

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JUDITH D. BERNES, PHYLLIS A. BROWNE  
AND SIXTY-ONE OTHER NAMED INDIVIDUALS,

Complainants,

vs.

MILWAUKEE BOARD OF SCHOOL DIRECTORS;  
LOCAL 1053 AFFILIATED WITH DISTRICT  
COUNCIL 48 AND CHARTERED BY AMERICAN  
FEDERATION OF STATE, COUNTY AND  
MUNICIPAL EMPLOYEES, AFL-CIO; AND  
DISTRICT COUNCIL 48, AFSCME, AFL-CIO,

Respondents.

Case LXVIII  
No. 20203 MP-582  
Decision No. 14382-C

ORDER AFFIRMING EXAMINER'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Marshall L. Gratz having, on July 15, 1977, issued his Findings of Fact, Conclusions of Law and Order in the above entitled proceeding wherein he concluded that neither Respondent had committed any prohibited practices within the meaning of Section 111.70(3) of the Wisconsin statutes and dismissed the complaint; and the Complainants having on August 4, 1977 filed a petition for review of said decision pursuant to Section 111.07(5) Stats. along with its supporting arguments; and the Respondents having declined the opportunity to file any further arguments in the matter; and the Commission having reviewed the entire record in the matter including the Complainants' petition for review and argument in support thereof and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order be affirmed;

NOW, THEREFORE, it is

ORDERED

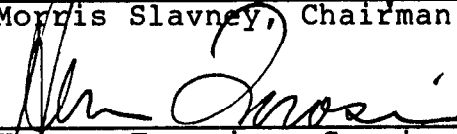
That the Examiner's Findings of Fact, Conclusions of Law and Order be, and the same hereby are, affirmed.

Given under our hands and seal at the  
City of Madison, Wisconsin this 8th  
day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

No. 14382-C

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainants, sixty-three employees of the Respondent Board who are not members of the Union, contend that the Board violated Section 111.70(3)(a)6 of the MERA when, on February 20, 1976, it deducted dues in the amount of \$19.50 for fair share payments for the months of January, February and March, 1975 from their earnings. It is the Complainants' position that there was no fair share agreement "in effect" during those months. In addition, the Complainants contend that the Union has violated Section 111.70(3)(b)2 and Section 111.70 (3)(c) of the MERA by inducing the Board to violate Section 111.70 (3)(a)6 of the MERA by said fair share deductions.

In his decision the Examiner found: that the 1973-1974 collective bargaining agreement, which contained a fair share agreement, was not extended by reason of an exchange of correspondence between the Board and Union on December 31, 1974 and January 3, 1975, and, that therefore, said agreement expired by its terms on December 31, 1974; that in January 1975 the Board ceased making fair share deductions from the earnings of employees who had not signed checkoff authorizations for Union dues and continued said practice in the months of February and March 1975; that an agreement was reached on February 3, 1975 to extend the terms of the 1973-1974 collective bargaining agreement until a ratification vote was held on the terms of a new tentative agreement for 1975-1977; that the terms of the 1975-1977 collective bargaining agreement, which contained a fair share agreement identical to the fair share agreement contained in the 1973-1974 collective bargaining agreement, were ratified by the Union's membership sometime after February 3, 1975 and before April 2, 1975; and that on April 2, 1975, the Board and Union executed a new 1975-1977 collective bargaining agreement which, by its terms, was retroactive to January 1, 1975.

Based on these findings, the Examiner concluded that neither the Board nor the Union violated any provision of the MERA because there was a fair share agreement "in effect" during the period in question. Specifically he concluded as follows:

- "a. respondents' February 3, 1975 agreement . . . extended their 1973-74 agreement, including fair-share, retroactively from January 1, 1975 through the date of mutual ratification of a successor agreement, and their ratification of a successor agreement . . . created an enforceable fair-share agreement in effect, inter alia, on and after said date of mutual ratification; and
- b. independent of (a) above, respondents' April 2, 1975 execution of their 1975-77 agreement, including fair-share, . . . created a fair-share agreement in effect retroactively as regards certain times from and after January 1, 1975 including January, February and March, 1975."

Based on these conclusions the Examiner concluded that the Union did not induce the Board to violate Section 111.70(3)(a)6 of the MERA, and therefore, did not violate Section 111.70(3)(b)2 or 111.70(3)(c) of the MERA.

In their petition for review, the Complainants take exception to the Examiner's finding that the Board and Union agreed on February 3, 1975 to extend the 1973-1974 collective bargaining agreement from January 1, 1975 to the date of the ratification of the new agreement and to his conclusions of law as set out above. It is the Complainants' position that the document which was signed on February 3, 1975 does not constitute an agreement to extend the terms of the 1973-1974 collective bargaining agreement but

instead, constituted a mere statement of intent to do so in the future. The Complainants contend that the Board and Union at no time thereafter agreed to extend the 1973-1974 agreement but instead agreed on April 2, 1975 to extend the provisions of the 1975-1977 collective bargaining agreement retroactively to January 1, 1975. According to the Complainants, such an agreement is contrary to the express wording of Section 111.70(3)(a)6 of the MERA and the decisions of the NLRB and courts under the National Labor Relations Act involving the application of "union shop" provisions.

#### DISCUSSION:

We agree with the Examiner's finding that on February 3, 1975, the parties agreed that the 1973-1974 collective bargaining agreement would be extended until the Union's membership and Board had acted on the ratification of the terms of the new agreement. The Complainants would attach an unwarranted literal interpretation to the words "will agree". The parties had just reached tentative agreement on the terms to be included in the new collective bargaining agreement. The use of these words in the context of that tentative agreement was no doubt intended to reflect a desire to stabilize the situation by defining the interim wages, hours and working conditions which would apply pending the outcome of the ratification process. The Examiner found that the Union had previously refused to agree to extend the 1973-1974 collective bargaining agreement and we agree with that finding. Once tentative agreement was reached on the terms to be included in the new agreement, the Union was willing to extend the 1973-1974 agreement and agreed to do so by the document in question.

We also agree with the Examiner's Conclusions of Law that there was a fair share agreement "in effect" as the result of the February 3, 1975 agreement to extend the provisions of the 1973-1974 collective bargaining agreement and the later agreement, after the successful ratification vote, to extend the provisions of the 1975-1977 collective bargaining agreement retroactively to January 1, 1975. The Complainants' argument that the words "in effect" found in Section 111.70(3)(a)6 of the MERA must be read to mean contemporaneously with the deductions, is likewise based on an unwarranted literal reading of the words utilized by the legislature.

We likewise agree with the Examiner that there is no sound policy basis for concluding that the use of these words was intended by the legislature to impose a limitation on the right of the parties to enter into fair share agreements which retroactively apply to periods when there is a hiatus between the expiration of a prior collective bargaining agreement containing a fair share agreement and the execution of a new collective bargaining agreement. Collective bargaining agreements are frequently, if not universally, given retroactive application under such circumstances. The obligation to contribute to the cost of collective bargaining and contract administration, which derives from the fair share agreement negotiated pursuant to the MERA, is not inappropriately applied to periods during which collective bargaining agreements are retroactively applied.


This is not a case like those relied upon by the Complainants where a union is seeking, through the application of a retroactivity clause, to obtain the discharge of employees who failed to become or remain members of the Union at a time when they had no reasonable basis for concluding that they were obligated to do so. Here the Union and the Board have merely agreed, through the retroactive application of all of the provisions of the collective bargaining agreements in question, to maintain the fair share agreement as part of the wages, hours and working conditions during January, February and March 1975. The retroactive application of the fair share agreement under these circumstances is consistent with the legislative intent that non-members may be required to pay their proportionate share of the cost of collective bargaining and contract administration and does not contravene any other policy of the Act.

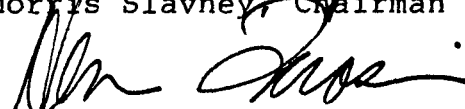
An important distinction exists between the attempted retroactive application of a union shop or maintenance of membership clause to compel

the assumption of membership obligation in a union under the penalty of discharge to employees who chose not to assume those obligations and the retroactive application of a fair share agreement to cover the costs of collective bargaining and contract administration during a contractual hiatus which is subsequently closed by a retroactive agreement, which is retroactive to the date of an earlier agreement, which also contained a fair share agreement. In the former situation the employees in question exercised their statutory right to refrain from assuming membership obligations in the Union at a time when they were entitled to believe they had such a right. The retroactive application of the membership obligations would unfairly defeat the exercise of such right. On the other hand, the retroactive application of a fair share agreement to cover a period when the union was in fact incurring expenses related to collective bargaining and contract administration 1/ defeats no such statutory right. The right to refrain from Union membership guaranteed by Section 111.70(2) is made expressly subject to the obligation to contribute to the costs of collective bargaining and contract administration as required by the collective bargaining agreement.

Dated at Madison, Wisconsin this *5th* day of August, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Morris Slavney, Chairman

  
Herman Torosian, Commissioner

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1/ Although there is no agreement at the time of the hiatus, the Union has a duty to fairly represent all employees in the unit during such period with regard to processing grievances in their behalf and ultimately arbitrating grievances which arose under the prior agreement.