STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMERICAN FEDERATION OF STATE, COUNTY and MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 24, AFL-CIO, and its appropriately affiliated LOCAL #1,	
Complainant,	Case CXLVIII No. 26294 PP(S)-72 Decision No. 17901-A
vs.	
STATE OF WISCONSIN,	
Respondent.	

Appearances:

Lawton & Cates, Attorneys at Law, 110 E. Main Street, Madison, WI 53703, by Mr. Richard V. Graylow and Mr. Thomas King, Executive Director, AFSCME, Council 24, 5 Odana Court, Madison, WI 53719, appearing on behalf of the Complainant.

Mr. Sanford Cogas, Attorney at Law, Department of Employment Relations, 149 E. Wilson Street, Madison, WI 53702, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent committed unfair labor practices within the meaning of Secs. 111.84(1)(a), (1)(c), (1)(e) and (1)(f) of the State Employment Labor Relations Act; and the Commission having appointed Stephen Pieroni, a member of the Commission's staff to act as Examiner; and a hearing on said complaint having been held on October 29, 1980; and the Complainant, during the course of the proceedings, having amended its complaint by withdrawing all references in the complaint to alleged violations of Sec. 111.84(1)(e) and by adding an allegation that Respondent's conduct constituted a violation of Sec. 111.84(1)(b); and the Examiner having considered the evidence, arguments and briefs and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. American Federation of State, County and Municipal Employees (AFSCME), Council 24, AFL-CIO and its appropriately affiliated Local #1, hereinafter referred to as the Union, is a labor organization existing for the purpose of representing employes through collective bargaining. The Union is the exclusive bargaining representative of, among others, Engineering Technicians 1, 2 and 3, who are part of the State Technical Bargaining Unit.

2. That the State of Wisconsin, hereinafter referred to as the Employer, is an employer within the meaning of the State Employment Labor Relations Act.

3. The Union and the Employer were at all times material hereto parties to a collective bargaining agreement covering the wages, hours and working conditions of employes classified as Engineering Technician 1, 2 and 3 in the Technical Bargaining Unit. Said agreement pursuant to Article II, Recognition And Union Security, Sec. 2, Dues Deduction provided as follows:

> Section 2 Dues Deduction
>
> 9 A. Upon receipt of a voluntary written individual order therefore from any of its employes covered by this Agreement on forms presently being

provided by the Union, the Employer will deduct from the pay due such employe those dues required as the employe's membership in the Union.

10 Such orders shall be effective only as to membership dues becoming due after the date of delivery of such authorization to the payroll office of the employing unit. New individual orders will be submitted on or before the 25th day of any month for deduction the following pay period. Such deductions shall be made from the employe's pay for the first pay period of each month, except that where the payroll of the department is processed by the centralized payroll of the Department of Administration such deductions shall be evenly divided between the A and B pay periods. Deductions shall be made only when the employe has sufficient earnings to cover same after deductions for social security, federal taxes, state taxes, retirement, health insurance, income continuation insurance, and life insurance. Deductions shall be in such amount as shall be certified to the Employer in writing by the authorized representative of the local Union.

11 Such orders of employes transferred from the jurisdiction of one local Union to another within the certified bargaining unit shall continue to be effective providing the transferred employe provides the payroll office of the new employing unit with a signed transfer card prior to the end of the pay period during which the transfer was affected. New authorization cards must be submitted as indicated above by employes returning after a leave of absence without pay in excess of 12 months. The Employer will remit all such deductions to the appropriate local Union within 10 days after the payday covering the pay period of deduction.

12 Such orders may be terminated in accordance with the terms of the order the employe has on file with the Employer. However, under no circumstances shall an employe be subject to the deduction of membership dues without the opportunity to terminate his/her order at the end of any year of its life or earlier by the employe by giving at least 30 but not more than 120 days written notice to the Employer and local Union.

13 B. In those units that have a fair share agreement the Employer agrees to deduct the amount of dues or proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members, as certified by the Union from the earnings of the employes in the units. The amount so deducted shall be paid to the Union.

14 C. The Union shall indemnify and save the Employer harmless against any and all claims, demands, suits, or other forms of liability which may arise out of any action taken or not taken by the Employer for the purpose of complying with the provisions of this Section.

4. That Robert G. DuPont, Engineering Technician 2; Michael J. Beckwith, Engineering Technician 3 and James H. Miller, Engineering Technician 3, on June 23, 1977, June 30, 1977 and August 8, 1977, respectively, signed dues deduction cards and submitted same to the Employer. Said cards were provided by the Union and authorized the Employer to deduct union dues from the individual's bi-weekly paycheck

for membership in AFSCME Council 24, and Local #1. Said dues authorization for each individual remained in full force and effect at all times material hereto. Said cards included the following language:

> "It is agreed that this authorization shall begin on the first payroll period following this date and shall continue for one year from the date hereof, and shall thereafter continue for successive period of one year unless at least thirty days but not more than one hundred and twenty days prior to the end of any year of its life I give written notice of termination to my employer and to said organization." (Joint 1)

That at no time since the employes signed said orders have either of the above-stated individuals given written notice of termination of said deductions to the Employer or the Union.

5. That Commission's records (Case XXX, No. 11611-B) indicate that on May 24, 1973 a "fair share" referendum was certified in favor of the Union, said "fair share" agreement at all times material hereto covered the aforementioned employes in the Technical Bargaining Unit.

6. On June 28, 1979, the three employes referred to in Finding #4 were reclassified from Engineering Technician 3 to Engineering Technician 4. The latter classification is part of the Professional Engineers Bargaining Unit which is represented by the State Engineering Association, and is not affiliated with the complaining Union herein.

7. The Employer continued to deduct dues on behalf of the aforementioned employes and remitted same to the complaining Union, from January 1979 to January 1980.

8. Sometime in January 1980, the three aforementioned employes orally informed Mr. Lyle Hasenberg, Chief of Payroll, Bureau of Personnel and Employment Relations, that they wished to have their dues deduction to the instant Union terminated and sought recoupment, if possible, of all dues paid to the Union from January 1979 through January 1980. Said employes did not at any time material hereto put said request in writing and did not notify the Union either orally or in writing.

9. In February and March 1980, Hasenberg wrote several letters to the treasurer of the instant Union in which he requested reimbursement for the dues deductions which were made from the aforementioned employes paychecks from January 1979 through January 1980 and which, according to Hasenberg, were erroneously paid to the instant Union. Said deductions amounted to $120.45 from each employe's paychecks during said period. The total amount involved is $361.35.

10. When the Union failed to pay the amount requested by Hasenberg, he arranged on or about April 22, 1980 to have the payroll department withhold one bi-weekly dues deduction that would normally have been deducted on behalf of 23 individuals in the Union's bargaining unit. The amount of money withheld totaled $407.00. Hasenberg thereafter remitted the money as follows: $180.00 paid to the Treasurer of the State Engineers Association; this is the amount of money that the Employer normally would have deducted from each employe's paycheck under the Engineer's fair share provision during the period January 1979 through January 1980. ($5.00/per month); (2) $60.45 remitted to each of the three employes. ($181.35 total) This amount equals the difference between the monies remitted to the State Engineer's Association and the amount deducted from the employes paychecks on behalf of the instant Union during January 1979 through January 1980. ($361.35 - $180.00 = $181.35); (3) $45.65 remitted to the instant Union. This amount is the difference between the $407.00 which was collected by withholding from the Union the 23 employe's dues deductions and that $361.35 which is the combined amount paid to the Engineers Association and the three aforementioned employes. ($407.00 - $361.35 = $45.65).

11. The individual membership of the 23 employes in the instant Union whose dues were withheld by the Employer in April 1980, have not been terminated by the Union as a result of the Employer's action herein. In this regard, the parties stipulated that the dispute herein was not between the Union and the 23 referenced members.

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

CONCLUSIONS OF LAW

1. That the State of Wisconsin, by Lyle Hasenberg unilaterally withholding one bi-weekly dues deduction of 23 members of the Union and by terminating the dues deductions to the Union from the bi-weekly paychecks of Beckwith, DuPont and Miller without proper written notification, interfered with employe's rights guaranteed by Sec. 111.82 and thereby violated Sec. 111.84(1)(a).

2. That the conduct of the State of Wisconsin referred to in paragraph 1 above did not violate Secs. 111.84(1)(b), (c) or (f).

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

ORDER

IT IS ORDERED that the Employer, its officers and agents, shall immediately

1. Cease and desist from interfering with the rights of its employes under the State Employment Labor Relations Act by improperly withholding said employes dues deductions to the Union.

2. Reimburse the Union, American Federation of State, County and Municipal Employees, Council 24, AFL-CIO, and its affiliated Local #1, in the amount of all dues which were improperly withheld in April 1980 as well as those dues which should have been continuously deducted from the bi-weekly paychecks of Beckwith, DuPont and Miller from the date of the Employer's improper termination of same to the effective date of proper revocation.

3. Notify the Wisconsin Employment Relations Commission within twenty days of the date of this order regarding what steps it has taken to comply with this order.

Dated at Madison, Wisconsin this 24th day of August, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union filed the instant complaint alleging that the Employer had committed unfair labor practices within the meaning of Sec. 111.84 (1)(a), (1)(c), (1)(e) and (1)(f) by its unilateral termination of the dues deduction of members Beckwith, DuPont and Miller and by withholding the bi-weekly dues deductions from 23 unnamed employes in an effort to recover dues monies which had previously been paid to the Union on behalf of Beckwith, DuPont and Miller. During the course of the proceedings, the Union, without objection from the Employer, withdrew its allegation concerning Sec. 111.84(1)(e) and added an allegation in the complaint which alleged a violation of Sec. 111.84(1)(b). The Employer denied that it violated any of said statutory provisions.

All the facts were stipulated to by the parties. The preceding Findings of Fact contain all material facts upon which the instant decision is based.

POSITION OF THE UNION:

Principally relying upon the previous Commission decision of AFSCME Council 24, AFL-CIO vs. State of Wisconsin (DILHR), Dec. 11979-B(11/75), the Union argues that the Employer's conduct herein constitutes a willful violation of SELRA. According to the Union, there can be no dispute that the employes involved herein possess a statutorily created right which insures continued dues deductions once same are properly authorized. Here, the employes properly authorized dues deduction. State law requires written notification of termination to be transmitted to the Employer and the Union. Since none of the employes in question notified the Employer or the Union in writing to terminate said deductions, a legally sufficient revocation never existed. See also Shen-Mar Food Products, 91LRRM 1122, (1976). According to the Union, the Employer's conduct of unilaterally taking it upon itself to terminate the dues deductions is therefore unlawful.

POSITION OF THE EMPLOYER:

In support of its position, the Employer asserts that its conduct represents a good faith effort to correct administrative errors in a manner that deals fairly with the employes and the labor organizations involved.

Regarding the merits of the complaint, the Employer initially argued that the complaint should be dismissed because the Union failed to exhaust the contractual grievance procedure or, in the alternative, the case should be deferred to the arbitration procedure. Thereafter the Union withdrew its allegation concerning breach of contract pursuant to ERB 22.02(5)(a). The Employer did not raise an objection to the withdrawal of said allegation.

Moreover, the Employer asserts that its conduct was in compliance with Sec. 2, Paragraphs 11 and 13 of the parties collective bargaining agreement. (See Finding of Fact #3) Of particular significance, according to the Employer, is the fact that the payroll system is not designed to distinguish between fair share deductions and voluntary check off by Union members. Accordingly, the Employer argues that it should not be required to assume that an employe who transfers into another bargaining unit wishes dual deductions, one to his former union and another to his present union. To find for the Union could subject the Employer to an employe suit for violation of Sec. 111.84(1)(f). In any event, State of Wisconsin (DILHR), 11979-B (11/75) supports the Employer's position that the instant facts do not support a finding of a violation of Sec. 111.84(1)(f).

Looking to the allegations of Sec. 111.84(1)(a), (b) and (c), the Employer argues that same are unfounded. Indeed, the Employer relies on

the following two cases: Lodge 2424, International Association of Machinists vs. United States, 564 F. 2d 66 (1977); and 3480th Air Base Group, and American Federation of Government Employees Local 1816, (GEER 880: 11, 12). In Machinists, the Court of Claims there stated that a dues check off is intended to "guarantee payment only of the dues to which the Union is entitled. We cannot read it to mean the Union is entitled to retain dues which were improperly deducted from the employe's wages and mistakenly paid to the Union."

Finally, the Employer asserts that the contract, paragraph 14 of Sec. 2 Dues Deduction, holds it harmless from any liability it may incur.

DISCUSSION:

Did the Employer's Conduct Violate Section 111.84(1)(a)?

In State of Wisconsin (DIHLR), 11979-B (11/75), the Commission found that the instant Employer violated 111.84(1)(a) when it incorrectly advized employes in a letter as to when the employes could timely revoke their dues check off. The Employer's letter indicated to employes that they could terminate dues deductions after the expiration of the collective bargaining agreement. Said letter ignored the commitment contained in the dues check off authorization cards which had been executed by the employes as well as the employes' statutory right to have dues deducted on behalf of a labor organization, regardless of the existence of a collective bargaining agreement. 1/ The Commission concluded that the misleading nature of said letter encouraged employes to terminate their commitment to dues check off contrary to their individual dues check off authorization cards which had been submitted to the Employer. Hence, the Employer was found to have violated Sec. 111.84(1)(a).

1/ Sec. 20.921 provides:

"20.921 Deductions from salaries. (1) OPTIONAL DEDUCTIONS. (a) Any state officer or employe may request in writing through the state agency in which he is employed that a specified part of his salary be deducted and paid by the state to a payee designated in such request for any of the following purposes:

. . .

2. Payment of dues to employe organizations.

. . .

4. (b) The request shall be made to the state agency in such form and manner and contain such directions and information as is prescribed by each state agency. The request may be withdrawn or the amount paid to the payee may be changed by notifying the state agency to that effect, but no such withdrawal or change shall affect a payroll certification already prepared. However, time limits for withdrawal of payment of dues to employe organizations shall be as provided under s. 111.84(1)(f)."

Sec. 111.84(1)(f) provides:

1. It is an unfair labor practice for an employer individually or in concert with others:

. . .

(f) To deduct labor organization dues from an employe's earnings, unless the state employer has been presented with an individual order therefore, signed by the state employe personally, and terminable by at least the end of any year of its life or earlier by the state employe giving at least thirty but not more than one hundred twenty days written notice of such termination to the state employer and to the representative organization, except where there is a fair share agreement in effect. The employer shall give notice to the Union of receipt of such notice of termination.

In the instant case, as to the twenty-three employes whose deductions were withheld, the Examiner concludes that the Employer's conduct constituted egregious interference with employes' rights to have their concerted activities supported by contributions to their authorized labor representative. The Employer's conduct herein was obviously more serious than the conduct found to be prohibited in State of Wisconsin (DILHR) supra. Unlike the facts in DIHLR, here the Employer's conduct was intentional. Also, these employes were not a party to the dispute. Moreover, the Employer has ignored the fact that the monies withheld belonged to the employes! Whether the monies were to be deducted from these employes' paychecks pursuant to a dues authorization card or a fair share provision is of no significance since it is the employe's right, either an individual right per the dues authorization card or a collective right per a majority vote in a fair share referendum, to direct the Employer thereafter to remit monies to their labor representatove. The Employer's role is merely that of a conduit. For the Employer to intercept said monies as it did here, clearly interferes with employes' rights which are guaranteed in Sec. 111.82.

In short, the Employer had no legitimate basis for becoming involved in this dispute in the manner described herein. If there was a dispute, it was between the Union and the three employes (Beckwith, DuPont and Miller), who wanted a refund from the Union apparently after realizing that they had failed to properly notify the Union of their revocation of dues check off. Even if the Employer was sued by these employes, it was protected from liability under para. 14, Sec. 2 (Indemnification Clause) of the parties agreement. Therefore, there was no need for the Employer to take the action herein.

Likewise, the Employer's conduct must be found to have violated Sec. 111.84(1)(a) as to it's conduct toward the three previously mentioned employes. As was held in State of Wisconsin (DILHR), supra., the Employer's instant conduct permitted employes to terminate their commitment to check off dues contrary to their individual dues check off authorization cards which had been submitted to the employer and were in full force and effect at all material times.

Moreover, persuasive policy considerations exist for refusing to sanction the Employer's conduct with respect to these three employes. For example, an employe may desire to continue dues deductions to his former labor union. If said employe should later become disenchanted with his former union, he could simply tell the Employer that he forgot to terminate same and seek recoupment of the amount previously paid. Having the Employer act as such a "collection agency" would have an obviously deleterious impact on the parties labor relations. To avoid such instances, the statutes, as well as the individual authorization card, require the employe to timely notify the Union and the Employer in writing of such revocation.

The cases cited by the Employer in it's brief are distinquishable from the instant case on the basis of the facts and the applicable law. Those cases involved applicable Federal Personnel Rules, Federal Civil Service Commission Regulations and Executive Order 11491. Said regulations contain specific provisions which require that dues check off be terminated on behalf of an employe when said individual is removed from the bargaining unit. Hence, the law is substantially different in the federal sector. Also, the contracts in each of the cited cases required a termination of check off for employes who had left the bargaing unit; and in Machinists, supra., the courts specifically found that the Union was obligated, by contract, to notify the Employer of an employe's change in status. That is not the factual setting here. Hence, the case law cited by the Employer is not persuasive to the outcome of this case.

Did The Employer's Conduct Violate Sections 111.84(1)(b), (c) or (f)?

Looking to the other alleged violations, the undersigned concludes that the Union failed to establish a violation of either of said provisions.

Sec. 111.84(1)(b) makes it an unfair labor practice for the Employer

"To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it. . . .

The only words of this statement having relevance to this case are "dominate or interfere with the . . . administration" of the Union.

Here there is no evidence in the record to conclude that the Employer's offensive conduct threatened the independence of the Union as an entity devoted to the employes' interests as opposed to the Employer's interest. 2/

In order for the Union to establish a violation of Sec. 111.84(1)(c), it must prove, inter alia, that the Employer by it's agent, was hostile toward union activities. No evidence exists for concluding that the Employer was motivated by union animous.

As stated in State of Wisconsin (DILHR), Sec. 111.84(1)(f) exists for the protection of employes. Said provision makes it unlawful for the Employer to deduct dues unless certain time periods for revocation are provided. Said provision does not make it an unfair labor practice to fail to deduct dues. Therefore, no violation of Sec. 111.84(1)(f) is found.

Remedy

The Union seeks a cease and desist order, reimbursement, attorney's fees, costs and punitive damages.

As to attorney's fees and costs, the Commission, in Madison Metropolitan School District, 16471-D (5/81), enunciated its policy with respect thereto. Relying on its decision in United Contractors, Inc., 12053-A, B, (7/74) the majority stated:

". . . In said decision the Commission set forth that it would not grant attorney's fees, except where the parties had agreed otherwise, because 'the goal of an expeditious adjudication of an award enforcement proceeding could be significantly hindered by the addition of potential controversial issues concerning what costs and disbursements were actually incurred, which of those types of costs should be granted, what is a reasonable amount of each type of cost, what constitutes a frivolous defense, did the Respondent have justification for non-compliance, etc.'."

Although other persuasive policy considerations could be argued for granting attorney fees and costs in those limited number of cases involving willful misconduct and where the defenses are frivolous, the Commission has decided otherwise.

Policy considerations and legal authority militate against awarding punitive damages in the context of an administrative hearing.

Consequently the undersigned has determined that the order to cease and desist and provide reimbursement best effectuates the purposes of the State Employment Labor Relations Act.

Dated at Madison, Wisconsin this 24th day of August, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

2/ Unified School District No. 1 of Racine County, Wisconsin 15915-B (12/77).