatures of more than 30% of the employes in the bargaining unit:

"PETITION FOR TERMINATION REFERENDUM

Pursuant to Sec. 111.70 of the

Wisconsin Statutes

We, the undersigned teachers employed by the Milwaukee Area Vocational, Technical & Adult Education District (school district) oppose continuation of the Fair Share agreement entered into between the school district and the Wisconsin Federation of Teachers which was implemented in September of 1973. We request that the Wisconsin Employment Relations Commission conduct a referendum for the termination of said Fair Share agreement."

Pursuant to Section ERB 15.05(3), Wisconsin Administrative Code, the Commission made an administrative determination of the sufficiency of the showing of interest filed in support of the petition herein and, being satisfied that the showing of interest was sufficient to warrant the further processing of the petition, scheduled hearing on the matter. A hearing was held at Milwaukee, Wisconsin on January 7, 1974. On February 27, 1974, Local 212 filed a brief in support of its opposition to the conduct of a referendum. On March 13, 1974, the Association filed a brief in support of its petition herein.

POSITION OF LOCAL 212:

Local 212 asserts two lines of argument in opposition to the conduct of a referendum. First, while it acknowledges that the letters "WFT" in the name under which it petitioned for the two previous referenda stands for "Wisconsin Federation of Teachers", it contends that the language used by the Association in the heading of the showing of interest form was deliberately misleading. Local 212 contends that the mistaken identity of the union party to the fair-share agreement being challenged should void the showing of interest or, at a minimum, should enable Local 212 to have an evidentiary hearing into the question of whether members of the bargaining unit were misled by the language of the showing of interest form. Secondly, Local 212 asserts that Section ERB 15.05(3), WIS. ADM. CODE is inconsisten with the provisions of Section 111.70(2) of the Municipal Employment Relations Act (MERA), and that the Union party to a fair-share agreement under challenge should be entitled to litigate the sufficiency of the showing of interest filed in support of a petition for a referendum to de-authorize that fair-share agreement. In this regard, Local 212 relies particularly on the use of the words "supported by proof" and "upon so finding" in Section 111.70(2).

POSITION OF THE MUNICIPAL EMPLOYER:

The Municipal Employer filed no brief in the matter. At the hearing, counsel for the Municipal Employer noted that the petition filed herein was filed on standard forms provided by the Commission, that it properly identified Local 212, and that the recent dispute on a similar referendum would be evidence of clear understanding. The Municipal Employer took the position that the Commission had jurisdiction to determine the sufficiency of the showing of interest.

POSITION OF THE ASSOCIATION:

The Association points to the fact that the letters "WFT" used in the name of Local 212 refer to the "Wisconsin Federation of Teachers" and that Local 212 is an affiliate of the Wisconsin Federation of Teachers. The Association contends that there is no misrepresentation, and that Local 212 is attempting to convert a minor and nominal matter into a matter of substance or significance. The Association notes the sophistication among members of this bargaining unit and the previous litigation as factors which weigh against any possibility of misinterpretation of the import of the showing of interest forms used by the Association. The Association defends Section ERB 15.05(3) as being consistent with similar regulations established to determine the validity of showings of interest by labor agencies under labor statutes since

been disposed of in our previous decision, supra. That litigation, the affiliation of Local 212 with the Wisconsin Federation of Teachers and the history of collective bargaining in this bargaining unit are found to be sufficient to identify the fair-share agreement being challenged in this proceeding, and to minimize any possibility of confusion among members of the bargaining unit concerning the showing of interest. We do not find such indications of fraud in the solicitation or filing of the showing of interest as would warrant an evidentiary hearing thereon or a rejection of the showing of interest.

The position taken herein by Local 212 with respect to the claimed conflict between Sec. 15.05(3) WIS. ADM. CODE and Section 111.70(2) of MERA calls for a finding of legislative intent to establish showing of interest policies in referendum proceedings under MERA which are completely different from showing of interest policies under the Wisconsin Employment Peace Act, the Wisconsin State Employment Labor Relations Act and the Federal Labor Management Relations Act. Upon review of the arguments advanced here by Local 212, no such statutory purpose is found. Showing of interest procedures have traditionally been used in labor-management relations to demonstrate that a party seeking an election or referendum has some reasonable prospect of obtaining the number of votes required to prevail. The actual questions of representation or referendum have traditionally been decided on the basis of the ballots cast in the secret ballot vote which follows. Determinations concerning the sufficiency of showings of interest have traditionally been made administratively, and without opportunity for litigation by the parties. To do otherwise would disclose the identities of employes supporting the showing of interest and would destroy their right to secrecy in the expression of their views.

Local 212's arguments here would expose the showing of interest to the view of all parties, and would clearly have the effect of identifying the employe supporters of the referendum petition. In this respect, Local 212 would ignore the definition of "Referendum" set forth in Section 111.70(1)(n) of MERA:

> "(n) 'Referendum' means a proceeding conducted by the commission in which employes in a collective bargaining unit may cas a secret ballot on the question of authorizing a labor organization and the employer to continue a fair-share agreement. Unless a majority of the eligible employes vote in favor of the fair-share agreement, it shall be deemed terminated and that portion of the collective bargaining agreement deemed null and void."

The Commission finds that the showing of interest procedure is an inseparable part of the referendum proceeding. To expose the identity of the employes signing the showing of interest would clearly be contrary to the plain meaning of Section 111.70(1)(n), which establishes the right of employes to express their views on the question of continuation of a fair-share agreement only in a secret ballot vote.

Proceedings for the de-authorization of union security arrangements are not unique to the MERA. Section 111.06(1)(c)(1) of the Wisconsin Employment Peace Act calls for the conduct of a referendum in the motor freight industry upon the filing of a 30% showing of interest and calls for the conduct of a referendum in all other private sector situations upon the filing of a petition with the Commission and a determination by the Commission that there "is reasonable ground to believe that there exists a change in the attitude of the employes since the prior referendum." Section 9(e)(1) of the Labor Management Relations Act provides for the practical equivalent of a referendum to be conducted by the National Labor Relations Board upon the filing of a petition supported by a 30% showing of interest. Local 212 has

not cited any case arising under any of the foregoing statutes in which the Union party to the Union Security Agreement under challenge has been permitted access to the identity of the employes joining in a showing of interest. In Local 714, IBT v. Madden (Harco Aluminum, Inc.) 57 LRRM 2284 (1964), aff'd 58 LRRM 2796 (CA-7, 1965), cert. denied 60 LRRM 2233 (1965) and in Operative Potters v. Shore (Airco Welding Products) 70 LRRM 2649 (1969) the Courts sustained the NLRB policy of making administrative determinations only in cases under Section 9(e)(1) of the LMRA.

Local 212 also contends that the rules which apply in referendum proceedings should be different from those which apply in representation proceedings, in that different types of rights are affected by the results of the vote and a different quantum of support is required for the incumbent union to prevail. These arguments are not persuasive, in that they would interpose obstacles to the expression of employe opinion, which is the very nature and purpose of referendum proceedings. Referendum proceedings could have been omitted from the MERA altogether if there were no concern for the availability of a forum in which employes holding an opposing view be entitled to voice their opinions on the subject of a fair-share agreement. The forum so created by statute is a secret ballot proceeding, and the Commission deems it appropriate to direct a referendum so that the instant dispute might be resolved in accordance with the desires of the majority of the employes in the bargaining unit.

Dated at Madison, Wisconsin this 17th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner