STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NEW BERLIN PUBLIC EMPLOYEES UNION LOCAL 2676, DISTRICT COUNCIL 40, AFSCME, AFL-CIO Complainant, vs. CITY OF NEW BERLIN, Respondent.	Case XLII No. 25292 MP-1050 Decision No. 17748-A

Appearances:
Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin, by Mr. Richard V. Graylow, for the Complainant.
Hayes and Hayes, Attorneys at Law, 7034 Plankinton Building, 161 West Wisconsin Avenue, Milwaukee, Wisconsin, by Mr. Tom E. Hayes and Mr. Edward A. Hannan, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, having, on November 9, 1979, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of New Berlin had committed a prohibited practice, within the meaning of the Municipal Employment Relations Act, by refusing to implement a decision rendered by Mediator-Arbitrator Frank P. Zeidler, pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act; and hearing in the matter having been conducted on January 16, 1980, at New Berlin, Wisconsin, by Peter G. Davis, a member of the Commission's staff; and the parties having filed post hearing briefs by February 28, 1980; and the parties having subsequently waived the provisions of Sec. 227.09(2), Wis. Stats., in order that the decision in the instant matter could be issued directly by the Commission; and the Commission, having considered the evidence and briefs of the parties, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. That the Complainant, New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, hereinafter referred to as the Union, is a labor organization, and has its offices at 5 Odana Court, Madison, Wisconsin 53719.

2. That the Respondent, City of New Berlin, hereinafter referred to as the City, is a municipal employer having its offices at 16300 West National Avenue, New Berlin, Wisconsin 53151.

3. That at all times material herein the Union, has been and is, the collective bargaining representative of office, clerical, technical and related employes in the employ of the City; that immediately prior to December 15, 1978 the parties engaged in negotiations in attempting to reach an accord on a collective bargaining agreement to succeed an agreement covering the wages, hours and working conditions for the aforesaid employes, which agreement was to expire on December 31, 1978; that on December 15, 1978 the Union filed a petition with the Wisconsin Employment Relations Commission, hereinafter referred to as WERC, requesting that WERC initiate a mediation-arbitration proceeding, pursuant to Sec. 111.70(4)(cm)6 of the Municipal Employment

Relations Act, to resolve an impasse existing between the parties; that following an investigation in said matter, conducted by a WERC staff member, on May 9, 1979, WERC issued an Order requiring the parties to proceed to mediation-arbitration, and in said regard directed the parties to select a single mediator-arbitrator from a panel of five individuals designated for such selection by the WERC; that thereafter the parties selected Frank P. Zeidler, of Milwaukee, Wisconsin, as the mediator-arbitrator; that on July 19, 1979 Zeidler conducted his hearing in the matter, where the parties presented evidence and argument in support of their positions on the single unresolved issue at impasse, namely a proposal of the Union that the new collective bargaining agreement, commencing on January 1, 1979 and continuing through December 31, 1980, contain a provision with respect to "fair-share" as follows:

1. Article XXV, Dues Check-off: Replace this Article with a new article entitled Fair Share Agreement - Dues Deduction, to read as follows:

"25.01 Subject to the provisions of sub-section (G) below, a fair share agreement shall be implemented as hereinafter set forth:

A. Representation: The Union, as the exclusive representative of all of the employees in the bargaining unit, shall represent all such employees, both Union and non-Union, fairly and equally; and all employees in the bargaining unit shall be required to pay their proportionate share of the costs of such representation as set forth in this Article.

B. Membership: No employee shall be required to joint (sic) the Union, but membership in the Union shall be made available to all employees who apply, consistent with the Constitution and By-Laws of the Union. No employee shall be denied Union membership on the basis of race, creed, color, sex, handicap, age or national origin.

C. Payroll Deduction: The Employer shall deduct from the first paycheck of each month an amount certified by the Treasurer of Local 2676 as the uniform dues required of all Union members, from the pay of each employee in the bargaining unit. With respect to newly hired employees, such deduction shall commence on the month following completion of the probationary period. Employees who become members of the Union prior to the completion of the probationary period may elect to have Union dues deducted from their paychecks upon submission to the City of an individually signed authorization on a form provided by the Union of such purpose.

D. Administration: The aggregate amount so deducted, along with an itemized list of the employees from whom such deductions were made, shall be forwarded to the Treasurer of Local 2676 within ten (10) days of the date such deductions were made. Any changes in the amount to be deducted shall be certified to the Employer by the Treasurer of Local 2676 at least thirty (30) days prior to the effective date of such change. The Employer shall not be required to submit any amounts to the Union under the provisions of this Article on behalf of employees otherwise

covered who are on layoff, leave of absence, or other status in which they receive no pay for the pay period noramally (sic) used by the Employer to make such deductions.

E. Inadvertience (sic) or Error: If, through inadvertence or error, the Employer fails or neglects to make a deduction which is properly due and owing from an employee's paycheck, such deduction shall be made from the next paycheck of the employee and submitted to the collective bargaining representative.

F. Indemnification and Hold Harmless Provision: The collective bargaining representative shall indemnify and save the Employer harmless against any and all claims, demands, suits, orders, judgements, or other forms of liability that shall arise out of, or by reason of, action taken or not taken by the Employer under this Section.

G. Referendum: The fair share agreement as set forth in this Article shall become effective on the first day of the month which falls at least fifteen (15) calendar days from the date that the results of a successful referendum have been certified by the Wisconsin Employment Relations Commission. The parties hereto shall jointly petition the W.E.R.C. to conduct such a referendeum (sic) among all employees in the bargaining unit, except those employees who quit or are discharged for cause prior to the date of such referendeum (sic). Unless a majority of the employees voting in such referendum approve the implementation of the fair share agreement, the provisions of Section 25.01 (A-F) above shall be null and void during the term of this Agreement.

25.02 Dues Deduction: In the event that the fair share agreement as set forth above does not become effective, or becomes invalid, the Employer agrees to deduct once each month, dues from those employees who individually authorize in writing that such deductions be made. The amounts to be deducted shall be certified to the Employer by the Treasurer of the Union, and the aggregate deductions from all employees shall be forwarded to the Treasurer of Local 2676. Any changes in the amount to be deducted shall be certified to the Employer by the Treasurer of the Union at least thirty (30) days prior to the effective date of such change."

4. That the City, in its final offer to the mediator-arbitrator proposed to continue a dues check-off provision in the new collective bargaining agreement identical to the provision contained in the expiring agreement, rather than any provision providing for "fair-share".

5. That on October 14, 1979 Mediator-Arbitrator Zeidler issued his decision, in the matter, wherein he directed that the "fair-share" provision proposed by the Union be included in the new collective bargaining agreement; that the City refused, and has continued to refuse, to include said "fair-share" provision in the collective bargaining agreement between the parties, for the term commencing on January 1, 1979 and continuing at least through December 31, 1980, which agreement was executed on January 18, 1980, and which agreement does not include the provision involved; and further, that the City

refused, and continues to refuse, to participate in a referendum as provided in said provision, contending that Mediator-Arbitrator Zeidler exceeded his power by requiring the City to submit to, and accept, a "fair-share" provision which is violative of the Municipal Employment Relations Act.

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

CONCLUSIONS OF LAW

1. That the City of New Berlin is a proper party in interest, within the meaning of Sec. 111.70(4)(a) of the Municipal Employment Relations Act, and Sec. 111.07, Wis. Stats., to contest the validity of the "fair-share" provision directed by Mediator-Arbitrator Frank P. Zeidler to be included in the 1979-1980 collective bargaining agreement between the City of New Berlin and New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO.

2. That since the pleadings filed by the parties herein concern an issue as to whether the "fair-share" provision involved herein is illegal, and since the New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, in its complaint has alleged that the City of New Berlin has committed a prohibited practice by not incorporating said provision in the 1979-1980 collective bargaining agreement between the parties, said issue constitutes a justiciable controversy which is ripe for decision by the Wisconsin Employment Relations Commission, pursuant to Sec. 111.70(4)(a) of the Municipal Employment Relations Act and Sec. 111.07, Wis. Stats.

3. That since Sec. 111.70(4)(cm)6 of the Municipal Employment Relations Act permits only mandatory subjects of bargaining, or permissive subjects of bargaining where neither party objects thereto, to be included in final offers for the purpose of mediation-arbitration, the Wisconsin Employment Relations Commission will not enforce any provision contained in a decision rendered by any mediator-arbitrator where such provision relates to an illegal subject of bargaining.

4. That the "fair-share" provision involved herein relates to a mandatory subject of bargaining within the meaning of Sec. 111.70(1)(d) of the Municipal Employment Relations Act, and therefore the decision of Mediator-Arbitrator Frank P. Zeidler, directing that the City of New Berlin incorporate said provision in the 1979-1980 collective bargaining agreement between it and New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, is valid and binding upon the parties, within the meaning of Sec. 111.70(4)(cm)6.d of the Municipal Employment Relations Act.

5. That the City of New Berlin, by failing to incorporate the "fair-share" provision, contained in the decision of Mediator-Arbitrator Frank P. Zeidler, in the collective bargaining agreement existing between it and New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, has committed, and continues to commit, a prohibited practice within the meaning of Sec. 111.70(3)(a)7 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

ORDER

IT IS ORDERED that the City of New Berlin its officers and agents, shall immediately

1. Cease and desist from refusing to incorporate the "fair-share" provision contained in the decision of Mediator-Arbitrator Frank P. Zeidler, in the collective bargaining agreement presently existing between it and New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Municipal Employment Relations Act:

a. Incorporate the "fair-share" provision contained in the decision of Mediator-Arbitrator Frank P. Zeidler in the collective bargaining agreement presently existing between it and New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO.

b. Upon request of New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, execute a Stipulation for Referendum, requesting the Wisconsin Employment Relations Commission to conduct a referendum among the employes covered by said collective bargaining agreement for the purpose of determining whether the required number of such employes favor the implementation of said "fair-share" provision, and should the required number of employes participating in the referendum vote in favor of such implementation, implement same immediately following the receipt of the Certification of such results by the Wisconsin Employment Relations Commission.

c. Immediately, upon receipt of a detailed statement from New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO, setting forth reasonable attorney's fees and costs, if any, incurred by said Union, in the proceeding before the Commission, remit payment thereof to said Union.

d. Notify New Berlin Public Employees Union Local 2676, District Council 40, AFSCME, AFL-CIO immediately, in writing, that it is ready, willing and able to comply herewith.

e. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to the steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 7th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Herman Torosian, Commissioner

_____
Gary L. Covelli, Commissioner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating the instant proceeding the Union alleged that the City committed a prohibited practice in violation of Sec. 111.70(3)(a)7 of the Municipal Employment Relations Act (MERA) by refusing to implement the mediation-arbitration award which required the City to incorporate the "fair-share" provision, set forth in paragraph 3 of the Findings of Fact, in the collective bargaining agreement between the parties covering the period from January 1, 1979 through at least December 31, 1980. In its answer the City admits such refusal, contending that the Mediator-Arbitrator exceeded his lawful authority in the matter on the basis that the Union's "fair-share" proposal was in effect, illegal, and that therefore the City did not commit the prohibited practice alleged.

The legality of the Union's "fair-share" proposal was apparently argued before the Mediator-Arbitrator, inasmuch as in his award said Mediator-Arbitrator stated:

> "The arbitrator holds that the final offer of the Union is not unlawful on its face absent a ruling from the WERC as to precisely what Union expenses are not allowed to be covered by fair share payments which are equal to dues uniformly required of members by the employee organization."

The City predicates its claim that the proposal is unlawful on the contention that its conclusion in said regard is supported by our Supreme Court in its decision rendered in Browne v Milwaukee Board of School Directors, 1/ on the basis that the proposal:

A. Does not preclude a fair share employe from paying anything more than his proportionate share of the cost of collective bargaining and contract administration;

B. Does not insure that fair share deductions are used only to pay for the necessary costs of collective bargaining and contract administration;

C. Permits the assessment of sums which are not strictly necessary to defray only the costs of collective bargaining and contract administration;

D. Allows for illegal co-mingling of union dues and fair share deductions; and

E. Fails to provide for any accounting of funds assessed.

The Union contends that the award was rendered in conformity with Sec. 111.70(4)(cm)7 of MERA; that the provision is lawful and provides adequate protection for both the City and the affected employes; that no fair share deductions have as yet been made and, thus no employe has objected, and therefore the City's ojbection is anticipatory and presents no justiciable controversy; and, finally, that the City is not a proper party to mount the challenge of illegality.

1/ 83 Wis. 2d 316 (May, 1978).

The initial issue to be determined by the Commission is whether the City has the standing to contend that the "fair-share" provision involved is not legal. The City has been charged with the commission of a prohibited practice. It is obligated to enter into a collective bargaining agreement with the Union as the bargaining representative of the employes represented by the Union. As a result of the arbitration award, the Union contends that such agreement must contain the "fair-share" provision included in the award of the Mediator-Arbitrator. If, indeed, said provision is illegal, the City, in an action brought by the employes covered by said agreement, contesting the application of an illegal provision, could be properly named as a respondent, along with the Union. Further, under the provision, the City is obligated to cooperate in the conduct of the referendum, seeking an indication whether the required number of employes favor the implementation of the "fair-share" agreement. The fact that the provision has not as yet been implemented, or the fact that no employe covered thereby has not as yet objected, are of no consequence. The City has properly exercised a right to raise any defense material to the alleged prohibited practice of which it is accused.

With respect to the Union's claim that there exists no justiciable controversy, it is clear that the Union has contended that the City has committed a prohibited practice by not complying with the mediation-arbitration award. The City alleges that said award requires it to incorporate a provision, which the City claims is illegal, in the collective bargaining agreement. While the Union contends that presently there exists no "fair-share" provision between the parties and that no employe has raised an objection to the use of Union dues, the provision involved requires the City to participate in a referendum, and the failure to do so could constitute a violation of the collective bargaining agreement. It is obvious that the dispute is ripe for determination by the Commission on the merits.

We also do not agree with the Union's contention that the Commission must enforce the award herein, regardless of whether it contains errors of law or fact. If it can be established that the provision herein is illegal, this Commission will not enforce the provision. For to do so would result in aiding and abetting the parties to the collective bargaining agreement in possible violations of statutory provisions contained in MERA. In addition, it should be noted that Sec. 111.70(4)(cm)6.a provides in part as follows, with respect to the final offers submitted by the parties to the mediator-arbitrator:

> ". . . Such final offers may include only mandatory subjects of bargaining. Permissive subjects of bargaining may be included by a party if the other party does not object and shall then be treated as a mandatory subject."

Thus, it is obvious that proposals pertaining to illegal subjects of bargaining should be excluded from final offers to be considered by the mediator-arbitrator, and the Commission cannot ignore a claim that an award of a mediator-arbitrator contains an alleged illegal provision. In said regard we wish to indicate that we are not condoning the failure of the City in not claiming, prior to the close of the Commission's investigation, that the "fair-share" provision involved herein was illegal.

The City, in support of its claim that the provision involved is illegal, heavily relies on our Supreme Court's decision in Browne contending that the provision is lacking in certain respects. Sec. 111.70(1)(h) of MERA 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 employes 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 (sic) a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.

The statutory provision: (1) identifies the employes who may be properly covered by a "fair-share agreement"; (2) contains a requirement that the employes covered by such 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 employes covered, as well as the manner for obtaining of same by the bargaining representative. 2/

The City interprets the Browne decision as requiring that the provision must (1) not require an employe to pay for "anything more than (his) proportionate share of the cost of collective bargaining and contract administration"; (2) insure fair-share funds are used only to pay for such costs; (3) contain a mechanism to advise "fair-share" payors of how their payments will be used; and (4) contain a mechanism for reimbursement of impermissable expenditures.

There is nothing in the Court's language in the Browne decision which supports the City's contention that the wording of a legal "fair-share" provision must contain anything more than the statutory language defining same. On the other hand, the language in the decision cited by the City refers to the application of such a provision, and the possible methods of reimbursement to "fair-share" payors for such payments which have been impermissibly expended. Further, the provision involved herein, on its face, does not provide for "fair-share" payments over and above permissible expenditures. While the provision is not couched in the exact statutory language, we conclude that the pertinent statutory intent is sufficiently set forth in paragraphs A and C of the Union's proposal as follows:

> A. . . . all employes in the bargaining unit shall be required to pay their proportionate share of the costs of such representation . . .
>
> . . .
>
> C. The Employer shall deduct from the first paycheck of each month an amount certified by the Treasurer of Local 2676 as the uniform dues required of all Union members from the pay of each employee in the bargaining unit.

Therefore, we have concluded that the provision, as proposed by the Union, and as selected by the mediator-arbitrator to be included in the pertinent collective bargaining agreement, is not illegal, and therefore must be incorporated in the collective bargaining agreement existing between the parties. We have ordered the City, upon the request of the Union, to jointly execute a stipulation requesting that a referendum be conducted among the employes involved for the purpose of determining whether a majority of the employes voting approve the implementation of the "fair-share" agreement.

Further, we have ordered the City to pay the attorney's fees incurred by the Union, as well as costs, in the instant proceeding before the Commission. Sec. 111.70(7m)(e) of MERA provides as follows:

2/ Deerfield Community School District (17503) 12/79.

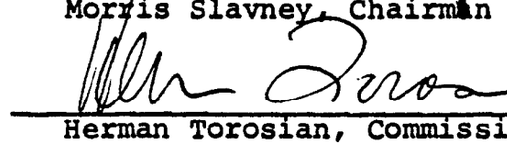
> Any party refusing to include an arbitration award or decision under sub. (4)(cm) in a written collective bargaining agreement or failing to implement the award or decision, unless good cause is shown, shall be liable for attorney fees, interest on delayed monetary benefits, and other costs incurred in any action by the non-offending party to enforce the award or decision.

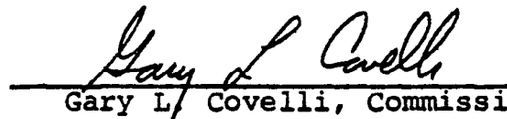
While the Commission does not doubt the City's good faith belief that the fair-share provision proposed by the Union was not legal, the City could have, and should have, raised its objection prior to the close of the Commission's investigation prior to its Order requiring the parties to proceed to mediation-arbitration. It has not established any good cause for failing to do so, and therefore the statutory provision cited above warrants the granting of reasonable attorney's fees and costs, if any, to the Union.

Dated at Madison, Wisconsin this 7th day of May, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner