STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WINTER JOINT SCHOOL DISTRICT NO. 1 Complainant, vs. NORTHWEST UNITED EDUCATORS, Respondent.	Case XXIII No. 24343 MP-965 Decision No. 16951-C
ROBERT HANUS, ROBERT J. LANGHAM and LLOYD D. WILLIAMS, Complainants, vs. NORTHWEST UNITED EDUCATORS, Respondent.	Case I No. 25238 MP-1047 Decision No. 18293-A

Appearances:

DeWitt, Sundby, Huggett & Schumacher, S.C., by Mr. Robert Hesslink, 121 South Pinckney Street, Madison, WI, 53703, on behalf of the School District.

Davis, Kuelthau, Vergeront, Stover & Leichtfuss, S.C., by Mr. David J. Vergeront, 250 East Wisconsin Avenue, Milwaukee, WI, 53202, and the National Right to Work Legal Defense Foundation, Inc., by Mr. Hugh L. Reilly, Staff Attorney, 8001 Braddock Road, Springfield, VA, 22160, on behalf of the individually named Complainants noted above.

Wisconsin Education Association Council, by Mr. Bruce Meredith, Staff Counsel, 101 West Beltline Highway, P.O. Box 8003, Madison, WI, 53708, on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMEDEO GRECO, HEARING EXAMINER: Winter Joint School District No. 1, herein the District, on March 28, 1979, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that Northwest United Educators, herein NUE, had committed certain prohibited practices under the Municipal Employment Relations Act, herein MERA. On April 5, 1979, the Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. Thereafter, three teachers employed by the District, Robert Hanus, Robert J. Langham and Lloyd G. Williams, - through their representative the National Right to Work Legal Defense Foundation, Inc. - moved to intervene in said proceeding. The Examiner on July 2, 1979, denied said motion. Following an appeal of that denial, the Commission on September 24, 1979, also denied the motion to intervene. The three individuals named above thereafter appealed that denial to the Circuit Court for Sawyer County. On October 22, 1979 they also filed a prohibited practice complaint with the Commission wherein they alleged the NUE had committed certain prohibited practices under MERA. Pursuant to the agreement of all the parties, the two complaints were subsequently consolidated and the appeal to the Circuit Court was withdrawn. The parties also agreed that no evidentiary hearing would be needed for resolution of some of the issues herein and that said issues could be decided upon the basis of a August 3, 1979, factual stipulation

between the District and the NUE. 1/ The parties thereafter filed briefs and Respondent filed a reply brief. Having reviewed the entire record, the Examiner hereby issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The District, a municipal employer, operates a school system in the Winter, Wisconsin, area.

2. The NUE, a labor organization, is the certifed collective bargaining representative for certain teaching and other personnel employed by the District. At all times material herein, Executive Director Alan Manson has served as the collective bargaining representative for the NUE and, as such, has acted as its agent.

3. Robert Hanus, Robert J. Langham and Lloyd Williams, herein Hanus et al, at all times material herein have been employed as teachers by the District in the above described unit.

4. In 1979, the District and the NUE were engaged in negotiations for a successor collective bargaining contract. The then existing contract did not contain a fair share provision. On February 16, 1979, the NUE proposed the inclusion of a fair share agreement for a successor contract. Although the NUE then indicated that its fair share fee initially to be deducted would be equal to the full dues paid by NUE members, it did not elaborate upon the exact terms of its fair share proposal. The NUE then indicated that said terms would be provided at the next bargaining session. On March 12, 1979, the NUE gave the District the following fair share proposal:

> 7. Article XIII, B - Replace with: Fair Share Agreement
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> (1) NUE, as the exclusive representative of all the employees in the bargaining unit, will represent all such employees, NUE and non-NUE, 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 NUE. No employee shall be required to join the NUE but membership in NUE shall be made available to all employees who apply consistent with the NUE constitution and bylaws. No employee shall be denied NUE membership because of race, creed, or sex.
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> (2) 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 NUE, as provided in Section 111.70(1)(h), Wis. Stats., and as certified to the District by NUE, and pay said amount to the treasurer of NUE on or before the end of the month following the month in which such deduction

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1/ Said stipulation provided that the stipulated facts were for the purpose of deciding only the issues raised at this stage of the proceedings. As a result, the Findings of Fact herein are made only for the limited purpose of resolving those issues.

was made. The District will provide NUE with a list of employees from whom deductions are made with each monthly remittance to NUE. For purposes of this Article, exempt employees are those employees who are members of NUE and whose dues are paid to NUE in some other manner authorized by NUE. NUE 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. NUE shall notify the District of the amount certified by NUE to be the fair share of the costs of representation by NUE, referred to above, two weeks prior to any required fair share deduction.

(3) NUE 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. NUE 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.

(4) NUE shall provide employees who are not members of NUE with an internal mechanism within NUE which will allow those employees to challenge the fair share amount certified by NUE as the cost of representation and to receive, where appropriate, a rebate of any monies determined to have been improperly collected by NUE.

(5) NUE and the Wisconsin Education Association Council do hereby indemnity and shall save the Winter School District harmless against any and all 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 with the provisions of this Article, and in reliance on any list or 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 NUE and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense.

5. Thereafter, the NUE in negotiations continued to insist upon such a fair share proposal.

6. Earlier, by letter dated February 21, 1979, Robert M. Hesslink, the District's negotiator and lawyer, advised Manson:

Dear Mr. Manson:

At the bargaining session on February 16, 1979, you orally proposed that Winter Schools and Northwest United Educators

amend their collective bargaining agreement to include a fair share proposal. However, in order to properly evaluate this request, we will need additional information on how Association dues are utilized. As you know, the Wisconsin Supreme Court in Browne v. Milwaukee Board of School Directors, 69 Wis. 2d 169, 230 N.W. 2d 704 (1975) held that a fair share provision is not, per se, illegal but that it is not permissible to compel employees to contribute to union activities which are not directly related to the collective bargaining process. Therefore, in order to allow us to ascertain the portion of the NUE dues which are directly attributable to the collective bargaining process we will need the following information:

1) The total amount of dues collected by NUE from its members who are employed within Winter School District for the school years 1976-77 and 1977-78, as well as the projected dues for the school year 1978-79.

2) The total amount of dues either collected or projected to be collected annually by NUE from all of its members or through other fair share provisions for the years indicated in sub. 1 above;

3) The amount of such fair share or dues collections which have been or will be forwarded to the Wisconsin Education Association and/or the National Education Association;

4) All subsidies, either in cash or in kind, received by NUE from the Wisconsin Education Association and/or the National Education Association for the years indicated in sub. 1 above;

5) The amount and percentage of said in kind or in cash subsidies received from the Wisconsin Education Association or National Education Association which are directly attributable to the collective bargaining process in the Winter School District and the administration of the Winter School District Collective Bargaining Agreement;

6) The costs or projected costs of collective bargaining and contract administration within the Winter School District for the school years indicated in sub. 1 above;

7) Your most recently projected costs for collective bargaining and contract administration for Winter School District for the school years 1979-80, 1980-81, and 1981-82; and

8) The financial statements of NUE, WEA, and NEA for the years indicated in sub. 1 above and any proposed financial statements for these organizations for the years 1979-80, 1980-81, and 1981-82.

I would appreciate having this information available to the District at our next regularly scheduled bargaining session. If you have any further questions or comments concerning this matter, please do not hesitate to contact me.

7. The District's request for such information was made in subjective good faith.

8. The NUE did not supply the District with the above requested information. The NUE did, however, inform the District of the approximate dollar amount which it believed would be certified as the amount initially to be deducted as a non-members fair share deduction for the up coming school year.

9. On June 11, 1979, the NUE filed a petition for mediation-arbitration with the Commission. The Commission thereafter certified that the parties were at impasse and ordered that they proceed to interest mediation-arbitration pursuant to Section 111.70(4)(cm)6 Stats. The NUE's final offer at that time contained a fair share proposal substantially similar to the one noted in paragraph four (4) above. The District's final offer on this issue stated:

"Article XIII - NUE Security"

A. Effective upon ratification of this Agreement, those employees who have authorized the Board to withhold NUE dues or the proportional costs of any representation from their pay during the term of this Agreement, and all employees hired after the effective date of this Agreement, shall be required to pay their proportionate share of the cost of representation by NUE. Such costs shall be withheld from the pay of affected employees by the Board and forwarded to NUE within thirty (30) days after such deduction is made.

B. NUE recognizes that the Board may only lawfully deduct those amounts which are related to the cost of negotiation and contract administration for this bargaining unit. Therefore, within fifteen (15) days after ratification of this agreement and within fifteen (15) days after the beginning of each school year within the term of this agreement, NUE will provide to the Board its actual itemized costs of negotiation and contract administration during the previous school year and an itemized budget of anticipated costs for that school year. These itemized costs need not be in such detail as to require disclosure of confidential union information. The Board will then compute the proportionate cost of representation by NUE based upon the reasonable budgeted costs, any unexpended or overexpended funds deducted during the previous school year, and the number of affected employees contributing to the costs of representation. Any adjustments in the amount of the deduction for individual employees resulting from changes in the number of affected employees shall be done annually at the time of establishing the proper deduction for the subsequent year.

C. The parties recognize that all complaints relating to the amount of costs withheld pursuant to this article and the uses to which these funds are actaully put by NUE are issues between the individual employees and NUE and are not subject to the grievance procedure specified in this Agreement. NUE shall indemnify and save the Board harmless against any and all claims, demands, suits or other forms of liability which may arise out of any action taken by the Board under this section for the purpose of complying with the provisions of this article. In any such action, NUE shall either undertake the defense of the action or shall reimburse the Board for the reasonable attorney's fees incurred in the defense thereof.

10. On July 31, 1980 mediator-arbitrator June Miller Weisberger issued her Award in said matter and ruled that NUE's final offer, including its fair share proposal, be incorporated into a written collective bargaining agreement.

11. The NUE has fair share agreements with other municipal employers covering different collective bargaining units. In those units, the NUE spends in excess of eight (8) percent of the dues revenues collected for purposes which do not constitute "collective bargaining" under applicable Wisconsin law and which do not constitute "collective bargaining, contract administration, and grievance adjustment" under Abood v. Detroit Board of Education, 431 11 U.S. 209, 95 LRRM 2411 (1977).

12. The NUE and the Wisconsin Education Association Council, herein WEAC, have an internal rebate procedure for those employes who seek to contest the amount of fair share dues levied on them. Said rebate procedure provides:

NON-MEMBER FAIR SHARE REBATE PROCEDURE

1. GENERAL

In addition to the rights provided in Section 3-B of the Bylaws of the Wisconsin Education Association Council (WEAC), any non-member covered by a fair share agreement may file a written notification with the local collective bargaining representative that the non-member objects to the expenditure of any portion of his or her fair share payment for any purpose not permitted by Wisconsin Statute 111.70. All notification of objections shall contain the following information:

A. The Name and address of the non-member.

B. The position and school district in which the non-member is employed;

C. The name of the WEAC affiliate which is the collective bargaining representative for the bargaining unit in question;

D. The amount of the deduction required of fair share persons; and

E. The reasons for the objection(s) and the organization(s) from which a rebate is requested (local, UniServ, WEAC, NEA).

2. INITIAL PROCESSING

Upon request, the local association shall assist the individual in setting forth his or her objection(s). The local association shall forward the notification of objection(s) to the UniServ unit (or to WEAC, if the local is not a UniServ unit).

All specific and general objections must be filed within the first sixty days of each membership year (September 1 - October 30) or within 60 days after the non-member becomes covered by a fair share agreement. However, if a person objects to a specific expenditure, made at other times, he/she may file a specific request for rebate within 60 days of the expenditure. The Union may waive the above time limitations if the person can demonstrate compelling reasons for the delay in filing.

Upon receipt of the rebate request, the WEAC will promptly evaluate the non-member's request for rebate and notify the non-member of the percentage of the non-member's fair share deduction which is budgeted to be spent for purposes which may not be permitted by Wisconsin Statute 111.70. Where applicable, this percentage shall be broken down by the bargaining unit's composite affiliations: local association, UniServ Council, WEAC/NEA. Based on these calculations, the WEAC will determine an overall sum which shall be rebated to the individual.

3. APPEALS PANEL

Upon receipt of this determination, the individual may either accept the rebate as a full settlement of the non-member's objection or may appeal the initial determination. If the individual accepts the determination, the money shall be immediately transmitted to the individual. If the individual does not accept the determination, the individual may request a hearing before a panel comprised of at least three members appointed by the President of WEAC and subject to the approval of the Board of Directors. All such requests shall be filed with the President of WEAC, copy furnished to the local association, within thirty days after receipt of the initial determination of the estimated potentially rebatable sum. If a hearing is requested, the individual may appear before the panel and present any evidence as to why the proposed figure is unacceptable. Upon request for a hearing by the panel, the Union shall escrow a portion of the non-member's fair share deduction which is at least equal to the amount initially determined to be potentially rebatable. This amount shall remain in escrow until the dispute is resolved. After hearing the objecting member's presentation, the panel may make adjustment to the initial determination of the amount to be rebated.

4. WEAC BOARD OF DIRECTORS REVIEW

If the non-member is still not satisfied, the individual may appeal to the full WEAC Board of Directors. Such an appeal must be filed with the President of WEAC within thirty (30) days after receipt of the panel's determination. Unless requested by the objecting non-member, the Board of Directors shall not act on the non-member's appeal until all expenditures for the current fiscal year are completed. At such time the Board of Directors shall inform the objecting non-member as to the amount of his or her fair share deduction which is properly rebatable based on actual expenditures.

5. ARBITRATION

Should the non-member still be dissatisfied with the amount of proposed rebate, the non-member may request the dispute be submitted

to binding arbitration whereby an arbitrator is selected in the order listed below.

A. An arbitrator selected from a list of five arbitrators supplied by the American Arbitration Association (AAA). Selection from the list shall be by the parties striking names alternately from the list, with the appellant striking a name first.

The decision of the arbitrator shall be final and binding, however, the arbitrator shall not have authority to modify any WEAC constitutional provision or bylaw and shall issue his/her decision in accordance with applicable law. (9/78)

13. The instant record does not reveal what costs the NUE will incur on collective bargaining and contract administration matters during the period that its fair share proposal will be in effect.

14. By letter dated September 24, 1980, Mr. Hesslink, on behalf of the District, advised the Examiner:

> This is in response to your letter of September 5, 1980 received by our office on September 8, 1980.
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> As indicated by Mr. Vergeront in his September 8, 1980 letter, we have received an award from Mediator/Arbitrator in the Winter Schools case. A copy of that award, and subsequent correspondence is enclosed for your convenience.
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> Prior to the entry of the award, we did not intend to file a reply brief, as we did not feel one was necessary. However, we do feel that the decision in the mediation/arbitration case is relevant on the question of "ripeness" raised by the union. Specially, we feel that an arbitrator's award ordering the district to implement full fair share, based upon the amount of union dues, certainly makes the issues presented in this case ripe for adjudication. Nothing further is left to future contigencies.
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> Thank you for your consideration in this matter.

15. By letter dated October 1, 1980, Mr. Meredith, on behalf of the NUE, advised the Examiner:

> This is in response to the letter of Mr. Robert Hesslink dated September 24, 1980.
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> In his letter, Mr. Hesslink states "However, we do feel that the decision in the mediation/arbitration case is relevant on the question of 'ripeness' raised by the union. Specifically, we feel that an arbitrator's award ordering the district to implement full fair share, based upon the amount of union dues, certainly makes the issues presented in this case ripe for adjudication. . . "
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> Respondent, Northwest United Educators, is unable to respond to this argument. Specifically, Respondent needs to know whether both the district and the individual intervenors are dropping their allegations in their respective complaints which challenged the NUE fair share proposal. So long as the Complainant and the Complainant-Intervenors wish to seek adjudication of their initial claims and seek a remedy for the

violation of sec. 111.70 as alleged in their prohibited practice complaints, then clearly the matter is not moot and Respondent's objections based on standing and ripeness remain the same.

If Complainant and Complainant-Intervenors wish to drop certain of their allegations, Respondent may well take a different position on the issue of ripeness.

Based upon the foregoing Findings of Fact, the Examiner makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. Since an employer does not commit a prohibited practice when it in good faith administers a contractual fair share provision, a union, absent extraordinary circumstances, is not required to turn over its financial records to an employer for the purpose of ascertaining the correct costs of collective bargaining and contract administration when the contract has a hold harmless clause.

2. NUE's refusal during collective bargaining negotiations to provide the District with the information requested in Paragraph 6 above was not violative of Sections 111.70(3)(b)2 and 3, nor any other provision, of MERA.

3. NUE's insistance to the point of impasse upon the fair share proposal herein was not violative of Sections 111.70(3)(b)1, 2, and 3, nor any other provision, of MERA.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner hereby issues the following Order.

ORDER

IT IS ORDERED that the complaint allegations be and the same are, dismissed in their entirety.

Dated at Madison, Wisconsin this 9th day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

All the parties have stipulated that the issues to be resolved herein are as follows:

(1) Is a union under a general obligation to provide information to a municipal employer, upon request, concerning the costs of collective bargaining and expected expenditures of fair share funds for collective bargaining and other purposes when the union proposes the inclusion of the fair share agreement in a collective bargaining agreement?

(2) Did Northwest United Educators violate MERA in this case by refusing to provide information requested by Winter Joint School District No. 1?

(a) If the union is not under a general obligation to provide the information in (1) above, did the particular facts of this case require that it do so? Or,

(b) If the union is under a general obligation to provide the information in (1) above, did the particular facts of this case excuse it from doing so?

(3) Did Northwest United Educators violate MERA by proposing the mandatory collection of "fair share" fees from non-member employes of the Winter School District, given the nature of Northwest United Educators' use or projected use of membership dues from its members at Winter or its expenditure or projected expenditure of fair share monies in other districts or at Winter Joint School District, No. 1?

In so stipulating, the parties agreed that NUE reserved the right to argue that resolution of this latter issue is legally inappropriate. They also agreed upon a bifurcated procedure under which the issues herein would be resolved without an evidentiary hearing, and that a subsequent hearing would be held only if any of the aforementioned issues are answered in the affirmative. Accordingly, Mr. Meredith, on behalf of the NUE, has filed a Motion for Summary Judgement which seeks dismissal of the complaints herein upon the basis of the stipulated facts.

The District's complaint alleges that NUE committed prohibited practices by: (1) refusing to supply the District with requested information pertaining to NUE's expenditures; and (2) spending monies which are used for political purposes and other purposes not directly related to the costs of collective bargaining or contract administration as provided for under Section 111.70(1)(d) Stats. The complaint filed by Hanus et. al. claims that NUE acted unlawfully by insisting that the District enter into and enforce a fair share agreement "which on its face, and is intended to be applied" contravenes Sections 111.70(d) and (h) Stats. and is therefore violative of Sections 111.70(3)(b)(1) and (2). 2/ In its defense, NUE contends that it has not committed any prohibited practices, that the District and Hanus et. al. lack standing to litigate some of the issues herein, that the issues are not ripe for adjudication, and that Section 111.70(1)(d) Stats. permits the collection of fair share fees which exceed the cost of collective bargaining and contract administration.

In resolving these issues, it is first necessary to point out what the cases herein do not involve. Here, both complaints center on NUE's

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2/ The brief filed by Hanus et. al. states that they "intend to preserve but not here argue their claims under the United States Constitution".

actions during the course of collective bargaining negotiations. It is unnecessary, therefore, to decide the broader parameters of a union's obligations on these issues once a fair share agreement has been actually implemented. For, on this latter point, both the Wisconsin Supreme Court 3/ and the Commission 4/ have already ruled upon a union's obligations during the time that a fair share agreement is in effect. The issues raised in these cases involve a different time frame - i.e. that period before a contract has been agreed to or implemented.

In this connection, and as noted in Finding of Fact No. 14 above, Mr. Hesslink by letter dated September 24, 1980, supplied the Examiner with a copy of the Arbitration Award rendered by Arbitrator Weisberger, wherein she selected NUE's final offer, including its fair share proposal. Hesslink there stated that said award "makes the issues presented in this case ripe for adjudication." In reply, and as noted in Finding of Fact No. 15 above, Mr. Meredith by letter dated October 1, 1980, advised the Examiner and the parties that the NUE wanted to know whether the complainants herein were dropping their complaint allegations which challenged NUE's fair share proposal. Complainants thereafter never responded to said letter and they similarly made no effort to amend their complaint allegations. As a result, it would be totally improper for the Commission to reach out and decide issues which may arise once a contract has been implemented, as such issues have not been alleged in the complaints herein.

The second preliminary point to be noted is that the Commission has not previously ruled on the precise issues herein. As a result, these issues are ones of first impression.

Thirdly, it should be acknowledged that the resolution of union security issues, particularly in the public sector, at times is an extremely difficult task since the resolution of such issues involves the clash of strongly competing considerations. On the one hand, unions have a justifiable interest in guarding their own internal union affairs, particularly from the prying eyes of those who may be antithetical to the union movement. At the same time, employes under a fair share arrangement are entitled to know how their fair share dues are being spent. Here, for example, it is the teachers who trek off to school each morning, it is they who expend their energies, and it is they who must utilize their abilities throughout the day in order to earn a living. In short, it is their money we are talking about. As a result, they have a clear right to know how each penny of their money is being spent, along with a concomitant right to object when their money is being spent for impermissable purposes. Lastly, employers are concerned with fair share proposals because it is they who may be caught in the middle of any conflict which may develope between a union and its employes under such an arrangement.

As a result, the clash of these considerations can take on constitutional overtones, overtones which have been noted by both the United States Supreme Court 5/ and the Wisconsin Supreme Court. 6/ In such cases, it is difficult to draw an exact line between lawful and unlawful actions, a point which was expressly noted by the court in Abood, supra, when it noted:

> "There will, of course, be difficult problems in drawing lines between collective bargaining activities, for

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3/ Browne V. Milwaukee Board of School Directors, 83 Wis. 316, (1978), herein Browne I.

4/ Browne et. al., Milwaukee Board of School Directors, Decision No. 18408, (2/81) herein Browne II.

5/ Abood, supra.

6/ Browne I, supra.

> which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited. The Court held in Street, as a matter of statutory construction, that a similar line must be drawn under the Railway Labor Act, but in the public sector the line may be somewhat hazier. The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.

It is because of this difficult line drawing that the law in this area has been slow in developing. Indeed, Browne, II is already five years old without any imminent end yet in sight. It is fair to conclude, therefore, that the law will continue to be in a state of flux as new issues relating to fair share expenditures are raised in the future.

The last general observation is that fair share arrangements by their very nature involve three seperate entities - an employer, a union, and employes. It is this three way relationship which distinguishes fair share arrangements from other mandatory subjects of bargaining affecting wages, hours, and conditions of employment, as these other subjects generally only involve the employer's obligation to its employes. 7/ In this connection, George Orwell's famous observation in Animal Farm is apropos wherein he wrote in effect that "all pigs are equal, but some pigs are more equal than others." Such an observation could well describe the distinctive nature of union security provisions vis-a-vis other mandatory subjects of bargaining.

Indeed, the Wisconsin Legislature itself has noted the distinctive feature of union security provisions. In the Wisconsin Employment Peace Act (WEPA), for example, Section 111.06(1)(c)1 provides that parties can enter into all union agreements only if employes have voted affirmatively in favor of such a proposal in a referendum conducted by the Commission, except when the union has been certified by either the Commission or the National Labor Relations Board (NLRB). WEPA does not attach any similar such requirement prior to the granting of any other mandatory subject of bargaining. By the same token, the State Employment Labor Relations Act (SELRA), states in Section 111.81(6) that a fair share agreement shall take effect sixty (60) days after the Commission has certified that a referendum vote favored the fair share agreement. As a result, once the employes vote in favor of such an agreement, the employer must grant it. Said subject is therefore not a subject of bargaining between the parties, except for its date of implementation. SELRA does not require that the employer automatically grant any other mandatory subject of bargaining. In addition, Section 111.70(2) of MERA specifies that a fair share agreement can be terminated upon a showing that "at least 30% of the employes in the collective bargaining unit desire that the fair-share agreement shall be terminated." MERA does not provide for the similar discontinuation of any other mandatory subject of bargaining. The common thread which is interwoven between the fabric of three labor statutes, then, is a clear legislative intent to treat union security provisions differently from other bargainable subjects.

7/ Fair share provisions of course do constitute mandatory subject of bargaining. Town of Allouez (Fire Dept.) (15022-B) 1/77.

With the foregoing general principles in mind, let us now turn to the specific issues at hand.

The District asserts that it needed the information requested in Finding of Fact No. 6 because, in its words, the District wanted to "appropriately evaluate whether or not the fair share proposal was legal and acceptable to us." In support of this position, the District points out that employers under the National Labor Relations Act as amended, herein NLRA, are required to supply unions with relevant information on bargaining issues. 8/ Going on, the District asserts that a union's duty under the NLRA to provide information to an employer is parallel to an employer's duty to a union, citing Printing and Graphic Communications Union, 97 LRRM 1047 (1977) and Tool and Die Makes Lodge No. 78, 92 LRRM 1202 (1976) for this proposition.

There are two major difficulties in accepting the District's position.

The first is that the District has mischaracterized the state of the law under the NLRA. For, while an employer is normally required to supply a union with requested information, that duty is not an absolute one. Thus, an employer in fact is free to reject demands for information when: (1) a union has failed to demonstrate its relevance; 9/ a union seeks to examine an employer's financial books in the absence of any inability to pay claim by the employer; 10/ (3) a union seeks information pertaining to non-unit employes; 11/ and (4) a union seeks the statements of propsective witnesses in an arbitration hearing. 12/ By the same token, although a union is under some obligation to provide some information to an employer, the National Labor Relations Board, herein NLRB, has not ruled in the cases cited by the District that a union's duty is identical to the duty imposed on employers. Thus, in Tool and Die Makers, supra, the Board majority expressly noted:

> "We may assume arguendo, without deciding that a union's duty to furnish information relevant to the bargaining process is parallel to that of an employer. [Emphasis added, footnote omitted].

The Board in Graphic Communications Union, supra, reiterated that position when it quoted the above phrase for the proposition that it still was not deciding that issue.

In any event, while the Commission is of course interested in how the NLRB has ruled on this issue, the fact remains that the Commission must determine for itself what the law should be in this general area. In this connection, the Commission has ruled that:

> "Intentwined with the duty to bargain in good faith is a duty on the part of an Employer to supply a labor organization representing employes, upon request, with sufficient information to enable the labor organization to understand

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8/ White Furniture Co., 63 LRRM 1277 (1966), Truitt Manufacturing Company, 351 U.S. 149, 38 LRRM 2042 (1956), and Metlox Mfg. Co., 59 LRRM 1657 (1965).

9/ Glazers Wholesale Drug Co., Inc., 211 NLRB 1063, and The Little Rock Downtowner, Inc. 145 NLRB 1286.

10/ Precision Casting Co., 233 NLRB No. 35.

11/ NLRB v. Western Electric Inc., 559 F. 2d 1131 (C.A. 8).

12/ Anheuser Busch, Inc., 237 NLRB No. 146.

and intelligently discuss issues raised in bargaining. . . . Information requested by a labor organization must be relevant and reasonably necessary to its dealings in its capacity as the representative of the employes." 13/

Applying this principle here, we come to the second and most important flaw in the District's arguement - its total failure to establish how the requested information will aid it in its negotiations with the NUE. Instead, the District offers only the conclusionary claim that it needs such information to protect it from any civil liability arising under Monell v. Department of Social Services of the City of New York, 436 U.A. 658, 98 S. Ct. 2018, (1978). In addition, the District indicates that unless it receives such information, it can be found guilty of committing a prohbited practice if it deducts fair share fees which exceed the costs of contract administration and collective bargaining.

In making this argument, the District does not explain how, in the face of a hold harmless clause, it can be subject to any money damages. For, as noted in Finding of Fact No. 4 above, NUE's fair share proposal specifically provided:

> C. The parties recognize that all complaints relating to the amount of costs withheld pursuant to this article and the uses to which these funds are actually put by NUE are issues between the individual employees and NUE and are not subject to the grievance procedure specified in this Agreement. NUE shall indemnify and save the Board harmless against any and all claims, demands, suits or other form of liability which may arise out of any action taken by the Board under this section for the purpose of complying with the provisions of this article. In any such action, NUE shall either undertake the defense of the action or shall reinburse the Board for the reasonable attorney's fees incurred in the defense thereof.

In light of that language, there is no question but that the District is absolved of any financial responsibility under the fair share proposal herein. Indeed, the District itself acknowledges the importance of such a provision, since its very own fair share proposal, which is contained in Finding of Fact No. 9, has a hold harmless clause which is nearly identical to the very one proposed by NUE. Perhaps recognizing that such a hold harmless clause renders Monell, supra, totally inapposite, the District's brief is completely silent as how it can be subject to any financial liability under such a provision.

The only other possible liability which can be inflicted on the District is to hold that an employer commits a prohibited practice by agreeing to a fair share fee which exceeds the costs spelled out in Section 111.70(1)(a) and 111.70(2) Stats. On this point, it is true that the Court in Browne I, noted in footnote 9 that:

> "Moreover, we interpret the Wisconsin Statutes as providing that it is an unfair labor practice [sic] to require a municipal employee to pay for anything more than their proportionate share of the cost of collective bargaining and contract administration. Sections 111.70(1)(h), 111.70(2), 111.70(3)(a)1, Stats., 1975."

13/ Sheboygan Education Association v. Board of Education Joint School District No. 1, City of Sheboygan, et. al., No. 11990-A (10/74); aff'd in relevant part No. 11990-B (1/76).

A carefull reading of Browne I, however, reveals that the narrow question of an employer's liability was not there in issue. As a result, footnote 9 is dicta. In such circumstances, it would be improper to exclusively reply on that dicta, absent a more reasoned and fuller explanation by the Court on this issue.

Indeed, it would be hard to believe that the Court would find that an employer commits a prohibited practice by merely performing the ministerial function of deducting fair share fees from an employe's paycheck. Thus, Section 111.70(1)(h) states in pertinent part that a fair share agreement:

> "shall contain 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."

There is nothing in either this language, or any other provision of MERA, which requires a municipal employer to become involved in determining the correct amount of a fair share fee. Rather, the clear import of Section 111.70(1)(h) is that a municipal employer should not concern itself with such matters and that, instead, it should accept at face value the correctness of the fee certified by a union.

These are fundamental policy considerations why a municipal employer is to serve only as a mere conduit in administering a fair share arrangement and why, as such, it cannot commit a prohibited practice when it performs that role. For, if one were to hold to the contrary, that in effect would mean that every single municipal employer throughout Wisconsin would be guilty of committing a prohibited practice if the fair share fees in effect between it and a union exceed by one penny the correct costs of collective bargaining and contract administration.

Such a ruling would simply cripple, if not destroy, collective bargaining throughout Wisconsin. For, in order to avoid such liability, every single such employer would either resist entering into a fair share arrangement and/or demand a union's financial records so that it can make its own independent determination on what the correct fair share fee should be. As noted in greater detail below, however, it is almost impossible in negotiations to pinpoint with mathematical precision the exact costs of such matters. As a result, employers would be required to ask the Commission and the courts to make such determinations for each and every collective bargaining unit. Bargaining, in the meanwhile, would come to a grinding halt pending resolution of such matters and such a flood of litigation would simply overwhelm the Commission and the courts. Moreover, if employers chose to avoid such protracted delays, which may well take years, by instead not entering into fair share agreements, employers then may well lose out in any mediation-arbitration proceedings which include the question of whether a fair share agreement should be included in the collective bargaining agreement. Furthermore, even if a mediator-arbitrator accepts a union's final offer which includes a fair share provision, an employer even then would commit a prohibited practice when it implemented a provision which exceeds by one penny the costs spelled out in Section 111.70(d)(1) Stats. Accordingly, an employer is faced with a Hobson's choice irrespective of which way it turns.

By the same token, it is not realistic to expect that such matters - which at times are only one step removed from the cutting edge of difficult constitutional law questions - can be resolved during collective bargaining negotiations. For, any such attempt would only serve to poison and pollute the collective bargaining atmosphere.

Here, for example, the parties are not arguing over principal; the parties here are arguing over principle. That is, the amount of money herein is relatively insignificant. We have only three teachers who oppose NUE's fair share proposal. If the difference between the NUE proposal exceeds the cost of collective bargaining and contract

administration by say, twenty dollars, we are only talking about a total of sixty dollars per year. It is unlikely that the parties herein have chosen to engage in extensive litigation merely because of such a small sum. Rather, it is apparent that they feel very strongly that there are fundamental principles involved - i.e. a union's right to have non-members pay their fair share of a union's legitimate costs vs. the wish of the individual teachers not to pay more than what is required under the law and an employer's desire to avoid any liability arising under a fair share proposal.

Anyone who has ever sat in on collective bargaining negotiations in Wisconsin knows that fair share matters frequently are the most hotly contested of all bargaining subjects because of such strongly held views. The resolution of such matters during negotiations, therefore, frequently is a most difficult task. If parties were suddenly required to bargain over the exact costs of collective bargaining and contract administration during negotiations, those negotiations would, as surely as night follows day, in many instances lead to rancor and bitterness.

Such a result would be contrary to the legislative goal of promoting the peaceful resolution of labor disputes. Thus, Section 111.70(6) of MERA specifies:

> (6) DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative of the employes' own choice. If such procedures fail, the parties should have available to them a fair, speedy, effective and, above all, peaceful procedure for settlement as provided in this subchapter.

In addition, such a result would be contrary to the legislature's determination in WEPA, MERA, and SELRA, that parties are free - subject to certain conditions - to enter into union security provisions. Indeed, and as noted above, Section 111.81(6) of SELRA states that, once it has been approved in a referendum, such a provision must be included in the collective bargaining contracts which the State of Wisconsin has with its own bargaining unit employes. In the face of such a strong legislative policy countenancing union security provisions, it simply makes no sense whatsoever to undermine, if not actually gut, that policy by holding that an employer commits a prohibited practice merely because a fair share fee may exceed the costs of collective bargaining and contract administration.

In this connection, Section 111.81(6) of SELRA goes on to provide that when the employer implements a fair share provision it:

> . . . shall be held harmless against any and all claims, demands, suits or other forms of liability which may arise . . .

No such language of cause exists in MERA. It is fair to ask, then, whether the legislature's failure to include such language in MERA reflected a determination on its part that municipal employes should be held liable when they implement a fair share provision. I think not.

Thus, this particular provision of SELRA was enacted in 1972, after MERA was passed in 1971. Since the legislature is the state employer - as reflected by the fact that it must approve any tentative state contracts under Section 111.92(1) of SELRA - it is reasonable to infer that the legislature included the hold harmless language above because it then realized that the state might be subject to liability in administering a fair share proposal. When it enacted MERA, on

the other hand, the legislature in all probability did not focus on this narrow issue. 14/

As a result of the foregoing, I conclude that the dicta in footnote 9 in Browne I, supra, is not dispositive and that, in fact, an employer does not commit a prohibitive practice when it in good faith agrees to a fair share fee which may exceed the costs of collective bargaining and contract administration.

Turning now to the requested information which is set forth in Finding No. 6, the District's request centers on: (1) NUE's past and projected expenditures on contract administration and collective bargaining, including information pertaining to other NUE locals; (2) financial statements from the NEA and WEAC for a three year period; and (3) any financial assistance given to the NUE by WEAC and/or the NEA.

Such a broad request for information is irrelevant to the question of what costs the NUE will incur for contract administration and collective bargaining for the duration of the contract under negotiation. For, it is immaterial what such costs-past, present, and future - are in other locals, as those costs may well vary from local to local. Similarly, it is immaterial to know what projected costs the Winter local will incur in future years, as such costs may be different from the costs incurred by the NUE in negotiating and policing this contract. The same goes for NUE's past costs in Winter, especially when it is remembered that NUE members in the past were not covered under any fair share arrangement and they were therefore free to expend their dues in any fashion they chose. By the same token, NUE's past financial relationship to WEAC and the NEA is not necessarily indicative of what that relationship will be during the time that this contract is in effect. Furthermore, since any assistance received by the NUE from WEAC and the NEA may be but only a small portion of NUE's income in negotiating and administering the Winter contract, such information need not be supplied because of its minor relevance. The only relevant information sought, therefore, is the District's request that it be advised as to the amount of the fair share dues charged during the contract's duration, information which the NUE has admittedly supplied.

In addition, the District is completely silent on what it would do with that mountain of information. The only possible relevancy of such information in negotiations would be to enable the District to ascertain what it thought the accurate costs of collective bargaining and contract administration would be in the Winter local.

But, how would the District perform such a feat? In Browne II, supra, the Commission ruled that the following activities were properly included in the costs of collective bargaining and contract administration:

(a) Gathering information in preparation for the negotiation of collective bargaining agreements;

14/ That would also explain why MERA has no provision similar to Section 111.93(3) of SELRA which provides that collective bargaining contracts supercede civil service and other applicable statutes relating to wages, hours and conditions of employment. The absence of any such similar provision in MERA does not mean that other applicable statutes automatically supercede MERA. To the contrary, the Supreme Court in Glendale Professional Policeman's Association vs. Glendale, 83 Wis. 2d 90 ruled that collective bargaining agreements should be harmonized with other applicable statues whenever possible. Here, in light of the strong legislative policy supporting union security provisions and collective bargaining, and in the absence of any express statutory language in MERA dictating a contrary result, there is no basis for finding that the absence of a hold harmless provision in MERA dictates that a municipal employer commits a prohibited practice when it administers a fair share provision.

(b) Gathering information from employes concerning collective bargaining positions;

(c) Negotiating collective bargaining agreements;

(d) Adjusting grievances pursuant to the provisions of collective bargaining agreements;

(e) Administration of ballot procedures on the ratification of negotiated agreements;

(f) The public advertising of positions on the negotiation of, or provisions in, collective bargaining agreements, as well as on matters relating to the representational interest in the collective bargaining process and contract administration;

(g) Purchasing books, reports, and advance sheets used in matters relating to the representational interest in the collective bargaining process and contract administration;

(h) Paying technicians in labor law, economics and other subjects for services used in matters relating to the representational interest in the collective bargaining process and contract administration;

(i) Organizing within the bargaining unit in which Complainants are employed;

(j) Organizing bargaining units in which Complainants are not employed;

(k) Seeking to gain representation rights in units not represented by Respondent Unions, including units where there is an existing designated representative.

(l) Defending Respondent Unions against efforts by other unions or organizing committees to gain representation rights in units represented by Respondent Unions;

(m) Proceedings regarding jurisdictional controversies under the AFL-CIO constitution;

(n) Seeking recognition as the exclusive representative of bargaining units in which Complainants are not employed;

(o) Serving as exclusive representative of bargaining units in which Complainants are not employed;

(p) Lobbying for collective bargaining legislation or regulations or to effect changes therein, or lobbying for legislation or regulations affecting wages, hours and working conditions of employes generally before Congress, state legislatures, and state and federal agencies;

(q) Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreements governing Complainants' employment, to the extent that such support and fees relate to the representational interest of unions in the collective bargaining process and contract administration;

(r) Membership meetings and conventions held, in part, to determine the positions of employes in Complainants' bargaining unit on provisions of collective bargaining agreements covering their employment or on grievance administration pursuant to the provisions thereof;

(s) Membership meetings and conventions held, in part, for the purposes relating to the representational interest in the collective bargaining process and contract administration;

(t) Publishing newspapers and newsletters which, in part, concern provisions of the collective bargaining agreement covering Complainants' employment, or grievance administration pursuant to its provisions;

(u) Publishing newspapers and newsletters which, in part, relate to activities which have been determined herein to constitute proper expenditures of fair-share deductions;

(v) Lawful impasse procedures to resolve disputes arising in collective bargaining and in the enforcement of collective bargaining agreements;

(w) The prosecution or defense of litigation or charges to enforce rights relating to concerted activity and collective bargaining, as well as collective bargaining agreements;

(x) Social and recreational activities, as well as payment for insurance, medical care, retirement, disability, death and related benefit plans for persons who receive same in compensation for services rendered in carrying out the representational interest in the collective bargaining process and contract administration; and

(y) Administrative activities allocable to each of the categories described in categories (a) through (x) above,

At the same time, the Commission held in Browne II, supra, that the following activities could not be included in such costs:

(a) Training in voter registration, get-out-the-vote, and campaign techniques;

(b) Supporting and contributing to charitable organizations, political organizations and candidates for public office, idealogical causes and international affairs;

(c) The public advertising on matters not related to the representational interest in the collective bargaining process and contract administration;

(d) Purchasing books, reports, and advance sheets utilized in matters not related to the representational interest in the collective bargaining process or contract administration;

(e) Paying technicians for services in matters not related to the representational interest in the collective bargaining process and contract administration;

(f) Lobbying for legislation or regulations, or to effect changes therein, not related to the representational interest in the collective bargaining process and contract administration, or with respect to matters not related generally to wages, hours and conditions of employment, before Congress, state legislatures and federal and state agencies;

(g) Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective

bargaining agreements governing the employment of the Complainants to the extent that such support and fees do not relate to the representational interest of Respondent Unions in collective bargaining and contract administration involving Complainants, or for activities of such other labor organizations which do not relate to matters involving otherwise proper expenditures of fair-share deductions;

(h) Membership meetings and conventions held, in part, with respect to matters which do not relate to activities which have been determined herein to relate to proper expenditures of fair-share deductions;

(i) Publishing newspapers and newsletters which, in part, do not relate to activities which have been determined herein to constitute proper expenditures of fair-share deductions;

(j) Unlawful strike activity and concomitants thereof, and the prosecution or defense of such activity, or on matters related thereto, and the prosecution or defense of activity not related to the representational interest in collective bargaining or contract administration;

(k) Social and recreational activities for members where such activities are not related to the representational interest in the collective bargaining process and contract administration;

(l) Payments for insurance, medical care, retirement, disability, death and related benefits to persons who do not receive same as compensation for services rendered in carrying out the representational interest in the collective bargaining process and contract administration; and

(m) Administrative activities allocable to each of the categories described in categories (a) through (l) immediately above;

In light of the above, it is clear that the resolution of what costs are proper under Section 111.70(d) Stats, is a most difficult task.

Here, the District requested the information in issue nearly one year before the Commission issued Browne II, supra. How, then, could the District determine which of the above expenditures were and were not covered under Section 111.70(d) Stats? Did the District plan on waiting a year before the Commission decided such issues? If not, how could it possibly have made the determinations made by the Commission? And, if it did plan on waiting for a year, what assurance is there that the District would have agreed that the Commission correctly ruled on the multitude of issues above? Furthermore, even if it did agree, what assurance is there that a reviewing court would agree with the Commission's decision? Lastly, even if, contrary to all rules of reason, the District somehow did correctly ascertain what expenditures were and were not proper, would the District not need yet another hearing to determine the precise costs of such expenditures, just as is the case in Browne II, supra? The District offers no answers to these questions.

Moreover, let us assume, for example, that the District ultimately decided that the correct amount for fair share dues was $180, instead of say $200 as requested by the NUE. Is it really reasonable to assume that the parties would be able to bargain over the correct figure to be levied, especially when it is remembered that the law in this area is uncertain and that this is such an emotional issue for many? Of course not. And, if the parties were unable to resolve this issue, is it really reasonable to assume that a mediator-arbitrator would be able to delve

into such a complex area of the law, one which literally requires the production of a multitude of financial documents and which requires that the costs of collective bargaining and contract administration be computed to the exact penny? Of course not.

Furthermore, even if the District did attempt to bargain over such a matter, it is impossible for the parties to know with mathematical precision what the costs of collective bargaining and contract administration would be during the duration of this contract. Here, it must be remembered the District requested information on February 21, 1979. The parties thereafter met in negotiations for an unspecified number of times and ultimately utilized the services of a mediator-arbitrator to resolve their contractual differences. The NUE on February 21, 1979, therefore obviously had no way of knowing how many more bargaining sessions would be needed and the costs of going through the mediation-arbitration process. How, then, could the District determine the costs of negotiating this contract when said negotiations were not yet completed? The District offers no answer to this fundamental question. Similarly, when the District requested said information, the parties obviously then had no idea of how much NUE would have to spend in administering this contract. Again, the District does not explain how it could determine what those costs would be.

In such circumstances, which show that the District has failed to establish that the information requested was relevant to collective bargaining negotiations, it must be concluded that the NUE did not act unlawfully when it refused to supply said information. This complaint allegation is therefore dismissed in its entirety.

I also find that, absent extraordinary circumstances which are not here present, a union under a hold harmless clause need not supply a municipal employer with its financial records which have been requested for the purpose of ascertaining the costs of collective bargaining and contract administration. For, as noted above, a municipal employer in such circumstances is not subject to any financial or other legal liability. That being so, the employer simply has no justifiable interest in seeking such sensitive information. As a result, any questions arising under a fair share provision are matters which only involve a union and those employes covered under such an arrangement. Indeed, the District itself has acknowledged that this is so when it proposed a fair share provision which expressly provided:

> "The parties recognize that all complaints relating to the amount of costs withheld pursuant to this article and the use to which these funds are actually put by NUE are issues between the individual employees and NUE . . ."

However, since the law in this area is still being developed, it is possible that a union under extraordinary circumstances may be required to provide such information when an employer can clearly prove that it needs such information. But, until and unless the case law dictates such a result, a union in the meanwhile need not supply such information.

Furthermore, the NUE correctly notes that Hanus et. al. lack standing to litigate this issue. For, the underlying premise of the duty to furnish information principle is that another party needs such information in order to effectuate its collective bargaining obligations. Here, even assuming arguendo that the requested information was relevant, it would be relevant only because the District needed that information to intelligently bargain over the fair share matter during its negotiations with the NUE. The individuals herein, on the other hand, were not engaged in such collective bargaining negotiations. As a result they lack standing to insist upon such information during negotiations. In this connection, Hanus et. al. claims that the NUE is required to turn over the requested information under Racine Education Ass'n v. Racine Unified School District, 82 F.R.D. 46 1, (E.D. Wis. 1979). There, the union sought the discharge of employes who declined to pay an agency fee. In response

to the employer's claim, the court ordered the union to produce certain financial data. That case, however, is not on point since the agency shop provision therein was already in effect and the union was relying on that provision in seeking the discharge of certain employes. Here, on the other hand, the complaint allegations center only on NUE's proposal - a proposal which may or may not be implemented. This is not to say, however, that employes lack standing to request some information under certain circumstances once they are covered under an existing fair share provision. To the contrary, both the Wisconsin Supreme Court and the Commission have acknowledged that employes do have that right. Browne I and II, supra.

Turning to the second major issue in the combined cases, the District and Hanus et. al. argue that NUE committed a prohibited practice by demanding up to the point of impasse upon the fair share proposal herein, one which allegedly exceeds the costs of collective bargaining and contract administration. Going on, they assert that the proposal contravenes Section 111.70(1)(h) Stats. and numerous court cases which have held that a union under a fair share proposal can only collect an amount which does not exceed the costs of collective bargaining and contract administration.

The fundamental premise underlying the above allegation is that NUE's fair share proposal, when and if implemented, will in fact exceed the cost of collective bargaining and contract administration. In this connection, it is true that the NUE and the District have jointly agreed to the following stipulation:

> For purposes of its initial motion only, the Respondent [NUE] agrees that in other Wisconsin locals which have 'fair share' agreements with municipal employers, the Association and its affiliates spend in excess of 8% for purposes of activities which are not collective bargaining, contract administration, and grievance adjustment under Abood.

This stipulation, however, only centers on NUE's activities in other collective bargaining units. 15/ There is nothing in the above stipulation, or any other part of the stipulated record, to indicate that NUE's proposed fair share arrangement for the Winter unit will in fact exceed the actual costs of collective bargaining and contract administration. As a result, the Commission is being asked to infer that because the NUE has certain practices in other unnamed bargaining units, the NUE will automatically adopt those same practices in this bargaining unit.

There are several reasons why no such inference can be drawn. First of all, it is entirely possible that NUE will incur greater expenses on contract administration and collective bargaining on the Winter unit than it does on its other units. Indeed, if one wishes to take administrative notice of the Commission's own records, it is clear that NUE and the District have been engaged in extensive litigation over the past four years. Thus, they have been involved in the following litigation before the Commission:

1. Decision No. 14482-C (4/77) - a prohibited practice complaint.

2. Decision No. 15193-B (5/77) - a prohibited practice complaint which was ultimately adjusted by the parties.

3. Decision No. 15904 (10/77) - a representation election.

4. Decision No. 16467 (9/78) - a representation election.

15/ The complainants herein obviously lack standing to litigate how the NUE expends money in its other locals.

5. Decision No. 16366 (5/78) - a declaratory ruling petition which asked that the Commission declare the mediation/arbitration statute to be unconstitutional. Said petition was ultimately withdrawn. 16/

6. Decision No. 16518-B (3/79) - a prohibited practice complaint.

7. Decision No. 16815-B (5/79) - a prohibited practice complaint which was subsequently withdrawn.

8. Decision No. 25394 (3/80) - a declaratory ruling requested by the District which was subsequently withdrawn.

In light of this past litigation, it may well be that the NUE will have to continue to expend considerable resources on litigation. Conversely, it is possible that the relationship herein may improve and that, therefore, the NUE's costs for bargaining and administering the Winter contract will decrease. In any event, the only certainty existing in the present record is that there is no certainty as to what those costs will be when and if a contract has been implemented. As a result, it is simply impossible to find a priori that the NUE's fair share proposal on its face exceeds the cost of collective bargaining and contract administration.

In this connection Mr. Hugh L. Reilly, by letter dated August 26, 1980, supplied the Examiner with the decision prepared by a special master in Harry E. Beck Jr., et. al. v. Communications Workers of America (CWA) et. al., Civil No. M-76-839 (August 18, 1980). There, the master ruled that certain union expenditures under an "agency fee" provision exceeded the cost of collective bargaining and contract administration and, as such, were unlawful. Similarly, the brief filed by Hanus et. al. contains an affidavit from Dr. Edwin Vieira Jr., who has done extensive research on this general area. He there states that unions regularly spend dues on political activities which are unrelated to either contract administration or collective bargaining.

While Beck, supra, and the proferred affidavit are interesting in that they show how other unions expend their monies, they are not really material to this proceeding since they fail to show how the Winter local will expend its monies in negotiating and administering this contract. As a result, no conclusion can be drawn in this case that the Winter local will act unlawfully merely because other unions may expend their monies in an impermissible fashion.

Moreover, the plain language of the fair share proposal herein is facially lawful since it expressly provides that:

> NUE agrees to certify to the District any 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. NUE 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.

NUE's brief correctly notes that the law surrounding fair share matters is just now in the process of being formulated in Wisconsin and that unresolved questions exist in this area. Since the law is in a state of flux, a union's bargaining proposal obviously can do no more than to promise that the union will adhere to the law as it develops. If such a fair share proposal is subsequently implemented, and if a union thereafter does unlawfully expend fair share dues, there is no question but that an effective avenue is then available

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16/ Mr. Heslink filed said petition on behalf of Winter Administrator William V. Keigan. The petition named the Winter School District and the NUE as Respondents. In paragraph 3 of said petition, Mr. Heslink stated that he also represented the District. I have included said case in the litigation history between the District and NUE by virtue of Mr. Hesslink's apparent dual representation.

to challenge such expenditures. 17/ But, unless and until that happens, there simply is no reason why anyone should assume that a facially lawful fair share proposal such as the one herein is ipso fact unlawful. As a result, the complaint allegations which charge the contrary are hereby dismissed in their entirety. 18/

In so finding, I reject the claim made by the complainants that this case is governed by the Commission's decision on Deerfield. 19/ Thus, it is argued that the costs of collective bargaining and contract administration in Deerfield, supra, were not ascertainable when the employer there proposed that a fair share fee should not exceed $50. That being so, complainants maintain that since the facts in Deerfield, supra, were ripe for adjudication, the facts herein are similarly ripe.

The flaw in this argument rests on a misinterpretation of the facts in Deerfield, supra. For, as noted in its accompanying memorandum, the Commission there noted:

> "No evidence material to a determination thereof has been adduced in this proceeding. It is apparent to the Commission that the District is predicating its position on the claim that the statutory provision involved does not require that the full prorata share of the cost of collective bargaining and contract administration need be deducted under a 'fair share provision.'"

It is clear, in light of the above, that while the exact cost of collective bargaining and contract administration were uncertain in Deerfield, supra, the employer there nonetheless was attempting to bargain over a proposal which admittedly was less than said costs. As a result, the Commission was able to rule that such a proposal was not a mandatory subject of bargaining. Here, on the other hand, for the reasons noted above, the record is unclear whether NUE's fair share proposal will be lesser, equal to, or greater than the costs of collective bargaining and contract administration.

Left, then, is the question of whether Hanus et. al. have standing in the instant proceeding to question this facially lawful fair share proposal. On this point, Section 111.07(1)(2)(a) of WEPA states:

> Any other party claiming interest in the dispute or controversy, as an employer, an employe, or their representative, shall be made a party upon application.

Rule 10.12(s) also provides:

> (2) TO INTERVENE. Any person desiring to intervene in any proceeding, shall, if prior to hearing, file a motion with the Commission. Such motions shall state the grounds upon which such person claims an interest. Intervention at the hearing shall be made by oral motion stated on the record. Intervention may be permitted and upon such terms as the Commission or the individual conducting the proceeding may deem appropriate.

Here, it is true that Hanus et. al. have a legitimate concern

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17/ Indeed, that is exactly what the plaintiffs have done in Browne I and II, supra.

18/ In light of this ruling, it is unnecessary to decide NUE's contention that a union can insist upon a fair share provision which exceeds the costs of collective bargaining and contract administration.

19/ Deerfield Community School District, (17503) 12/79.

in NUE's negotiations with the District. They are not alone, however, as all the Winter teachers have a concern in the outcome of those negotiations, since those negotiations will have a direct impact on their hours, wages, and other conditions of employment. Hanus et. al. therefore, are no different from any of the other Winter teachers.

But, unless and until a contract has been concluded, none of the Winter teachers, including Hanus et. al., know for certain what that contract will provide and how contractual provisions will be applied. Thus, it is entirely possible that a union may either drop or modify its fair share proposal up to and including the time of the mediation-arbitration process. Furthermore, a mediator-arbitrator may select an employer's fair share proposal which grandfathers out existing non-union members. If the contract ultimately excludes non-union members from under its coverage, non-union members such as Hanus et. al. would be unable to establish that they have been adversely affected by such a fair share arrangement.

As a result, it is entirely speculative whether non-union members would necessarily be harmed merely because a union in negotiations has pressed a particular fair share proposal to impasse. Accordingly, such individuals cannot prove that they have a legal "interest" which is sufficient to warrant their intrusion into the collective bargaining process.

Indeed, any contrary holding would simply be untenable. Thus, if employes can challenge the prospective application of a fair share proposal, they likewise could challenge a lay off proposal on the grounds they may be adversely affected if such a provision is ultimately applied. The same would be true of a seniority provision. Or insurance. Or vacation. Or sick leave. Or call-in. Or overtime. Or work day. Or work week. Or wages. In short, under this novel theory every single bargaining proposal could be challenged, irrespective of whether it ultimately was included in a contract.

That surely is not the kind of "interest" which Section 111.07(1)(2)(a) of WEPA and Rule 10.12(2) was intended to cover. Instead, it is much more reasonable to conclude that individual employes can file complaints and intervene only when they can show that they are directly affected by an action which has already taken place or which will in fact occur. As a result, Hanus et. al. have no standing to question a facially lawful bargaining proposal which may or may not ultimately be implemented in a collective bargaining agreement.

Indeed, if one were to accept the premise that individuals have the right to challenge mere proposals prior to their actual implementation, logic dictates that citizens could likewise challenge legislative proposals which may or may not be enacted. Surely, no court would ever entertain such a challenge as it knows that such proposals may be either modified or rejected in the legislative process.

In this connection, the District cites Wisconsin Environmental Decade Inc. vs. PSC, 69 Wis. 2d 1, 230 N.W. 2d 243 (1975) for the proposition that the issues herein are ripe for ajudication and that, in its words, "Future rights are not in issue." The District's reliance on that case is misplaced since the question there centered on an order of the Public Service Commission which was already in effect. Here, on the other hand, it is not at all clear that the fair share proposal will be implemented or that it will be implemented in an unlawful manner. Indeed, if one were to accept the District's position, that in effect would mean that citizens could challenge proposals which may be under consideration by the Public Service Commission, but which in fact may never be formally adopted.

No court, obviously, would ever find merit to a challenge to such proposals prior to their actual adoption and implementation.

Dated at Madison, Wisconsin this 9th day of April, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner