STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHYLLIS ANNE BROWNE, BEVERLY ENGELLAND, ELEANORE PELISKA, BETTY C. BASSETT, YETTA DEITCH, VIRGINIA LEMBERGER, DONNA SCHLAEFER, KATHERINE L. HANNA, LORRAINE TESKE, JUDITH D. BERNS, NINNETTE SUNN, MARY MARTINETTO, CHARLOTTE M. SCHMIDT and ESTHER PALSGROVE, Complainants, vs. THE MILWAUKEE BOARD OF SCHOOL DIRECTORS; THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; DISTRICT COUNCIL 48, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; JOSEPH ROBISON, as Director of District Council 48; LOCAL 1053, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; MARGARET SILKEY, as President of Local 1053; and FLORENCE TEFELSKE, as Treasurer of Local 1053, Respondents.	Case XCIX No. 23535 MP-892 Decision No. 18408-A

ORDER DENYING MOTION TO STAY PROCEEDINGS AND MOTION TO DISMISS COMPLAINT AND PERMITTING THE TAKING AND PRESERVING OF EVIDENCE

Pursuant to the procedure agreed to between the parties, the Commission, on February 3, 1981, issued its decision in Stage I of this proceeding 1/ wherein it found that certain expenditures made by the Respondent Unions from fair-share exactions taken from the earnings of the Complainants related to the Respondent Unions' representational interest in the collective bargaining process or to the administration of collective bargaining agreements and that some such expenditures did not so relate or only so related in part; and the Commission having, on March 11, 1981, held a pre-hearing conference concerning the procedures to be followed with regard to the determination of the issues remaining to be decided in Stage II; and after the conclusion of said pre-hearing conference, the parties having agreed to attempt to arrive at a mutually acceptable procedure for determining the amount of fair-share monies exacted from the earnings of the Complainants in past years which were spent for impermissible purposes so as to avoid the need for a protracted evidentiary hearing concerning said amounts; and the parties having endeavored to agree to such a procedure, but having failed in said effort, except that they did agree to utilize the year 1980 as a representative year for purposes of determining said amounts; and the Respondent Unions having, on July 21, 1981, filed a Motion to Stay Proceedings wherein they requested that the Commission stay further proceedings in this matter for seventy-five days to permit an initial determination, in accordance with the internal rebate procedure set forth in Respondent AFSCME's Constitution, for the years since the filing of this proceeding, of the amounts due and owing the Complainants, and that in this regard the Commission approve the

1/ Decision No. 18408.

use of 1980 as a representative year for such purpose; and the Complainants having opposed said motion and requested that the Commission deny same, as well as an earlier Motion to Dismiss Complaint filed by the Respondent Unions on October 9, 1978, and to order the discovery of certain accounting and other records; and both parties having filed written arguments in support of their positions, the last of which was received on August 31, 1981; and the Commission, having considered the arguments of the parties, makes and issues the following

ORDER

1. That the Motion to Stay Proceedings filed by the Respondent Unions on July 21, 1981, be, and the same hereby is, denied.

2. That the Motion to Dismiss Complaint filed by the Respondent Unions on October 9, 1978, be, and the same hereby is, denied.

3. That the Complainants may for the purpose of preparation for further hearing before the Commission, or before other person or persons designated by the Commission for that purpose, take and preserve the following evidence:

> All of the Respondent Unions' accounting and other records with regard to their disbursements and activities for the period January 1, 1980 to date;

and that said taking and preservation of evidence shall be in accordance with a timetable to be agreed to between the parties and submitted to the Commission on or before December 1, 1981, or, in the absence of any such agreement, and upon the request of one of the parties in accordance with a timetable to be established by the Commission.

Given under our hands and seal at the City of Madison, Wisconsin, this 15th day of October, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney, Commissioner

Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO STAY PROCEEDINGS AND MOTION TO DISMISS COMPLAINT AND PERMITTING THE TAKING AND PRESERVING OF EVIDENCE

As noted in the preface to our order, the parties have endeavored to agree to a procedure to determine the amount of fair-share monies exacted from the earnings of the Complainants in past years which were spent for impermissible purposes so as to avoid the need for a protracted evidentiary hearing concerning said amounts. Unfortunately they have failed in that effort, except to the extent that they have agreed to utilize the year 1980 as a representative year for purposes of determining said amounts. It is in light of this background that the Respondents have filed their Motion to Stay Proceedings.

The Respondents also have pending a Motion to Dismiss which was filed on October 9, 1978, prior to the Commission's hearing on the issues raised in Stage I of this proceeding. That motion, which was predicated on the argument that the Complainants, and the members of the class they represent, had all either participated in or failed to avail themselves of the opportunity to participate in the internal rebate procedures provided in Respondent AFSCME's Constitution, had affidavits and exhibits attached which indicate that the internal rebate procedures which were utilized by some of the Complainants resulted in a determination that only certain monies, which had been expended for political and ideological purposes, should be refunded. The Respondent Unions concede that the procedures followed did not result in a determination as to the amount of monies that had been expended for purposes found to be impermissible in the Commission's decision of February 3, 1981, because the procedure was utilized prior to the Commission's decision. According to the provisions of AFSCME's Constitution, as most recently amended, "If a law authorizing an agency shop or similar service fee requires a rebate based on criteria other than those set forth above [payments for partisan political or ideological purposes] and if the required criteria would result in the rebate of a larger portion of the fee paid . . ." the larger amount is to be rebated under the internal procedure.

In their Memorandum in Support of their Motion to Stay Proceedings and their response to the Complainants' arguments and requests, the Respondent Unions have set out what they perceive to be the relationship between the two pending motions. The Respondent Unions note that, because of the parties' inability to agree on a procedure for determining the amount of monies which have been spent from fair-share exactions for purposes which were found to be impermissible by the Commission, it would appear that an evidentiary hearing will be required. Therefore, the Respondent Unions propose that they be allowed sufficient time to invoke AFSCME's internal rebate procedures for the purpose of making a second determination, based on the findings made by the Commission in its February 3, 1981 decision, as to the amount of monies that has been spent for purposes found by the Commission to be impermissibly spent from fair-share exactions. While the Complainants would be permitted to participate in that procedure by appealing any initial determinations made by union officers to AFSCME's Judicial Panel and ultimately to its Review Panel, the Respondent Unions argue that the factual determinations thus made would not be binding on the Commission or the Complainants in a later evidentiary hearing, if one is required. However, the Respondent Unions acknowledge that they still intend to argue that this proceeding should be dismissed for reasons set out in the Motion to Dismiss and for additional reasons they intend to make after this motion has either been granted or denied.

According to Respondent AFSCME, the granting of its Motion to Stay Proceedings will advance the Commission's disposition of the remaining issues in this case by "narrowing the remaining factual issues" and establishing a record of the operation of that procedure and its fidelity to the standards established in the Commission's decision, which can then be reviewed by the Commission "in whatever breadth and depth it considers appropriate." Finally Respondent AFSCME contends that, contrary to the assumptions implicit in the arguments of the Complainants, it does not, through this motion, seek to have the Commission adopt a formal exhaustion requirement.

The Complainants' arguments in opposition to the Motion to Stay Proceedings may be summarized as follows:

1) A stay would be inconsistent with the Commission's mandate from the Wisconsin Supreme Court that it make findings of fact to determine how much of the Complainants' fair-share contributions have been used for impermissible purposes.

2) The intra-union exhaustion doctrine does not apply to non-members.

3) Courts have generally held that the intra-union exhaustion doctrine does not apply to statutory or to constitutional rights.

4) AFSCME's internal procedure denies due process because of the unilateral method of selection of the members of the appeal bodies.

5) The imposition of a stay would itself violate the Complainants' first amendment rights by placing an obstacle in the way of their assertion of such rights.

6) The Abood 2/ case did not establish an exhaustion requirement.

The Complainants concede that Respondent AFSCME may, if it chooses, invoke its internal rebate procedure, but maintain that the Complainants may not be required to participate. Therefore, instead of granting the requested stay the Complainants ask that the Commission deny the Motion to Stay Proceedings, as well as the Motion to Dismiss Complaint, and proceed with Stage II by allowing the Complainants to proceed with discovery, limited to the year 1980 and to date, in preparation for an evidentiary hearing. In the latter regard the Complainants ask that the Commission issue a specific order for discovery of the Respondent Unions' accounting and other records with regard to their disbursements and activities for the period from January 1, 1980 to date, and that the Commission resolve any future disputes which may arise between the parties as to the scope of the discovery to which they are entitled.

In response to the Respondent Unions' claim that there is no pending motion for discovery, the Complainants point out that a Motion to Compel Discovery was filed on December 11, 1978, in reference to the issues in Stage I and that said motion was never ruled upon or withdrawn. It argues that the discovery requested now, as narrowed in its brief in opposition to the Motion to Stay, is even more fundamental to the resolution of the issues in Stage II which focuses on the specifics of the Respondent Unions' expenditures. The Complainants also state that they will not be willing to concede the permissibility of any expenditures which have not been subjected to

---

2/ Abood v. Detroit Board of Education 431 U.S. 209 (1977).

"independent verification through the examination of the Unions' books and records." Finally they argue that even though the Supreme Court has asked the Commission to review the adequacy of the rebate system, it did not rule on the constitutional adequacy of that procedure which, for the reasons noted above, is violative of the Complainants' first amendment rights.

Discussion

We have considerable difficulty with the Respondent Unions' arguments which seek to distinguish or otherwise separate their Motion to Stay Proceedings from their Motion to Dismiss Complaint. The Respondent Unions acknowledge that if the Commission were to grant their Motion to Stay Proceedings they will eventually renew and amend their arguments in support of their Motion to Dismiss Complaint. Presumably they will then argue, as they have heretofore, that by either participating in or declining to participate in the internal rebate procedures, the Complainants should be foreclosed from challenging any additional amount rebated. At a minimum it is clear that they will then ask the Commission to limit the "breadth and depth" of its review.

Unless in ordering a stay we also made it clear that in reviewing the results of the internal rebate procedure the Commission would not attach any weight or significance to the participation or non-participation of the Complainants in that procedure and that we would not defer to those results in any way, it would, in our view, be necessary to address the arguments raised by the Complainants. Otherwise we would have ordered a stay under circumstances where the Complainants would be uncertain of their rights and compelled to act at their peril. Thus, in fairness to the Complainants, if the Commission believed it was appropriate to order a stay now, we would either have to address the constitutional and other legal issues raised by the Complainants or advise the Complainants that they will not in any way be bound by the outcome.

To grant a stay and at the same time advise the Complainants that they will not be bound by any of the results, regardless of whether they elected to participate, would not significantly advance or simplify the completion of Stage II of this proceeding. Such an approach would not narrow the factual issues in any material way. At most, only those expenditures which were indisputably related to the Respondent Unions' representational interest in the collective bargaining process or contract administration would be taken out of dispute. Even in the case of those expenditures the Complainants state that they would not accept such determinations absent "independent verification."

For these reasons we have concluded that our determination of the Respondent Unions' Motion to Stay Proceedings is inseparable, for purposes of decision, from their Motion to Dismiss Complaint. The Respondent Unions point out that they have not had the opportunity to update and amend their arguments previously filed in support of their Motion to Dismiss Complaint, nor have they responded to the constitutional and other legal arguments advanced by the Complainants, which are set out above, and ask that we not rule on those arguments until they have had an opportunity to reply.

We are convinced that the Motion to Dismiss should be denied for practical reasons separate and apart from the important constitutional and legal issues raised by the Complainant.

First of all it should be noted that this is a case of first impression in Wisconsin. It is apparent, based on our decision in Stage I, that the Respondent Unions have already made expenditures from fair-share funds for purposes which are impermissible. It is therefore quite likely that the Commission will, in the course of

deciding the remaining issues in this case, find that the Respondent Unions have committed prohibited practices and it will then be faced with the question of what is the appropriate remedial order in such cases. It is unlikely that our order will be limited only to refunding sums already spent for such purposes, which is the maximum relief the Complainants could obtain from the rebate procedures. Our order will also be prospective in terms of advising the Respondents as to what actions they must take in the future to comply with the law. Thus an order of dismissal would be inappropriate in this case because it would ignore past violations of the law and deprive the Complainants of prospective relief.

We wish to make it clear to the parties that the Commission may very well address the question of the appropriateness of requiring resort to and exhaustion of the Unions' internal rebate procedure as part of the question of the appropriate remedial order in this case. However, it should also be clear to the parties that we do not intend to ignore past violations of the law which may have occurred in this case merely because of the present availability of such a procedure.

The Complainants point out that they did file a Motion to Compel Discovery prior to the hearing in Stage I of this proceeding. It was not necessary for the Commission to rule on that motion since the parties thereafter entered into a stipulation that obviated the need for the evidence being sought. While that Motion arguably does not extend to the factual issues in Stage II, we believe that the Complainants' request contained in its Statement in Opposition to the Motion to Stay Proceedings is sufficient for this purpose.

At the time of the prior motion for discovery the Respondent Unions contended that the Commission should not grant the motion based on their argument that the Unions' actual expenditures were not then in issue. Here there is no question that the Unions' expenditures are in issue. The Respondent Unions also argued that, "even if it is assumed that this proceeding is properly classified as a Class 2 proceeding," Section 227.08(7) of the Wisconsin Statutes, as it then read, limited the Complainants' discovery rights to those set out in Chapter 887 of the Wisconsin Statutes, before it was expanded and renumbered Chapter 804. However, since that argument was made, Section 227.08(7) has been corrected to reflect that the reference therein was intended to be to Chapter 804 of the Wisconsin Statutes as it is currently set out in the statutes.

We have previously notified the parties that we have determined to treat this as a Class 2 proceeding. 3/ However, even if it is not properly classified as a Class 2 proceeding the Commission has the discretion to allow for the taking of depositions in prohibited practice proceedings as set out in Section 111.07(2)(b), Wisconsin Statutes. While we do not ordinarily grant requests for the taking of depositions in prohibited practice proceedings except upon good cause shown, 4/ we believe that good cause exists in this case. Absent pre-hearing discovery we are concerned that the hearing in this case will be unnecessarily protracted and the record will be unduly burdened. For these reasons as well we have granted the

---

3/ See the letter from the Commission's General Counsel dated October 17, 1978, and our Notice of Hearing dated February 15, 1979.

4/ See Section ERB 10.15, Wis. Adm. Code.

Complainants' request that we allow pre-hearing discovery. However, we note that since our order in this regard is at the request of the Complainants, any expenses incurred in connection with such discovery, including witness fees and mileage, 5/ shall be paid by the Complainants.

Dated at Madison, Wisconsin, this 15th day of October, 1981

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney, Commissioner

Herman Torosian, Commissioner

5/ Section 111.07(2)(d), Wisconsin Statutes.