

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
DEERFIELD EDUCATION ASSOCIATION

Requesting a Declaratory Ruling
Pursuant to Sec. 111.70(4)(b), Stats.,
Involving a Dispute Between
Said Petitioner and

DEERFIELD COMMUNITY SCHOOL DISTRICT

Case VI

No. 23671 DR(M)-103

Decision No. 17503

Appearances:

Mr. Bruce Meredith, Staff Counsel and Mr. Michael L. Stoll, Staff Counsel, on behalf of Deerfield Education Association.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. David Shaw, on behalf of Deerfield Community School District.

Isaksen, Lathrop, Esch, Hart & Clark, Attorneys at Law, by Mr. Gerald C. Kopps, filing an amicus curiae brief on behalf of the Wisconsin Association of School Boards.

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, filing an amicus curiae brief on behalf of Wisconsin Council of County and Municipal Employees, District Council 48, AFSCME, Professional Fire Fighters of Wisconsin, Wisconsin Professional Police Association, and Wisconsin County Police Association.

DECLARATORY RULING

Deerfield Education Association having filed a petition, and an amended petition, with the Wisconsin Employment Relations Commission requesting the Commission to issue a declaratory ruling, pursuant to Sec. 111.70(4)(b) of the Municipal Employment Relations Act, with respect to whether two proposals, contained in a tentative final offer submitted by the Deerfield Community School District in a mediation-arbitration proceeding involving said District and said Association, related to mandatory subjects of collective bargaining; and the parties having waived hearing in the matter and having executed and filed a stipulation of facts material to the issues herein; and thereafter the parties, as well as the Wisconsin Association of School Boards, Wisconsin Council (AFSCME), District Council 48 (AFSCME), Professional Firefighters of Wisconsin, Wisconsin Professional Police Association, and Wisconsin County Police Association, having filed briefs in the matter; and the Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That Deerfield Education Association, hereinafter referred to as the Association, is a labor organization and has its offices at Deerfield, Wisconsin.

2. That Deerfield Community School District, hereinafter referred to as the District, operates a school system in and about Deerfield, Wisconsin.

3. That at all times material herein the Association has been, and is, the recognized collective bargaining representative of teachers in the employ of the District; and that in said relationship the Association and the District were parties to a collective bargaining agreement covering the wages, hours and conditions of employment affecting said teachers for the term August 1, 1977 to July 31, 1978; and that agreement contained among its terms the following material herein:

Article IX
Terms of Agreement

. . .

C. The teachers waive the right to further bargaining during the terms of the agreement with respect to any subject or material whether or not referred to or covered in this agreement. The District assumes with confidence that its bargaining obligations have been fulfilled and that the District will not incur any contractual obligations, monetary or otherwise, for the term of this agreement.

4. That during the spring of 1978 the parties engaged in collective bargaining for a successor collective bargaining agreement to become effective upon the termination of the existing agreement; that in said negotiations the District proposed that the new agreement again include para C. of Article IX; and that the Association, during said negotiations contended that said proposal related to a permissive, rather than a mandatory, subject of bargaining.

5. That also during the negotiations in the spring of 1978 the Association proposed that the new collective bargaining agreement contain a "fair-share" agreement as follows:

FAIR SHARE AGREEMENT

- A. All employees in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be available to all employees who apply, consistent with the Association's constitution and by-laws.
- B. Effective thirty (30) days after the date of initial employment of a teacher or thirty (30) days after the opening of school in the fall semester, the District shall deduct from the monthly earnings of all employees in the collective bargaining unit, except exempt employees, their fair share of the costs of representation by the Association, as provided in Section 111.70(1)(h), Wis. Stats. and as certified to the District by the Association, and pay said amount to the treasurer of the Association on or before the end of the month following the month which such deduction was made. The District will provide the Association with a list of employees from whom deductions are made with each monthly remittance to the Association.
1. For the purposes of this Article, exempt employees are those employees who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to Article _____ (Dues Deduction) (or paid to the Association in some other manner authorized by the Association.) The Association shall notify the District of those employees who are exempt from the provisions of this Article (by the first day of September of each year), and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article thirty (30) days before the effective date of such change.

2. The Association shall notify the District of the amount certified by the Association to be the fair share of the costs of representation by the Association, referred to above, (two weeks prior to any required fair share deduction.)
- C. The Association agrees to certify to the District only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. The Association agrees to inform the District of any change in this regard. The Association agrees to inform the District of any change in the amount of such fair share costs thirty (30) days before the effective date of the change.
- D. The Association shall provide employees who are not members of the Association with an internal mechanism within the Association which will allow those employees to challenge the fair share amount certified by the Association as the costs of representation and to receive, where appropriate, a rebate of any monies determined to have been improperly collected by the Association.

The Association does hereby indemnify and shall save the District harmless against any claims, demands, suits, or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the District, which District action or non-action is in compliance (sic) with the provisions of this Article, and in reliance on any list of certificates which have been furnished to the District pursuant to this Article; provided, that the defense of any such claims, demands, suits or other forms of liability shall be under the control of the Association and its attorneys.

The operation of this fair share agreement shall not preclude the District from participating at its own expense in any action to which this clause applies, provided the District does not take a position contrary to the position of the Association in defense of this fair share agreement.

6. That the parties, having been unable to reach an accord in their collective bargaining, on or about August 2, 1978 jointly filed a petition with the Wisconsin Employment Relations Commission, requesting that the Commission initiate a mediation-arbitration proceeding to resolve their alleged impasse in collective bargaining; that during the course of the investigation on said petition by the Commission's Investigator, the District in a meeting on October 9, 1978, proposed that the new agreement contain the following provision relating to "fair-share":

Fair Share

The Deerfield Education Association, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, association and non-association, fairly and equally, and all employees in the unit will be required to pay, as provided, in this article, their fair share of the

costs of representation by the Association. No employee shall be required to join this Association, but membership in the Association shall be made available to all eligible employees who apply consistent with the Association Constitution and by-laws. No employee shall be denied Association because of race, creed, color, sex, handicap or age.

Employees who were not members of the Association during the 1977-78 year shall not now or hereafter be required to pay a fair share fee of any nature under any conditions.

Employees new to the District in the fall of 1978 and returning employees who were members of the Association during the 1977-78 year have the option of joining the Association or of being assessed a fair share equal to \$50.00 if they elect not to join the Association. The dues check-off procedure may be used to enact either decision. The Association's Treasurer shall certify a list of dues deductions and fair share deductions to the District by September 10th. (Emphasis added.)

The Association shall indemnify and save the District harmless against any and all claims, demands, suits, orders, judgments, or other forms of liability that shall arise out of or by reason of action taken or not taken by the District under this article, including but not limited to damages, costs as well as reasonable attorney fees.

7. That the Association has certified that the amount of dues uniformly required of each of its members totals \$200.00 for the school year 1978-1979.

8. That prior to the close of the investigation in the mediation-arbitration proceeding, and on October 28, 1978, the Association filed the instant petition for declaratory ruling, wherein it contended that the District's proposal with respect to waiver of bargaining, as reflected in its proposed Section C of Article IX, and its proposal that "fair-share" assessment be limited to the sum of \$50.00 per year to teachers who chose not to become members of the Association constitute proposals relating to permissive, rather than to mandatory, subjects of bargaining.

9. That, following the filing of the instant petition, the District, over the objection of the Association, was permitted to amend its proposal relating to waiver of bargaining as follows:

Section C. The District and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to: (1) any subject or matter specifically referred to or covered in this Agreement; (2) subjects or matters that arose as a result of the parties' proposals during bargaining, but which were not agreed to; (3) other subjects or matters relating to wages, hours or conditions of employment even though such subject or matter may not have been within the knowledge and contemplation of either or both of the parties at the time that they negotiated or signed this Agreement. (Emphasis added)

10. That following the receipt of such amended proposal the Association has advised the Commission that it is challenging subsection (3) of said proposal, contending that it relates to a permissive, rather than a mandatory subject of bargaining.

Upon the basis of the above and forgoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. That the proposal of the District that the "fair-share" contributions from non-members of the Association be a sum less than "their proportionate share of the cost of collective bargaining process and contract administration measured by the amount of dues uniformly required of all members" relates to a non-mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

2. That the District's blanket waiver of bargaining proposal in issue herein, namely subpara C. (3) of Article IX, relates to a permissive rather than a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING

The Association has no duty to bargain with respect to "fair-share" and blanket waiver proposals submitted by the District.

Given under our hand and seal at the
City of Madison, Wisconsin this 19th
day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Gary L. Covelli
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECLARATORY RULING

During the course of a mediation-arbitration investigation, and prior to the close of said investigation, the Association initiated the instant proceeding, wherein it requested the Commission to issue a Declaratory Ruling as to whether two proposals submitted by the District, with the intent that said proposals be included in the District's final offer for the purposes of mediation-arbitration, related to mandatory subjects of collective bargaining.

The Proposal Relating to "Fair-Share"

The Association contends that the District's proposal relates to a non-mandatory subject of collective bargaining, in that it seeks to establish a "fair-share" payment which is less than provided in the pertinent statutory provision, which is contrary to the sum of money which is required to be deducted by that provision. The Association also contends that "bargaining over the amount of fair share deductions will interfere substantially with productive collective bargaining". The briefs amicus filed by other labor organizations support the position of the Association, as well as contending that the proposal constitutes an attempt to interfere with the internal affairs of the Association.

The District asserts that "fair-share" provisions constitute mandatory subjects of bargaining, and "since the dollar amount to be deducted is an integral component of fair-share, it too must be considered to be a mandatory subject of bargaining". It also argues that Sec. 111.70(1)(h), the provision relating to "fair-share" agreements, does not preclude parties from bargaining with respect to an amount which is less than the actual pro rata share of the Association's cost of collective bargaining and contract administration. The District, in response to the assertion of the Association that the sum of \$50.00, set forth in the District's proposal, was arbitrarily arrived at, the District sets forth that its negotiating team reviewed the history of the bargaining unit in order to determine as best as possible what the cost of bargaining and administering the collective bargaining agreement would be per unit member. In arriving at the Fifty Dollar amount, the Respondent considered the following: that essentially only one grievance had been filed in the past; that the District has typed, duplicated and distributed the collective bargaining agreements; and that to the Respondent's knowledge the only costs involved were those incurred in negotiating the agreement, and finally, that Respondent's Board felt that at least some of the costs incurred by the Deerfield Education Association included political campaign contributions, monies for social gatherings and a "Sunshine Fund," and that such costs should not be included in the amount determined to be a "fair share".

The Wisconsin Association of School Boards, in its amicus curiae brief supports the position of the District.

DISCUSSION

Sec. 111.70(1)(h) of the Municipal Employment Relations Act defines the term "fair-share agreement" as follows:

"Fair share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employees in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contained a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employees affected by said agreement and to pay the amount so deducted to the labor organization.

We do not construe the District's argument that the sum of \$50.00 contained in its "fair-share" proposal was not arbitrarily arrived at as constituting a claim that said sum constitutes the cost of collective bargaining and contract administration, for the simple reason that no evidence material to a determination thereof has been adduced in this proceeding. It is apparent to the Commission that the District is predicated its position on the claim that the statutory provision involved does not require that the full pro rata share of the cost of collective bargaining and contract administration need be deducted under a "fair-share" provision.

Further neither party herein is contending that a "fair-share" proposal, if otherwise valid, does not relate to a mandatory subject of bargaining. In fact, the Commission has so previously held. 1/

The statutory provision: (1) identifies the employees who may be properly covered by a "fair-share agreement"; (2) contains a requirement that the employees covered by such an agreement pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members; and (3) establishes the manner in which the amount is obtained from the employees covered, as well as the manner for obtaining of same by the bargaining representative. The plain reading of the provision permits less than "all" of the employees in the unit to be covered by a "fair-share agreement". As a matter of fact the parties herein have recognized such an intent, inasmuch as the District, as part of its proposal on "fair-share" does not propose that it cover all employees in the unit, and the Association has not claimed that such proposed coverage is impermissible. On the other hand the provision is specific as to the sums of money to be deducted pursuant to a "fair-share agreement", that being the proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. 2/

Had the legislature intended that an amount less than such cost as measured by the cost of collective bargaining and contract administration could be properly deducted from employees' earnings as "fair-share" contributions, the legislature could have expressed itself as it did with respect to the scope of coverage of "fair-share agreements". In effect the District would have the Commission determine that the provision involved permits "fair-share" deductions up to and including the amount of dues paid by employees who voluntarily become members of the Association. 2a/ We interpret the provision to read otherwise. Such an interpretation does not bar a proceeding before the Commission, if in fact there arises a good faith issue as to whether any portion of the dues of an employee organization, where there exists a "fair-share agreement", is utilized for purposes other than the cost of the collective bargaining process and contract administration.

1/ Town of Allouez (Fire Dept.). (15022-B) 1/77

2/ The Commission notes that the question posed in the instant case is one which is different from the one decided by the Wisconsin Supreme Court in Erowne v. Milwaukee Board of School Directors 83 Wis. 2d 316 (1978). The Court in Erowne held that Section 111.70(1)(h) Stats., required that a fair share agreement could only cover the cost of the collective bargaining process and contract administration and that as a result, any agreement which exceeded such costs was improper. But, in so ruling, the Court did not rule on the issue posed herein - whether an employer could lawfully insist upon bargaining a fair-share proposal which establishes an amount which may be less than the cost of collective bargaining and contract administration.

2a/ Provided such cost does not exceed the cost of bargaining and administration.

The Contested Proposal Relating to the Waiver of Bargaining

The Association contends that the District's proposal, set forth in subsection C. of Article IX, relates to a permissive subject of bargaining in that the proposal: (1) does not primarily relate to wages, hours, or conditions of employment; (2) eliminates the Association's statutory role as the exclusive bargaining representative; and (3) contravenes public policy. The employe organizations which filed a brief amicus support such contentions, and further aver that such a proposed waiver is invalid since it would not be voluntarily agreed to by the Association.

The District, as well as the Wisconsin School Board Association, argues that the proposal does relate to wages, hours and conditions of employment, and further that it is analagous to a management rights clause, which relates to a mandatory subject of bargaining. The District contends that the purpose of the proposal is to "maintain the status quo as to those matters during the term of the agreement, thereby promoting labor peace and stability", and further that the provision "will deprive both parties of the privilege of proposing additions to the written agreement during its life".

DISCUSSION

With respect to the latter assertion, we cannot agree with the District's view that its proposal merely freezes the status quo established by the terms of the collective bargaining agreement. In fact it would permit the District to unilaterally implement matters affecting wages, hours and conditions of employment which were not covered by the existing collective bargaining agreement, or which did not relate to matters which had arisen in proposals made during negotiations leading to the collective bargaining agreement involved.

Contrary to the view of the Association, it is clear that the proposal in issue covers "subjects or matters relating to wages, hours or conditions of employment". Said subjects or matters might very well primarily affect wages, hours or working conditions, or might only have an impact thereon, and thus in the absence of a waiver provision the District would have a statutory duty to bargain with the Association.

In Wisconsin Federation of Teachers vs. State of Wisconsin, 3/ wherein the Commission was called upon to interpret a waiver provision almost identical to the proposal involved herein, we stated:

Blanket waivers of the duty to bargain, generally have been construed restrictively in refusal to bargain cases, and waiver has been found only where an examination into the background shows that the union clearly and unmistakably waived its interest in the matter. The reason for not giving blanket waivers an expansive construction, as though these were mere contract interpretation cases, is that the origin of the duty to bargain is statutory, not contractual. . . . Moreover, the legislature has found as a fact that collective bargaining is an essential ingredient for labor peace. Consequently, in view of the public interest and the statutory nature of the duty to bargain, the rule has evolved that waiver of the duty to bargain can be found only on evidence which is clear and unmistakable. (footnote citations omitted.)

We conclude that subsections (1) and (2) of the waiver of bargaining proposal are not inconsistent with public policy and therefore would constitute effective waivers. However, the same cannot be said with regard

to subsection (3), since by said proposed provision the District is requesting the Association to waive bargaining on matters affecting wages, hours and working conditions, which "may not have been within the knowledge and contemplation of either or both of the parties at the time that they negotiated or signed this Agreement." The plain reading of such a provision would include matters with respect to which there existed no iota of evidence relating to a possible waiver of bargaining. Furthermore as we said in the State of Wisconsin case, at page 5, such blanket waivers may only be given such effect as the negotiating history and other surrounding circumstances seem to make appropriate in a given case and then only when its application is not repugnant to the basic policies of the law.

For these reasons we conclude that the proposed blanket waiver, as worded, while not prohibited in the sense that it would be violative of the law, is a permissive rather than mandatory subject of bargaining. Furthermore, if the parties agree to include such blanket waivers in their agreements they should be aware that they will only be given such effect as is consistent with public policy, taking into consideration all the facts and circumstances in a given case. For example, only if it can be shown that the union knew or should have known that the employer intended to make some change in wages, hours and working conditions and there were other facts in the case which supported the finding of a clear and unmistakable waiver, would we find that such a waiver clause could be given effect in a given case.

Dated at Madison, Wisconsin, this 19th day of December, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Herman Torosian
Herman Torosian, Commissioner

Gary L. Covelli
Gary L. Covelli, Commissioner