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-D
ROBERT HANUS, ROBERT J. LANGAHM and LLOYD D. WILLIAMS, Complainants, vs. NORTHWEST UNITED EDUCATORS, Respondent.	Case I No. 25238 MP-1047 Decision No. 18293-B

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, Werner & Goodland, 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.

ORDER REVISING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Amedeo Greco having, on April 9, 1981, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matters, wherein he concluded that Northwest United Educators had not committed any prohibited practices in violation of the Municipal Employment Relations Act by making and maintaining a fair share proposal during bargaining with Winter Joint School District No. 1, and by refusing to provide the District with certain information regarding said fair share proposal; and based upon the foregoing conclusions the Examiner having dismissed the complaints filed by the District and Robert Hanus, Robert J. Langham and Lloyd D. Williams; and Robert Hanus, Robert J. Langham and Lloyd D. Williams having on April 28, 1981 timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision, pursuant to Sec. 111.07(5), Stats.; and Robert Hanus, et al. and Northwest United Educators having filed briefs in support of, and in opposition to, the petition, and the Commission, having considered the record, the petition for review, and the parties' arguments, being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be revised as follows:

REVISED FINDINGS OF FACT

1. That Winter Joint School District No. 1, hereinafter referred to as the District, maintains and operates a public school system in and about the Winter, Wisconsin area; and that the District maintains its principal offices at Winter, Wisconsin.

2. That Robert Hanus, Robert J. Langham and Lloyd D. Williams, hereinafter referred to as Hanus, et al., at all times material herein have been and are employed as teachers by the District.

3. That Northwest United Educators, hereinafter referred to as NUE, is a labor organization, affiliated with the Wisconsin Education Association Council and the National Education Association; and that the NUE has its offices at 16 West John Street, Rice Lake, Wisconisn.

4. That at all time material herein NUE has been, and is, the exclusive collective bargaining representative of all full-time employes of the District engaged in teaching, including classroom teachers, guidance counselors, and librarians; that in said relationship, representatives of the District and the NUE, on February 16, 1979, met in open session to exchange proposals and begin negotiations on a collective bargaining agreement, covering wages, hours and working conditions affecting the employes in said bargaining unit, to succeed the agreement which was scheduled to terminate on June 30, 1979; that the expiring agreement did not contain a fair share provision; that at said meeting NUE proposed that the successor agreement contain a fair share provision; and that at that time NUE indicated that the fair share fee initially deducted would be equal to the full dues paid by NUE members, but did not elaborate on the precise wording of the fair share provision.

5. That on February 21, 1979, the District, by its Counsel and negotiator, directed a letter to NUE as follows:

> 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;
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> 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;
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> 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;
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> 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;
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> 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;
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> 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.

6. That thereafter, and on March 12, 1979, NUE submitted its fair share proposal to the District, and that such proposal read as follows:

7. Article XIII, B - Replace with: Fair Share Agreement

(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.

(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 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 or 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 indemnify 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 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.

7. That as a counter to the fair share proposal of NUE, the District, during negotiations proposed the following for inclusion in the successor collective bargaining agreement:

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 over-expended 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 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 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.

8. That the request for the information set forth in its letter of February 21, 1979 was made by the District in subjective good faith; and that NUE did not, at any time material herein, furnish the information requested therein, except for the approximate dollar amount which NUE believed would be certified by it as the amount initially to be deducted as a non-members fair share deduction.

9. That the NUE and the District were unable to reach an accord in their negotiations on the successor agreement; that as a result, NUE, on June 11, 1979, filed a petition with the Wisconsin Employment Relations Commission requesting the initiation of a mediation-arbitration proceeding; and that therein NUE included its fair share proposal, and therein the District submitted its proposal on fair share.

10. That NUE also represents municipal employes other than those teachers employed by the District; that other affiliates of WEAC represent various other municipal employes employed by other municipal employes situated in the State of Wisconsin; that NUE and other affiliates of WEAC, in such representative status, are parties to collective bargaining agreements which contain fair share provisions; that in said bargaining units various WEAC affiliates spend in excess of 8% of dues and fair-share revenue for purposes which are not "collective bargaining" under Wisconsin law, and which are not "collective bargaining, contract administration and grievance adjustment" under Abood v. Detroit Board of Education, 421 U.S. 239 (1977), and that at all times material herein, WEAC has maintained fair share rebate procedure applicable to non-members of local affiliates of WEAC, including non-members of NUE, and such procedure is as follows:

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 debatable 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 alternatively 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)

11. That Hanus et al., as teachers in the employ of the District, and as non-members of NUE, would be subject to the provisions of any fair share agreement which would be negotiated and agreed upon by the District and NUE, or which would be required to be incorporated in a collective bargaining agreement pursuant to a mediation-arbitration award.

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

REVISED CONCLUSIONS OF LAW

1. That the fair share provision proposed by Northwest United Educators for inclusion in the collective bargaining agreement between said labor organization and Winter Joint School District No. 1, covering wages, hours and conditions of employment of all full-time teachers, guidance counselors and librarians in the employ of said District, is, on its face, legal, within the meaning of Secs. 111.70(1)(h) and 111.70(3)(a)3 of the Municipal Employment Relations Act.

2. That, since said fair share proposal of Northwest United Educators is facially legal, and, further since said proposal has, at no time material herein, been implemented;

(a) Northwest United Educators, its officers and agents, at all times material herein, did not coerce, intimidate, or induce any officer or agent of Winter Joint School District No. 1 to interfere with any of its employes in the enjoyment of their legal rights, including those set forth in Sec. 111.70(2) of the Municipal Employment Relations Act, nor did Northwest United Educators, its officers and agents, at any time material herein, engage in any practice with regard to any employes of Winter Joint School District No. 1 which would constitute a prohibited practice within the meaning of the Municipal Employment Relations Act if such practice would have been undertaken by any agent of the Winter Joint School District No. 1, on his own initiative, and therefore, in said regard, Northwest United Educators did not commit any prohibited practice within the meaning of Sec. 111.70(3)(b)2 of the Municipal Employment Relations Act.

(b) Northwest United Educators, its officers and agents, at all times material herein, and during negotiations with Winter Joint School District No. 1, by failing and refusing to furnish information requested by the District, did not refuse to bargain collectively with Winter Joint School District No. 1, and therefore, Northwest United Educators did not commit any prohibited practice within the meaning of Sec. 111.70(3)(b)3 of the Muncipal Employment Relations Act.

3. That, since at all times material herein there existed no fair share agreement applicable to the conditions of employment of Robert Hanus, Robert J. Langham and Lloyd D. Williams, teachers in the employ of Winter Joint School

District No. 1, and since the fair share proposal involved herein is facially legal, said employes are not parties in interest within the meaning of Sec. 111.07(2), Stats., for the purpose of alleging in a complaint proceeding that the Northwest United Educators, by proposing that the fair share proposal be included in a collective bargaining agreement applicable to said three employes, among others, committed a prohibited practice within the meaning of Secs. 111.70(3)(b)(1) and (2) of the Municipal Employment Relations Act.

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

REVISED ORDER 1/

That the complaints, filed by Winter Joint School District No. 1, and by Robert Hanus, Robert G. Langham and Lloyd D. Williams, separately alleging that Northwest United Educators committed certain prohibited practices within the meaning of the Municipal Employment Relations Act, be, and the same hereby are, dismissed in their entireties.

Given under our hands and seal at the City of Madison, Wisconsin this 1st day of February, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By ______________________________
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

____
Herman Torosian, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of
(Continued on Page Nine)

1/ (Continued)
the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING REVISED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THE PLEADINGS

On March 28, 1979 the Winter Joint School District No. 1, herein the District, filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent Northwest United Educators, herein NUE, had committed certain prohibited practices within the meaning of Secs. 111.70(3)(b)2 and 3, Stats., by (1) refusing to provide the District with information concerning the amounts or purposes of expenditures of funds collected as either membership dues or fair share deductions from employes by NUE; and (2) by making a fair share proposal which will, if implemented, compel the District to collective fair share deductions from employes which will be utilized for purposes outside the parameters of collective bargaining and contract administration.

In its answer to the District's complaint, NUE admitted certain allegations relating to the facts, denied others, and denied that any of its actions constituted prohibited practices within the meaning of any provisions of MERA.

As indicated in the preface to the Examiner's decision, three teachers in the employ of the District, Hanus et al., attempted to intervene in the proceeding. The Examiner's denial of the motion to intervene was affirmed by the Commission, which determination was appealed to the Sawyer County Circuit Court. While the latter court proceeding was pending, Hanus et al. filed a separate complaint, on October 22, 1979 alleging that NUE was committing prohibited practices within the meaning of Sec. 111.70(3)(b)1 and 2 of MERA, by insisting that the District enter into and enforce a fair share agreement, which, on its face, and as intended to be applied, exceeded the permissable limits for such an agreement found in Sec. 111.70(d) and (h) of MERA and of the Constitution of the United States. 2/

After the filing of the latter complaint all the parties agreed that the two complaints would be consolidated for the purposes of hearing and that the proceeding before the Sawyer County Circuit Court would be withdrawn.

THE FACTS

The parties (the District, Hanus et al., and NUE) waived hearing in said matters, and on February 29, 1980 the parties filed the following stipulation with the Commission:

STIPULATION

> The Complainants and Respondent (jointly referred to as Parties), through their respective counsel, hereby stipulate and agree as follows, subject to the concurring signatures of counsel for the Commission and Winter School District:
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> 1. This case and the Commission case filed by Winter Joint School District No. 1 vs. Northwest United Educators can be consolidated upon the Commission's agreement.
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> 2. The Parties agree to the Stipulation previously entered by the Winter School District and the Respondent in Case XXIII No. 24343 MP-965 except that portion concerning the order in which the issues are to be decided. That aspect of the Stipulation is to be modified so that the Commission consider issues identified therein as (1), (2) and (3) simultaneously.

2/ In their brief filed with the Examiner and their brief filed with the Commission in support of their petition for review, Complainants Hanus et al. subsequently indicated that they did not intend to litigate their constitutional claims.

3. The Parties agree, for purpose of this case, that the Union's "fair share" proposal and the School District's response to it are "final". They also agree that the general subject of "fair share" is a mandatory subject of bargaining. The parties do not agree as to whether or not the Union's "fair share" proposal here was or is lawful.

4. For purposes of its initial motion only, the Respondent 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 and activities which are not "collective bargaining", under Wisconsin law, and are not "collective bargaining, contract administration, and grievance adjustment" under Abood.

5. The Complainants will file an affidavit, which for the purpose of summary judgment, will be uncontroverted by the Respondent. The affidavit will describe the activities of the Respondent and its affiliated organizations which are not "collective bargaining process or contract administration" and not "collective bargaining, contract administration, and grievance adjustment" under the applicable statutory and constitutional standards.

6. The Respondent will move for Summary Judgment in Complainants' portion of the consolidated cases, based upon the claims that the Complaint does not state a claim upon which relief can be granted and that this portion is not ripe for adjudication. In particular, the Respondent's position will be:

> a. That an individual may not challenge a fair share provision in advance of its actual implementation and, in particular, that an individual may not challenge a fair share provision when it is possible that the provision may not ultimately be incorporated in a collective bargaining agreement.
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> b. That it is not unlawful for a union to utilize fair share funds for purposes which arguably are prohibited by Section 111.70(1)(h) until such time as a proper dissent is filed by the individual employee.

7. That Exhibit B is a true copy of the WEAC and affiliated locals' internal rebate procedure. That, for the purposes of the preliminary motion, the undersigned agree that such a procedure is available to all bargaining unit employees of the Winter School District who voluntarily invoke the procedure. However, the Union agrees that it will not assert in this preliminary proceeding that employees would first be required to utilize an internal rebate procedure prior to commencing suit, whether before the WERC or a Court of competent jurisdiction.

The prior stipulation referred to in paragraph 2 of the above contained the following provisions:

> In order to allow for the hearing of this case in a more orderly fashion, the parties hereby stipulate that issue (1) below can be decided by the Hearing Examiner first and that this issue can be decided upon the basis of this Stipulation and the briefs of the parties. Thereafter, such other remaining issues will be decided in an appropriate manner after hearing before the Examiner.
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> STIPULATION OF ISSUES
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> (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 employees 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? 1/

STIPULATION OF FACTS

The parties hereby agree that all factual allegations of the Complaint not disputed in the Answer are deemed to be uncontroverted and, for the purposes of deciding issue (1) only, further agree and stipulate as follows:

(1) The address of Complainant is Winter High School, Winter, Wisconsin 54896.

(2) The authorized representative of the Complainant for collective bargaining purposes is Robert M. Hesslink, Jr., 121 South Pinckney Street, Madison, Wisconsin 53703.

(3) Respondent is the certified bargaining representative of, and frequently engages in concerted activities on behalf of, employees of the Complainant;

(4) On February 16, 1979, the Respondent proposed the inclusion of a fair share agreement in the successor collective bargaining agreement between the Complainant and the Respondent but, other than indicating that the fair share fee initially to be deducted would be equal to the full dues of union members, did not provide the exact terms of Respondent's fair share proposal. Respondent indicated at that time that the exact terms of Respondent's fair share proposal would be provided at the next bargaining session. On March 12, 1979, Respondent gave the Complainant document attached to Respondent's Answer as Exhibit 1 as the Respondent's fair share proposal. Respondent has continued through the negotiations to press for a fair share agreement of the nature described in Exhibit 1.

(5) Complainants' request for information attached as Exhibit 2 to the Respondent's Answer was made in subjective good faith.

(6) The document attached hereto as Exhibit A is the collective bargaining agreement which was in effect between

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1/ In agreeing to this stipulated issue, Respondent reserves the right to argue that resolution of that issue is legally inapproriate.

the Complainant and the Respondent during the period of time at issue in these proceedings and through June 30, 1979.

(7) The Respondent filed a petition for mediation-arbitration of the collective bargaining impasse (which existed between Complainant and Respondent) with the WERC on June 11, 1979, and that the Examiner and the parties may take administrative notice of the parties' respective final offers. The information requested in Exhibit 2 to the Respondent's Answer has not been provided to the Complainant by the Respondent, except that Respondent has informed Complainant of the approximate dollar amount which it believes will be certified as the amount initially to be deducted as a non-member's fair share deduction.

Pursuant to the aforementioned Stipulation, NUE filed a Motion for Summary Judgment of March 25, 1980. That parties thereafter filed briefs and on April 9, 1981 the Examiner issued his Findings of Facts, Conclusions of Law and Order.

THE EXAMINER'S DECISION

In addition to facts stipulated by the parties, the Examiner, in Findings of Facts 10, 14, and 15, set forth various "facts" garnered from correspondence received by him from counsel for NUE and the District following the receipt of the stipulations previously referred to herein. His remaining Findings of Fact were consistent with the stipulations filed by the parties.

The Examiner issued the following Conclusions of Law and Order:

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 assertaining (sic) 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 (sic) 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.

. . .

ORDER

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

The Examiner's decision also included a memorandum, with respect to the issues generally, and a discussion of other matters which, in our opinion, were superfluous to the issues involved herein. The Examiner's rationale in support of his Conclusions of Law can be summarized as follows:

1. The District's assertion that the information requested from NUE was relevant and reasonably necessary for bargaining because of the District's exposure to civil suit or violation of MERA under fair share proposal must be rejected given the proposal's hold harmless clause and the inapplicability of the dicta in footnote 9 of Browne v. Milwaukee Board of School Directors 83 Wis. 2d 316, 334 (1978). In the latter regard, the Examiner stated that a municipal employer does not violate MERA when it in good faith agrees to fair share language which allows collection of a fair share fee which may exceed the legally allowable costs of collective bargaining and contract administration.

2. Inasmuch as the past and projected expenditures requested by the District are irrelevant to a determination of the costs of collective bargaining and contract administration during the term of the contract being negotiated, said information is not relevant and reasonably necessary for collective bargaining and need not be supplied.

3. It is impossible to determine the precise costs of collective bargaining and contract administration prior to the commencement of the contract at issue, and thus the information requested, even if relevant, would be of little practical utility to the District.

4. The only relevant information, the amount of the fair share deduction to be charged during the term of the contract, was supplied to the District by NUE.

5. Absent extraordinary circumstances, a hold harmless clause exempts a union from any obligation to supply municipal employer with financial information requested for the purpose of ascertaining the costs of collective bargaining and contract administration.

6. Hanus et al. lack standing to protest the NUE's failure to supply information inasmuch as any duty to supply which NUE may have arises from the collective bargaining obligation vis-a-vis the District. An individual employe does not engage in collective bargaining over a fair share proposal which may or may not be implemented.

7. Hanus et al. lack standing to challenge a facially lawful fair share proposal which may or may not ultimately be included in a collective bargaining agreement.

8. As it is impossible to determine from the record whether the legally deductible costs of collective bargaining and contract administration will be less than the amount to be deducted under the fair share proposal at issue, it cannot be concluded that the NUE's proposal calls for an illegally excessive deduction.

9. The fair share proposal in question is facially legal.

THE PETITION FOR REVIEW

Hanus et al. timely filed a petition for review of the Examiner's decision wherein they asserted:

1. The Examiner's reference in Conclusion of Law 1 to "good faith" administration of a fair share provision is either unsupported by any evidence in the record or contrary to the record, and thus is clearly erroneous.

2. The Examiner's Conclusions of Law raise substantial question of law or administrative policy.

3. The Examiner's failure to address the issue of standing in his Findings of Fact and Conclusions of Law, although addressing said issue in his memorandum, is a prejudicial procedural error.

THE PARTIES POSITIONS

Hanus et al. filed a brief in support of their petition for review, wherein they reaffirmed their belief that the record does not support the Examiner's Conclusion of Law 1 relating to "good faith." They assert that the record contains no reference to any motivation which the District might have when administering the fair share proposal. If anything, they believe the record warrants the conclusion that the District could not lawfully administer the proposal, and therefore that the District could not in "good faith" administer the agreement. Hanus et al. thus assert the Examiner's Conclusion is clearly erroneous, and also reaffirm their belief that the Examiner's failure to address the issue of standing in his formal Findings of Fact and Conclusions of Law deprives them of the opportunity to know how the discussion of that issue in the Memorandum influenced the Examiner's decision.

Turning to the merits of the issue of standing, Hanus et al. argue that the Examiner erred when concluding that they lacked same. They assert that employes

have standing to litigate the legality of the fair share proposal and the legitimacy of the District's informational request as they are a party to any fair share agreement. Hanus et al. further assert that the issues are ripe for adjudication because, although no deductions have been made, the record establishes that the NUE is insisting upon a proposal which would deduct more than the law allows. In this regard, they argue that as the level of fair share deduction has been set in the disputed proposal at the level of the dues collected from members, and as the level of dues may have no relationship to the legally permissible costs of collective bargaining and contract administration, the record allows a finding of finding of illegality even before deductions have been made. Given this apparent illegality, they argue that unless the District receives the information requested regarding past and projected expenditures, the District cannot be forced to bargain over the fair share proposal at issue herein. They cite Deerfield School District (17502) 12/79 aff'd Dane County Cir. Ct. 1/81 and Racine Education Association v. Racine Unified School District 82 F.R.D. 461 (E.D. Wis. 1979) in support of their arguments.

NUE filed a brief in opposition to the petition for review, wherein it initially argues that as only the District raised an allegation regarding the refusal to supply information and as the District did not seek an appeal, Hanus et al. cannot now protest the Examiner's decision in said regard. Should the Commission disagree, NUE asserts that the Examiner properly concluded that Hanus et al. lacked standing to challenge the NUE refusal to supply information, and that the refusal did not violate its duty to bargain with the District. NUE further contends that the Examiner properly disposed of all remaining issues in the case and that his decision should be affirmed.

DISCUSSION

We have issued revised Findings of Fact so as to only include those facts which were either admitted in the pleadings filed in both of the cases involved herein or set forth in the parties stipulations. The Conclusions of Law have been revised to dispose of the allegations in both complaints relating to the alleged violations of MERA and related legal issues and to respond to Hanus, et. al's concerns regarding "standing" and "good faith." We have also revised the Order to cover the disposition of both of the complaints filed herein.

Initially we are confronted with the NUE's assertion that the issues on review are limited by the absence of an appeal by the District. As we believe that we have a statutory obligation to review all portions of an Examiner decision when any party to a proceeding files a petition for review, we must reject this argument.

The Examiner's Conclusion of Law 1 is in our opinion, pure dicta, and therefore not necessary for inclusion in his decision. Furthermore, on the basis of the record herein, and the lack of an opportunity for the parties to file briefs with regard thereto, we cannot adopt such dicta by the Examiner.

A review of the fair share proposal at issue herein establishes its facial legality. The proposal limits the amount of the deduction to ". . . the costs of representation by NUE as provided in Section 111.70(10(h), Wis. Stats., . . . " and goes on to state that fair share deductions will be limited to ". . . . 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." Having cited the appropriate statutory provision, which has been found in Brown v. Milwaukee Board of School Directors 83 Wis. 2d 316 (1978) to be facially constitutional, NUE has limited itself to deducting only that to which it is statutorily and constitutionally entitled--the cost of representation. Also see City of New Berlin (17748-A) 5/81. NUE has also done all it can to comply with the ongoing development of the law vis-a-vis fair share by agreeing to abide by future developments. Since the fair share proposal is couched in the statutory language, and therefore is facially legal, NUE is not obligated to submit any of the information requested by the District, which relates to the past expenditures by the NUE and the State and national organizations with which it is affiliated, either in negotiations on an initial fair share agreement, or with regard to negotiations involving the continuation of a fair share agreement. The amount of the fair share deduction is a non-mandatory subject in collective bargaining. Deerfield, supra. Thus to the extent the District's request stemmed from a desire to bargain over the amount of the

fair share deduction, it cannot be found to have been relevant and reasonably necessary information for collective bargaining. To the extent that the informational request reflected a concern over potential liability to civil suit or to prohibited practice allegations under Sec. 111.70(3)(a)(1) Stats., we again conclude that the information is not relevant and reasonably necessary. As the proposal is facially legal, as no costs have been incurred, and as there is no basis in this record for concluding the deductions will be improperly spent if the proposal becomes part of the contract, concern over liability is purely speculative.

However, we do not mean to say that such information can never be obtained by a proper party seeking a determination as to whether the fair share deductions have been impermissably expended by the labor organization involved. Such a request would be proper in a complaint proceeding alleging that the labor organization, following the implementation of a fair share agreement, expended portions of fair share deductions for impermissable purposes, and thereby interfered with the rights of employes involved, and possibly coerced their employer. Such an informational request need not be honored in a complaint proceeding alleging that the failure to furnish such data and information, prior to the implementation of any fair share agreement, constituted a refusal to bargain in good faith in violation of MERA.

As to the allegation that NUE committed prohibited practices by making and placing in its final offer the fair share proposal, we reject the notion that there is any evidence in the record which would support a finding that NUE either intends to or will in fact utilize fair share monies impermissably if its proposal becomes part of a collective bargaining agreement. Prior impermissable expenditures in other units by NUE and WEAC are not relevant to resolution of the issue at hand, given the facially legal proposal at issue herein and the fact that the proposal has not been incorporated into a collective bargaining agreement.

With respect to the complaint filed by Hanus et al., we agree with the Examiner's conclusion and supporting rationale that where, as here, a union makes a facially legal proposal during negotiations with an employer, an employe in the bargaining unit involved lacks standing to challenge the proposals as being violative of MERA.

In his Findings, the Examiner included correspondence from Counsel for the District and NUE with regard to the mediation-arbitration Award issued by Arbitrator Weisberger, which required, among other things, the District to incorporate the disputed fair share provision in their collective bargaining agreement. The record before the Examiner had been closed prior to the receipt of said correspondence, and in addition, neither counsel sought thereafter to amend their pleadings or to expand the record in the matter.

To the extent that the Examiner's memorandum is consistent with the Commission's rationale herein, we adopt same. To the extent that it is not, those portions of the Examiner's memorandum are set aside.

Dated at Madison, Wisconsin this 1st day of February, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney
Morris Slavney, Commissioner

Herman Torosian
Herman Torosian, Commissioner

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