STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FLOYD FLORA, Complainant, vs. BOARD OF EDUCATION-SCHOOL DISTRICT OF WAUSAU, Respondent.	Case XVII No. 26290 MP-1113 Decision No. 17888-A

Appearances:

Mr. Roger L. Deffner, Attorney at Law, 124 Washington Street, Wausau, Wisconsin 54401, appearing on behalf of the Complainant.

Ms. Judith Neumann, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Floyd Flora, having on May 30, 1980 filed a complaint with the Wisconsin Employment Relations Commission wherein he alleged that the Board of Education-School District of Wausau had committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Dennis P. McGilligan, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Section 111.07(5) of the Wisconsin Statutes; and the above parties having mutually waived hearing on the complaint and instead entered into a stipulation dated November 2, 1979 before Marathon County Circuit Court, Branch II, Wausau, Wisconsin, regarding certain facts relative to a decision in the matter; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Board of Education-School District of Wausau, hereinafter referred to as the Respondent or District, is a municipal employer engaged in the operation of a public school system.

2. That Wausau Education Association, hereinafter referred to as the Association, is a labor organization and the duly-authorized exclusive bargaining representative of certain professional personnel, including teachers, employed by the Respondent for purposes of collective bargaining on matters affecting wages, hours and conditions of employment.

3. That Floyd Flora, hereinafter referred to as the Complainant or Flora, is a teacher and municipal employe in the employ of the Respondent in the bargaining unit represented by the Association at all times material herein.

4. That Flora initiated a complaint with the Small Claims Branch of the Marathon County Court, State of Wisconsin on January 15, 1979; that thereafter on March 26, 1980 the Small Claims Division of the Circuit Court of Marathon County, State of Wisconsin issued an Order Granting Motion to Refer the case to the Wisconsin Employment Relations Commission and that subsequently on May 30, 1980 Flora filed the instant complaint on the matter with the Wisconsin Employment Relations Commission.

5. That the Association and Respondent were signators to a collective bargaining agreement effective from August 15, 1978 through August 14, 1980 covering wages, hours and conditions of employment of the employes in the aforesaid bargaining unit; that said agreement contained the following provision:

ARTICLE 21 - FAIR SHARE AGREEMENT

* * *

B. Effective Date and Employees Covered: Effective August 15, 1978, and unless otherwise terminated, the Employer shall deduct from each paycheck (beginning the first pay period after October 1) of all regular full-time employees specified herein an amount equal to such employees [sic] proportionate share of the cost of the collective bargaining process and contract administration as measured by the amount of dues uniformly required of all members, as certified by the Wausau Education Association, and shall pay such amount to the Treasurer of the bargaining representative of such employee on or before the end of the month following the month in which such deduction was made.

1. Present Employees: As to persons employed on the effective date of this agreement, such deductions shall be made and forwarded to the Treasurer of the bargaining representative only from the earnings of those employees who are members of the employee organization on the effective date of this Agreement.

and that the "fair share" deductions in question were deducted pursuant to the above provision of said Agreement.

6. That the Complainant voluntarily elected to be a member of the Wausau Education Association, as well as of its affiliates - the Wisconsin Education Association Council, the National Education Association and Central Wisconsin UniServ Council-North, at the beginning of the 1977-1978 school year; that the Complainant signed a Dues Authorization Form on September 23, 1977, voluntarily authorizing the District to deduct his annual membership dues totalling $167.50 from his paychecks during the 1977-1978 school year, in ten consecutive equal installments; that the District did deduct the Complainant's annual membership dues pursuant to said Authorization Form and that the Complainant thus paid full annual membership dues to the Association and its affiliates for the relevant membership year.

7. That the membership year of the Wausau Education Association and the Wisconsin Education Association Council is set by the Constitution and Bylaws of the Wisconsin Education Association Council in Bylaw 2-Membership, 2-2, Membership Year; that said membership year is

from September 1 through August 31 of any given year and that the Constitution and Bylaws of the Association and its affiliates provides a mechanism whereby a member can resign from same.

8. That the Association and the Respondent entered into negotiations for a new labor agreement to succeed the agreement in effect during the 1977-1978 school year; that tentative agreement on a successor collective bargaining agreement for the period of time from August 15, 1978 through August 14, 1980 was reached between the Association and Respondent negotiators on September 21, 1978; that thereafter the Association held meetings in the various school buildings to acquaint teachers with the terms of the tentative agreement; that on October 1, 1978, the Association held a general membership meeting and ratified said collective bargaining agreement; that both parties did not ratify and execute said agreement until October 6, 1978; that the effective date of the applicable collective bargaining agreement was August 15, 1978 and that the parties made the terms of said agreement retroactive to August 15, 1978.

9. That on September 29, 1978, the Complainant submitted a resignation to the Association designating such resignation retroactive to and effective on August 14, 1978; that prior to September 29, 1978, the Complainant took no other action directed at resigning his membership; that the Respondent has, at all times material herein, treated the Complainant as a bargaining unit employe who was a member of the Association "on the effective date of this Agreement" within the purview of Article 21 of said Agreement and that at all times material herein, the District has continued to deduct the certified "fair share" amounts from the Complainant's paychecks since October 6, 1978.

10. That pursuant to Article 21, subsection 4 (Indemnification and Hold Harmless Provision) in the aforementioned applicable collective bargaining agreement, the Association undertook the defense of the instant complaint on behalf of the Respondent.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Complainant, Floyd Flora, is a municipal employe within the meaning of Section 111.70(1)(b), Stats.

2. That, since the alleged prohibited practice concerning the Respondent's dues deductions from the Complainant's earnings in the 1977-1978 school year made pursuant to a dues deduction authorization form occurred on a date more than one year preceding the date on which the complaint was filed, Sections 111.70(4)(a) and 111.07(14), Stats., precludes the Wisconsin Employment Relations Commission from exercising its jurisdiction over the merits of said matter.

3. That the Respondent did not interfere with the Complainant's right to bargain collectively through representatives of his own choosing within the meaning of Section 111.70(2), Stats., and therefore has not committed a prohibited practice within the meaning of Section 111.70(3)(a)1, Stats., because Respondent made deductions from the Complainant's earnings pursuant to a valid fair-share agreement contained in the 1978-1980 collective bargaining agreement referred to in Finding of Fact 5, above.

4. That because the Respondent has not been found herein to have committed a prohibited practice in violation of Section 111.70(3)(a)1, Stats., by making the deductions noted in Finding of Fact 8, above, the Association could not have and did not commit any prohibited practice under the Municipal Employment Relations Act.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

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

Dated at Madison, Wisconsin this 23rd day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint was filed on May 30, 1980. The Respondent, through the Wausau Education Association, WEAC-NEA, filed an answer on June 4, 1980. Thereafter, the parties agreed to stipulate to the facts in writing as noted above; waive their rights to a hearing; make any arguments in written brief form and let the Examiner decide the issues. The Respondent filed a brief on July 2, 1980. The Complainant did not file a brief in the matter.

SUBSTANTIVE ISSUES:

The instant complaint contains an allegation for the first time that the Respondent violated Section 111.70(3)(a)6, Stats., by deducting dues from the Complainant's paychecks in the 1977-1978 school year pursuant to an invalid dues deduction authorization. 1/ However, the activity alleged to have constituted a prohibited practice occurred more than one year prior to the date upon which the complaint was filed, therefore precluding the Commission from finding such activity a prohibited practice. 2/ Based on the above, the Examiner dismisses this portion of the complaint.

The Examiner next turns his attention to the Complainant's allegation that the Respondent interfered with Complainant's exercise of his rights to bargain collectively through representatives of his choosing in violation of Section 111.70(3)(a)1, Stats. The Complainant bases this claim on the fact that the Respondent and Association entered into a collective bargaining agreement containing a fair-share provision effective retroactively which required the Respondent to make fair-share deductions from the Complainant's earnings. The Complainant argues that he should be able to resign retroactively from the Association prior to the ratification and execution of the aforementioned Agreement in order not to be subject to said fair-share arrangement. 3/

Section 111.70(2), Stats., excepts from municipal employes' right "to bargain collectively through representatives of their own choosing . . . [the limitation] that employes may be required to pay dues in the manner provided in a fair-share agreement."

1/ Flora's complaint filed in the Small Claims Court of Marathon County did not contain said allegation.

2/ City of Milwaukee (13093) 10/74; City of Sheboygan (12134-A, B) 11/74.

3/ Flora's complaint concerns a continuing series of incidents (the monthly fair-share deductions from his paychecks) commencing on December 22, 1978. Flora filed his original complaint on January 16, 1979 in the Small Claims Branch of the Marathon County Court. On March 26, 1980 said court issued an Order referring the matter to the Commission citing, in part, Brown v. Milwaukee Board of School Directors, 83 Wis. 2d 316 at 340-341, 265 N.W. 2d 559 (1978). Based on the above and the record as a whole, the Examiner finds it unnecessary to make any findings on the effect of Sections 111.70(4)(a) and 111.07(14), Stats. on Flora's fair-share charges.

A fair-share agreement is a mandatory subject of bargaining and a union and employer must bargain in good faith over proposals to place a fair-share arrangement in the contract. 4/ In the Berns case, the Examiner found that it was not a prohibited practice for a municipal employer to deduct fair-share payments from bargaining unit members where the fair-share agreement took effect retroactively. 5/ In affirming the Examiner's decision, the Commission concluded that retroactivity of fair-share arrangements is consistent with legislative intent. 6/ The circuit court affirmed the Commission's decision, and the Court of Appeals affirmed the lower court's decision. The Court of Appeals stated the principle established:

> In light of the above, and after giving consideration to the expressed legislative policy behind the enactment of MERA, we must agree with the trial court that fair-share agreements become effective, and continue in effect by their own terms according to the parties' agreements and understandings. 7/

The Court of Appeals quoted approvingly the Commission's reasoning in the matter:

> . . . 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.

Based on the above, the Examiner finds that the fair-share agreement in the Wausau contract was legitimately and validly made retroactive to August 15, 1978, along with the rest of the collective bargaining agreement executed on October 6, 1978. Said fair-share provision required non-members who were members of the Association on August 15, as well as newly-employed non-members, to pay fair-share of the costs of collective bargaining and contract enforcement. In this regard the purpose of the fair-share agreement in the aforementioned contract was legitimate under Section 111.70(1)(h), Stats.

Under the literal terms of the fair-share agreement, the Complainant was "a member" of the Association on the effective date of the collective bargaining agreement. Since Flora was a member of the Association on August 15, 1978, the Respondent was obligated under the valid fair-share agreement with the Association to deduct the sums in question from his paycheck. 8/ To permit Flora to resign retroactively as argued herein by the Complainant would contravene both the plain language and the parties' purpose in negotiating said fair-share agreement and run counter to the principle of law established in the cases noted above. In this regard the Examiner finds it reasonable to conclude that, although the facts in the two cases are distinguishable, the Court's ruling and rationale in Berns is persuasive in the instant dispute.

4/ See Berns v. Wisconsin Employment Relations Commission, 94 Wis. 2d 214 (1979), at 222, and cases cited therein; Town of Allouez (15022-B) 1/77.
5/ Milwaukee Board of School Directors (14382-A) 7/77.
6/ Milwaukee Board of School Directors (14382-C) 8/78.
7/ Berns, supra at 223.
8/ Section 111.70(1)(h), Stats.

The Association and the Respondent are not attempting to force the Complainant to become or stay a member of the Association in the instant case. Neither the constitution of the Association or the Wisconsin Education Association Council place any limits on a member's right to resign from the Association. However, the Complainant's right to refrain from Union membership which is guaranteed by Section 111.70(2) Stats., is expressly subject to the obligation to contribute to the costs of collective bargaining and contract administration as required by the collective bargaining agreement. 9/ Consequently, it was proper for the Association to accept the Complainant's resignation as a member on September 29, 1978 but not retroactive to avoid fair-share responsibilities.

In the absence of any persuasive evidence to the contrary, and based on all of the above, as well as the record as a whole, the Examiner rejects the Complainant's allegation that the Respondent violated Section 111.70(3)(a)1, Stats. by its actions herein.

The complaint does not specifically mention the Association as a Respondent. However, the complaint does refer to the actions of the Association which caused and induced the Respondent to make the disputed deductions. Such conduct does not constitute any violation of the Municipal Employment Relations Act since the Respondent's conduct was not shown to have been a prohibited practice. Therefore, in so far as it was alleged in the complaint that the Association committed a prohibited practice by its actions herein said claim is dismissed by the Examiner.

Based upon the foregoing considerations, the Examiner therefore concludes that the Respondent did not violate Section 111.70(3)(a)6 or Section 111.70(3)(a)1 of MERA, nor any other section of the Act and that, as a result, the complaint must be dismissed in its entirety.

Dated at Madison, Wisconsin this 23rd day of October, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P McGilligan
Dennis P. McGilligan, Examiner

9/ Milwaukee Board of School Directors, (14382-C) supra at 4.

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