

JUDITH D. BERNES, PHYLLIS A.
BROWNE, and Sixty-One Other
Named Individuals,

Plaintiffs,

Case No. 470-606

-v-

WISCONSIN EMPLOYMENT
RELATIONS COMMISSION,

Decision No. 14382-C

Defendant.

MEMORANDUM DECISION

This action was commenced under Chapter 227, Wis. Stats., to review an order of the Wisconsin Employment Relations Commission.

It was conceded on oral argument by one of the Petitioners' counsel, David T. Bryant, that the facts are not in dispute and that only a question of law is presented.

The Commission concluded, in affirming a decision of Examiner Marshall Gratz, dated July 15, 1977, that the employer, Milwaukee Board of School Directors, and the union had not engaged in prohibited labor practices in violation of the Municipal Employees Relations Act (Section 111.70, Wis. Stats.) when the employer School Board deducted labor union dues, designated as "fair-share deductions" for the months of January, February and March of 1975. These deductions were taken from the earnings of the Petitioners who are 63 secretarial fair-share employees of the Board.

The Examiner, in concluding that deductions from Petitioners' paychecks in February, 1976, by the Board were made when a fair-share agreement was "in effect" within the meaning of Section 111.70(3)(a)6, Wis. Stats., based his conclusions on two alternative theories.

"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."

A brief summary of the essential undisputed facts will be helpful in discussing the legal issue presented here. A collective bargaining agreement between the School Board and Local 1053, which agreement by its terms expired on December 31, 1974, contained a "fair-share agreement" which provided that the Board would monthly deduct from the earnings of nonmembers a sum equal to the monthly union dues established by the union for its members. Fair-share deductions were accordingly made from the Petitioners' wages and remitted to Local 1053 during all of calendar year 1974. No agreement to extend the 1973-74 agreement was reached until February 3, 1975.

On that date, bargaining representatives of the Board initialed a document setting forth the terms of several tentative agreements to be incorporated into the 1975-77 contract. This initialed memorandum further provided as follows:

"Term of agreement - contract is effective date of ratification with wages and benefits retroactive to January 1, 1975. It is understood that the Union will agree to extend the previous contract to the date of ratification of the new contract."

On April 2, 1975, the Board and the Union formally executed the 1975-77 agreement which also contained fair-share language identical to that in the prior contract.

It is not disputed that union dues did increase from \$5.50 a month in 1974 to \$6.50 a month in 1975.

In April, 1975, the Union president sent a newsletter to all employees in the bargaining unit including the Petitioners informing them, among other things, that the entire 1975-77 contract would be retroactive and that therefore all fair-share personnel would be obligated to pay an amount equal to a month's dues for each month in 1975.

On February 11, 1976, the membership of the Union approved the concept of collecting 1975 dues and fair-share arrearages. This included deductions for January, February and March of 1975 in the amount of \$19.50 or less. Pursuant to a repayment schedule, the Board proceeded to make deductions beginning with the paycheck of February 20, 1976, which resulted in the Respondent Board deducting \$19.50 from the February 20, 1976, earnings paycheck of each of the Petitioners as fair-share charges for January, February and March of 1975.

It is to be noted here that on oral argument Petitioners' counsel somewhat narrowed the legal issue for us to decide by conceding that the tentative initialed agreement of February 3, 1975, (extending the 1973-74 agreement until a new agreement was formalized) properly triggered fair-share deductions subsequent to that date. It had been initially urged before the Examiner and the Commission that all deductions from January 1, 1975, through March of 1975 were illegally deducted. This latest concession was premised upon an acknowledgement by Petitioners that the Commission's finding that there was an effective extension of the 1973-74 agreement on February 3, 1975, could not be successfully challenged.

The thrust of Petitioners' Complaint on appeal is that a collective bargaining agreement, which includes a fair-share provision, cannot be applied retroactively to cover the hiatus (now from January 1, 1975, to February 3, 1975) following the expiration of one collective bargaining agreement and the execution of a successor agreement. They urge that only prospective deductions are permitted under the Municipal Employment Relations Act and therefore any allowed retroactive deductions would constitute a prohibited labor practice.

The sole issue then goes to the legality of the exactions of fair-share payments from each Petitioner for January, 1975, and three days in February of that year, an amount totaling approximately a little more than \$400. We parenthetically observe here that the small amount involved does not depreciate the importance of the principle at issue.

We consider it proper to proceed upon the initial premise, urged by both sides, that the rule that "great weight" is to be given to the construction and interpretation of a statute adopted by the administrative agency charged by the legislature with the duty of applying it, is applicable here. Because the issue involved here is one of first impression in Wisconsin, it is such "great weight" and not the "any rational basis" test that must be applied. See Beloit Education Asso. v. Employment Relations Commission, 73 Wis. (2d) 43 at p. 68. We have given careful study to four excellent briefs received in this case and have come to the conclusion from our study that the decision of the Commission must be affirmed in all respects. In concluding as we do, we should point out that since 1971 when Section 111.70(3)(a)6 was amended, the Commission has consistently taken the position that fair-share agreements become effective and continue in effect by their own terms according to the parties' agreements and understandings. See Madison Jt. Sch. Dist. No. 8, (11271) 1972; Cf. City of Appleton (11043) 1972, cited in Respondent Union's

brief. As pointed out in the Union's brief, this holding has not been challenged by governmental or judicial authority, which is the established criteria for affording the Commission's interpretation "great or due" weight.

The singular issue in this case turns upon the question of whether a fair-share agreement was "in effect" from January, 1975, through February 3, 1975, within the meaning of 111.70(3)(a)6, Wis. Stats., which makes it a prohibited practice for a municipal employer to deduct labor organization dues from an employee's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefor, signed by the municipal employee personally, and terminable by at least the end of any year of its life or earlier by the municipal employee giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect.

The Commission, in affirming the Examiner, concluded that there was, and we agree. We find the reasoning of the Commission, contained on page 3 of its decision, most persuasive and controlling here. It is there stated:

"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."

Petitioners' thesis that such fair-share deductions during a period of time when no fair-share agreement is factually in existence, denies Petitioners a substantive right guaranteed to each employee not to have labor organization dues deducted from their earnings except when there is a fair-share agreement in effect not only begs the question but is premised upon what the Commission characterizes as an unwarranted literal reading of the words "in effect."

We further agree with the Commission's holding that the cases relied upon by Petitioners to defeat the retroactive effect given to the April 2, 1975, agreement are not conceptually in point. Again quoting the Commission:

"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 of 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."

We add to this that sound legislative policy supports the Commission's construction that the effective dates of a fair-share agreement are dictated by the terms that the parties have agreed upon. Its holding here is wholly consistent with and furthers the salutary policy adopted by our legislature in 1971:

"A public policy of the state as to labor disputes arising in municipal employment to encourage voluntary settlement through the procedures of collective bargaining." Section 111.70(3)(a)6, Wis. Stats., Cf. Sec. 10 Ch. 124, Session Laws (1971).

We further glean from a reading of the sections in the Act that the legislature strengthened the roll of municipal unions by forcing employers to bargain collectively with them and by making possible fair-share agreements so that such unions could properly finance contract negotiations and the entire bargaining process. A reading of 111.70(2), Wis. Stats., indicates a legislative limitation upon the protected rights of individual workers to refrain from any and all organizational activities by requiring the payment of dues in the manner provided in a fair-share agreement. As pointed out in the Union's brief, such an agreement is nothing more than an agreement or understanding between an employer and the exclusive representative of its employees, and the Act contains no other proscriptions on the type or form of fair-share provisions upon which the employers and unions may agree. A reading of the statute convinces us that there are no conditions precedent to the commencement of deductions pursuant to such an agreement, nor does it in any way restrict the parties from agreeing upon effective dates of the agreement. We agree with the thesis advanced by the Union in its brief that the terms of a particular fair-share agreement itself are determinative subject to two statutory limitations which are not applicable here. We conclude, therefore, that the findings of the Commission must be affirmed. Counsel for the Commission shall prepare an order for judgment consistent with this opinion.

BY THE COURT

George A. Burns /s/
CIRCUIT JUDGE

Dated at Milwaukee, Wisconsin,
this 25th day of January, 1979.