

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

DURAND UNIFIED SCHOOLS, JOINT  
DISTRICT NO. 1, CITY OF DURAND,  
ET. AL.

Involving Certain Employees of

DURAND UNIFIED SCHOOLS, JOINT  
DISTRICT NO. 1, CITY OF DURAND,  
ET. AL.

Case II  
No. 18514 ME-1129  
Decision No. 13552

Appearances:

Mr. Vaughn Hoffman, District Superintendent, appearing on behalf  
of the Petitioner.

Lawton & Cates, Attorneys at Law, by Mr. John C. Carlson, appearing  
on behalf of the Durand Education Association, affiliated with  
the Wisconsin Education Association Council and the National  
Education Association.

Mr. Fred L. Skarich, Staff Representative, appearing on behalf of  
the Durand Education Association, affiliated with the Wisconsin  
Federation of Teachers and the American Federation of Teachers.

ORDER OF DISMISSAL

Durand Unified Schools, Joint District No. 1, City of Durand, et.  
al., hereinafter referred to as the Petitioner, having on November 20,  
1974, filed a petition with the Wisconsin Employment Relations Commission  
to conduct an election pursuant to Section 111.70(4)(d) of the Municipal  
Employment Relations Act, among certain of its employes, to determine  
whether said employes are represented for the purposes of collective  
bargaining by the Durand Education Association, affiliated with the  
Wisconsin Education Association Council and the National Education  
Association or the Durand Education Association, affiliated with the  
Wisconsin Federation of Teachers and the American Federation of Teachers,  
and a hearing on such petition having been conducted on December 9, 1974,  
at Durand, Wisconsin, George E. Fleischli, Hearing Officer, being present;  
and the Commission having considered the evidence and arguments of the  
parties and being satisfied that the petition has been untimely filed;

NOW, THEREFORE, it is

ORDERED

That the petition in the instant matter be, and the same hereby is,  
dismissed.

Given under our hands and seal at the  
City of Madison, Wisconsin this 23<sup>rd</sup>  
day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney, Chairman

Howard S. Bellman, Commissioner

Norman Torosian, Commissioner

No. 13552

MEMORANDUM ACCOMPANYING ORDER OF DISMISSAL

In the 1973-1974 school year, the Petitioner employed 71 teachers in a voluntarily recognized bargaining unit consisting of all employees of the District engaged in teaching, including classroom teachers, guidance counselors, speech therapists and librarians, but excluding administrators, principals, supervisors, coordinators, substitute teachers, non-instructional personnel such as nurses, teachers aides and social workers, office, clerical, maintenance and operating employees. Pursuant to the collective bargaining agreement then in effect, all but three or four of the employees in the unit had executed check-off authorizations authorizing the Petitioner to withhold from their paychecks, on a monthly basis, an amount of money equal to their dues for their membership in the Durand Education Association (DEA), the voluntarily recognized bargaining agent, as well as their dues for their membership in the Wisconsin Education Association Council (WEAC), the National Education Association (NEA), the Northwest Wisconsin Education Association (NWELA), West Central Welfare Council (WC2) and Wisconsin Educators Politically Active and Concerned (WEPAC) 1/ . All of the dues so deducted were remitted to the Treasurer of the Durand Education Association on a monthly basis pursuant to the terms of the agreement.

Sometime prior to August 15, 1974, the Petitioner and the representatives of the DEA entered into a collective bargaining agreement effective from August 15, 1974 and to continue in effect until August 14, 1976. That agreement contains the following provision, which is relevant herein:

"ARTICLE VI

CHECKOFF OF DUES

A. The Board shall collect the dues of members of the DEA by deducting such amounts as determined by the DEA from the payroll checks in twelve separate equal sums on the 20th of each month from members who authorize such deductions in writing prior to September 1st. These monthly deductions must be paid to the DEA Treasurer each month after collection."

Beginning on August 19, 1974, the Petitioner began receiving authorization cards from a number of teachers authorizing the deduction of dues for the 1974-1975 school year. Prior to August 29, all of the cards were on a form, approved by the District's payroll officer, which read as follows:

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1/ Although the record does not indicate whether there were any teachers who authorized the other deductions but did not authorize deductions for WEPAC in 1973-1974, several teachers did so in the 1974-1975 school year.

AUTHORIZATION FOR  
PAYROLL DEDUCTION  
1974-75

I HEREBY AUTHORIZE THE PAYROLL OFFICER TO DEDUCT FROM MY  
SALARY THE FOLLOWING, AS SPECIFIED BELOW, FOR PROFESSIONAL DUES:

----- D.E.A.        \$  
----- W.E.A.C.  
----- N.E.A.  
----- N.W.E.A.  
----- W.C.2  
----- W.E.P.A.C.

TOTAL:        \$ \_\_\_\_\_ divided by 12 = \$ \_\_\_\_\_ PER MONTH

THE DEDUCTION SHALL BE TAKEN IN EQUAL AMOUNTS FROM MY 12 MONTHLY  
PAYROLL CHECKS FOR THE SCHOOL YEAR 1974-75.

DATE: \_\_\_\_\_

SIGNED: \_\_\_\_\_

WITNESSED BY: \_\_\_\_\_

On August 28, 1974, at a meeting of the DEA, certain actions were taken in an effort to disaffiliate the DEA from its affiliation with the WEAC and the NEA, and to affiliate the DEA with the Wisconsin Federation of Teachers (WFT) and American Federation of Teachers (AFT). On August 29, and 30, 1974, a number of teachers presented authorization cards to the Petitioner on a form, approved by the District payroll officer, which read as follows:

AUTHORIZATION FOR  
PAYROLL DEDUCTION  
1974-75

I HEREBY AUTHORIZE THE PAYROLL OFFICER TO DEDUCT FROM MY SALARY  
THE FOLLOWING, FOR PROFESSIONAL DUES:

----- A.F.T.        \$  
----- N.W.E.A.        - Eau Claire Convention

TOTAL:        \$ \_\_\_\_\_ divided by 12 = \$ \_\_\_\_\_ PER MONTH.

THE DEDUCTION SHALL BE TAKEN IN EQUAL AMOUNTS FROM MY 12 MONTHLY  
PAYROLL CHECKS FOR THE SCHOOL YEAR 1974-75.

DATE: \_\_\_\_\_

SIGNED: \_\_\_\_\_

At the time that the Petitioner began receiving the cards authorizing the deduction of dues for the AFT and NWEA, Vaughn W. Hoffman, Superintendent of Schools, became aware of the fact that an effort had been made to disaffiliate the DEA from its affiliation with the WEAC and NEA, and to affiliate the DEA with the WFT and AFT. In those few instances where a teacher who had previously presented an authorization card attempted to file another authorization card, the Petitioner's agent requested that they withdraw one of the two cards presented. Otherwise the Petitioner accepted all cards tendered.

As of September 1, 1974, the Petitioner had in its possession a total of 33 authorization cards, authorizing deduction of dues for the DEA, WLAC, NEA, NWEA, WC2 and WLPAC and 18 authorization cards authorizing deduction of dues for the AFT and NWEA. Since the Petitioner had 73 teachers under contract to teach during the 1974-75 school year, the remaining 22 teachers filed no authorization card with the District.

Sometime after September 1, 1974, one of the teachers who had authorized deduction of dues for the AFT and NWEA withdrew said authorization.

In response to a request from Hoffman that the DEA supply him with a list of its members, Hoffman received two lists on August 30, 1974. One list, which was presented to him by Cal Holland and signed by James B. White, who was President of the DEA during the negotiations leading up to the current collective bargaining agreement, and a member of the negotiating team, contained the signatures of approximately 37 2/ teachers under the following wording:

"The the [sic] following wish to remain in the D.E.A. - WC2, WEA & N.E.A., NWEA. We the undersigned authorize the Durand Unified School System to deduct on a 12 monthly payment basis dues for the above mentioned organizations."

The other document, which according to Hoffman's testimony was a list of names, was not produced at the hearing. Because the list was not produced at the hearing, it is impossible to tell how many teachers signed the list or whether they were indicating their desires insofar as checkoff was concerned or representation or both. The document did give Hoffman further reason to believe that some of the teachers employed in the District had attempted to disaffiliate the DLA from its affiliation with the WEAC and NEA, and affiliate with the AFT and AFT.

Hoffman returned both lists to the individuals who had presented them, and did not attempt to use them to determine which group, if either, represented a majority of the teachers in the District. On September 11, 1974, Hoffman received a document signed by four teachers in the District, Richard H. Duesterbeck, Charlotte Kraft, James A. Minette and William C. Penker, which read in relevant part as follows:

"On August 28, 1974, the Durand Teaching staff held a meeting in the multi-purpose room with the purpose being to 'discuss the advantages and disadvantages of a possible affiliation with the AFT and WFT.'

At the beginning of the meeting, representatives of both the WEA and the WFT addressed the membership and explained their organizations to us. Following this, the meeting was then opened to questions from the membership, which could be directed to either of the organizations. At the conclusion of the question and answer period, the representatives were asked to adjourn to the teachers lounge and stand by in case they were needed for means of further clarification of issues.

The discussion then continued on the merits of the two organizations. At the conclusion of the discussion, a motion was made to remain known as the Durand Education Association but to affiliate with the Wisconsin Federation of Teachers. A second was made to this motion, and it was opened to discussion. Following discussion,

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2/ The names of the 33 teachers who filed authorization cards on behalf of the DEA, WEAC, etc., were among the first 34 signatures on the list. It is not possible to tell from Hoffman's testimony whether all 37 names appeared on the list at the time it was shown to him. One of the signatures on the list, which was introduced at the hearing, had a notation beside it indicating that the person signing did not wish to authorize a payroll deduction, but did wish to be a member. Six other signatures had the letter "C" behind their names for reasons which are unexplained in the record.

a motion was made and seconded to have a vote on whether or not to hold a vote on affiliation. This passed on a voice vote.

The supporters of the WEA then stated that only teachers who are presently members of the DEA would be allowed to vote. This meant that those teachers who did not join the DEA last year could not vote, nor could any new teachers who had not joined the association as of yet. Those in attendance who were backing the affiliation with the WFT did not oppose this restriction to the balloting procedure.

After further discussion, a secret ballot was taken, and the result of the vote was 24-22 in favor of affiliation with the Wisconsin Federation of Teachers. It should be noted that the local unit remains as before--it is the Durand Education Association. However, the state and national affiliation of the local unit has changed.

This document is being submitted upon a motion passed by DEA members at a meeting September 5, 1974. The motion was that the president appoint a committee to notify the Board of Education of the DEA's change in affiliation."

Also in early September, 1974, White and Lester Martin, who had also been a member of the negotiating team which negotiated the current collective bargaining agreement, met with Hoffman to discuss the question of the proper affiliation of the Durand Education Association. White and Martin took the position that the Durand Education Association had never been properly disaffiliated from its affiliation with WEAC and NEA or affiliated with the WFT and AFT, and produced documents including the Constitution of the DEA and WEAC to back up their claims. Hoffman asked for and received a copy of the minutes of the DEA meeting on August 28, 1974 but did not attempt to resolve the question of whether the DEA had been properly disaffiliated from its affiliation with the WEAC and NEA or affiliated with the WFT and AFT.

Because the District had failed to deduct the dues for any of its teachers from the first paycheck issued on September 20, 1974, and perhaps because Hoffman had suggested at a prior Board meeting that a grievance be filed for the purpose of determining the District's obligation to check off dues under the agreement, James B. White wrote a letter dated September 23, 1974 to Hoffman claiming a violation of the contract checkoff provision. In addition, at a regular Board meeting held on or about September 25, 1974, a number of those teachers claiming that the DEA had properly disaffiliated from its affiliation with the WEAC and NEA and affiliated with the WFT and AFT indicated their desire to proceed to arbitration because of the District's refusal to honor any checkoff authorizations.

On November 11 and 12, 1974, a pre-hearing conference and hearing were held on the two grievances which claimed the District was violating the collective bargaining agreement by refusing to honor any checkoff authorizations. At that conference and hearing, the group claiming that the DEA was affiliated with the WEAC and NEA and the group claiming that the DEA was affiliated with the WFT and AFT were represented and presented evidence and arguments with regard to the alleged violation of the agreement.

On November 11, 1974, or shortly thereafter, a lawsuit was filed in Pepin County Circuit Court by the Durand Education Association, an unincorporated association affiliated with the Wisconsin Education Association Council, and the Wisconsin Education Association Council, an unincorporated association, Plaintiffs against Charlotte Kraft, Richard M. Duesterbeck, James A. Grotte, William C. Penker, and the Durand Education Association, affiliated with the Wisconsin Federation of Teachers, American Federation of Teachers, Defendants, wherein it was alleged, inter

alia, that the action taken at the August 28, 1974 meeting violated the Constitution of the Durand Education Association and the Constitution and by-laws of the Wisconsin Education Association Council. In that lawsuit, the Plaintiffs ask, inter alia, for a judgment declaring that the Plaintiff, Durand Education Association, affiliated with the Wisconsin Education Association Council, is the real party in interest to the collective bargaining agreement with the Durand School District. The Defendants in that case have asked that the Court defer ruling in that case pending a determination by the Commission in this case as to whether an election will be conducted. In the meantime, pursuant to a reopener clause in the collective bargaining agreement, the District has been presented with demands to negotiate a 1975-1976 salary schedule by representatives of both groups. However, the Petitioner had refrained from engaging in negotiations on the 1975-1976 salary schedule with either group as of the date of the hearing herein.

#### POSITION OF THE PARTIES:

The Petitioner contends that because of the events described above, it is uncertain as to which group truly represents the Durand Education Association, and is unable to determine its obligations with regard to checkoff under the collective bargaining agreement or which group to meet with for the purpose of negotiations concerning the salary schedule for the second year of the agreement. According to the Petitioner, it has attempted at all times to avoid favoring one group over the other group in exercising their right to select their own bargaining representative.

The Durand Education Association, affiliated with the Wisconsin Federation of Teachers and American Federation of Teachers, hereinafter referred to as the DEA-FT, contends that it properly terminated its affiliation with the WEAC and NEA and affiliated with the WFT and AFT, and, therefore, is the representative of the teachers covered by the agreement. However, in view of the fact that the DEA-FT concedes that the Petitioner may have a reasonable doubt with regard to its status as the representative of a majority of teachers employed in the District, the DEA-FT raises no objection to the conduct of an election at this time.

The Durand Education Association, affiliated with the Wisconsin Education Association Council and the National Education Association, hereinafter referred to as the DEA-EA, contends that the petition is untimely in view of the fact that the current collective bargaining agreement is not due to expire until August 14, 1976 and argues further that the Petitioner has not shown by objective evidence that it has a reasonable basis for believing that the DEA-EA no longer represents a majority of its teachers.

#### DISCUSSION:

At the outset of the hearing, the DEA-EA moved to dismiss the petition on the basis that it was untimely under the Commission's contract bar policy, first announced in the Wauwatosa case. 3/ The Hearing Officer correctly held that although the petition would appear to be untimely under the Wauwatosa policy, the Petitioner alleges facts which might be sufficient to cause the Commission to refuse to apply its contract bar policy and proceeded to take evidence in that regard.

At the end of the direct testimony of Hoffman, the only witness called by the Petitioner, the DEA-EA made a second motion, based on the correct assumption that the Petitioner had no other witnesses that it desired to call, that the petition be dismissed because the Petitioner had failed to meet the requirement, also established in the Wauwatosa case, that:

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3/ Wauwatosa Board of Education (8300-A) 2/68, aff. Dane Co. Cir. Ct. 8/68.

"An Employer petitioning for an election in an existing unit must demonstrate to this agency at the hearing, by objective considerations, that it has reasonable cause to believe that the incumbent organization has lost its majority status since its certification or the date of voluntary recognition." 4/

The DEA-EA's second motion to dismiss is apparently based on an interpretation of the quoted language that places the burden of proof on the Petitioner in such cases. While it is clear that the Petitioner in this case had the burden of going forward with the evidence for the purpose of establishing that its claim is not insubstantial, the Commission is satisfied that it is inappropriate to apply the concept of burden of proof in a non-adversary hearing on an election petition. The direct testimony of Hoffman indicates a dramatic decline in the percentage of teachers who had authorized checkoff for the DEA-EA and competing demands for checkoff rights and bargaining with regard to the salary schedule for the second year of the agreement. Such testimony, if left unrebutted, would require a decision on the merits and we, therefore, uphold the Hearing Officer's determination to develop an adequate record for decision.

The contract bar policy was established by the Commission for the purpose of encouraging stability in an established bargaining relationship by postponing, but not preventing, elections for the purpose of changing or eliminating the bargaining representative during the term of an existing collective bargaining agreement. Once a bargaining representative has been properly certified or recognized and has negotiated a collective bargaining agreement of reasonable duration, the resultant stability ought not be disturbed by the intervention of the Commission's election processes, absent some compelling reason.

There are a number of situations where the underlying purpose of the contract bar policy would not be served by its application. One well-recognized example is where the certified or recognized bargaining representative has become defunct and is not in a position to administer the agreement. Another recognized exception to the contract bar policy is the situation where the relationship has already become unstable as the result of a schism, 5/ and an election would contribute more to stability than the application of the contract bar policy.

On the surface, this case would appear to present an example of the type of situation where the application of the Commission's contract bar policy would be inappropriate. However, on closer analysis the Commission is satisfied that it is not.

The facts in this case do not support a finding that there is a schism. A schism, according to the definition applied by the National Labor Relations Board, exists when a "local union or a group within a local union has sought to change its affiliation in the context of a basic intraunion conflict over fundamental policy consideration involving an entire international union or a federation of unions." 6/ While the Commission might not agree that the intraunion conflict under the

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4/ Ibid at p. 14.

5/ The only Commission case involving the application of a schism doctrine is the case of Artistic Cleaners & Launderers, et. al. (4918-A) 11/58. The leading case under the National Labor Relations Act is Mershey Chocolate Corporation 121 NLRB 901, 42 LRRM 1460 (1958).

6/ Mershey Chocolate Corporation, supra, at 121 NLRB 906-907.

facts in this case would necessarily have to arise at the NEA level (as opposed to the WEAC level) it is satisfied for the reasons articulated in the Hershey Chocolate case that it would be inappropriate to find a schism in this case. As the Board stated in that case:

"... if the schism doctrine could be invoked in the absence of a basic intraunion conflict, it could be utilized to facilitate a raid or to permit a dissident group to repudiate the bargain made by the existing representative, thus providing a means for circumventing the normal contract bar rules when stability could be maintained on the basis of the contract without an election." 7/

In holding as we do that the agreement is a bar to an election at this time, the Commission does not reach the question of whether the Employer has reasonable cause to believe that the incumbent organization has lost its majority status, or whether it would be justified on that basis in refusing to meet with the DEA for the purpose of negotiating the 1975-1976 salary schedule.

In this regard, it should be noted that the recognition clause extends to the DEA without reference to any affiliations that the DEA might have. The Petitioner has been confronted with contradictory claims as to who represents the DEA. The question of the efficacy of the effort to disaffiliate the DEA from the WEAC and NEA and to affiliate with the WFT and AFT, which requires an interpretation and application of the relevant constitutional provisions and bylaws, is currently pending before the Circuit Court in Pepin County and nothing herein is intended to indicate the Commission's view as to the appropriate outcome of that proceeding. 8/

In the event that the Court determines that the DEA properly severed its affiliation with the WEAC and the NEA and properly established an affiliation with the WFT and the AFT, the DEA, affiliated with the WFT and AFT, shall be deemed the bargaining representative and shall be deemed as a party to the collective bargaining agreement, and the Petitioner District will be obligated to recognize the DEA, WFT, AFT for the purposes of negotiations and contract administration. If, on the other hand, the Court establishes that the disaffiliation of the DEA from the WEAC and the NEA was not properly accomplished, then the DEA, affiliated with the WEAC and the NEA, shall remain the collective bargaining representative with authority to negotiate and administer the collective bargaining agreement.

Dated at Madison, Wisconsin this 23<sup>rd</sup> day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Morris Slavney  
Morris Slavney, Chairman

Howard S. Bellman  
Howard S. Bellman, Commissioner

German Torosian  
German Torosian, Commissioner

7/ Ibid 121 NLRB at 907.

8/ The Hearing Officer refused to take any evidence with regard to the compliance or non-compliance with the requirements of the appropriate constitutional provisions and bylaws as irrelevant to this proceeding and the Commission expressly upholds the Hearing Officer's determination in that regard.