

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, NINETTE SUNN, :
: MARY MARTINETTO, CHARLOTTE M. SCHMIDT and ESTHER :
: PALS GROVE, et al, :
:

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,
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 99
: No. 23535
: MP-892
: Dec. No. 18408-J
:

: WALTER J. JOHNSON, MARSHALL M. SCOTT, GERALD :
: LERANTH, OLIVER J. WALDSCHMIDT, ERNA BYRNE, :
: CHRISTINA PITTS, MILDRED PIZZINO, JOHN P. :
: SKOCIR, HELEN RYZNAR, ANNABELLE WOLTER, :
: CHERRY ANN LE NOIR, DORIS M. PIPER, :
: LYNN M. KOZLOWSKI, EDWARD L. BARLOW, :
: IRVING NICOLAI, and ANNE C. TEBO, et al, :
:

Complainants,

vs.

COUNTY OF MILWAUKEE, a body Corporate;
AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO; DISTRICT
COUNCIL 48, AMERICAN FEDERATION OF
STATE, COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, and JOSEPH ROBISON, its
Director; LOCAL 594, AFSCME, affiliated
with District Council 48; LOCAL 645,
AFSCME, affiliated with District Council 48;
LOCAL 882, AFSCME, affiliated with District
Council 48; LOCAL 1055, AFSCME, affiliated
with District Council 48; LOCAL 1654,
AFSCME, affiliated with District Council 48;
and Local 1656, AFSCME, affiliated with
District Council 48,

Respondents.

: Case 161
: No. 29581
: MP-1322
: Dec. No. 19545-J
:

Appearances:

Kirschner, Weinberg & Dempsey, Attorneys at Law, by Mr. Larry P. Weinberg
and Mr. John J. Sullivan, 1615 L Street, N.W., #1360, Washington,
D.C., 20036.

Lawton & Cates, Attorneys at Law, by Mr. John H. Bowers, 214 West Mifflin
Street, Madison, Wisconsin, 53703, on behalf of Respondent District
Council 48 and the Respondent Locals.

No. 18408-J
No. 19545-J

Mr. Raymond J. LaJeunesse, Jr., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, Virginia, 22160, and Lindner & Marsack, S.C., by Mr. Charles P. Stevens, 700 North Water Street, Milwaukee, Wisconsin, 53202, on behalf of the Complainants.

ORDER

The Commission having, on April 24, 1987, issued its Findings of Fact, Conclusions of Law and Order in these cases; 1/ and said Order having, in relevant part, required the Respondent Unions to correct the deficiencies in their fair-share procedures and their "Notice to All Nonmember Fairshare Payors" and to submit the corrected procedures and notice to the Commission for a determination as to whether said procedures and notice meet the requirements set forth in Chicago Teachers Union v. Hudson; 2/ and the Respondent Unions having, on October 27, 1987, filed with the Commission their Motion For Approval of Hudson Notice to Nonmember Fair Share Payors; and the Complainants in these cases having, on November 27, 1987, submitted their written response in opposition to said motion, to which the Respondent Unions replied in writing on December 16, 1987; and the Commission having considered the Respondent Unions' Motion and the positions of the parties, and being satisfied that said Motion should be denied at this time;

NOW, THEREFORE, it is

ORDERED

That the Respondent Unions' Motion For Approval of Hudson Notice To Nonmember Fair Share Payors be, and the same hereby is, denied at this time pending its resubmission as discussed in the Accompanying Memorandum.

Given under our hands and seal at the City of
Madison, Wisconsin this 4th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Herpe
A. Henry Herpe, Commissioner

1/ The Respondent Unions filed a petition for rehearing which was denied by our order issued June 12, 1987. Dec. No. 18408-H, 19545-H (WERC, 6/87). The Respondent Unions subsequently filed a Motion for Modification of our order which was denied by our order issued September 16, 1987. Dec. No. 18408-I, 19545-I (WERC, 9/87).

2/ 106 S. Ct. 1066 (1986).

MILWAUKEE PUBLIC SCHOOLS
MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER

The Commission's Order in these cases issued on April 24, 1987, in relevant part, required that the Respondent Unions:

- A) Correct the deficiencies in the Unions' fair-share notice and procedures; and
- B) Continue the advance rebate for all present "objectors" and "challengers," including Complainants, and immediately escrow, with interest at the rate of seven percent (7%) per annum, all fair-share fees from all fair share payors in the bargaining units represented by the Respondent Locals, from March 4, 1986 until: 1) the Commission has determined or the parties agree that the Unions are prepared to provide adequate notice and have established the proper fair-share procedures; and 2) after the notice has been given and the dissent period has run.

After those conditions are met the monies will be dispersed or will remain in escrow per the approved procedures, with the fees of "challengers" and Complainants remaining in escrow until the impartial decisionmaker's determination has been rendered.

In our decision we held that the Respondent Unions' notice and procedures must produce a proper escrow arrangement and a "reasonably prompt" decision by an impartial decisionmaker, and this includes providing adequate access to relevant information, adequate time to prepare and sufficient advance notice of hearing. We further held that the notice and the procedures contained therein:

- 1) Must make clear the effect of "objecting" as opposed to "challenging" in that it must be clear that by "objecting" the fair-share employe waives his/her right to any benefit that results from the fair-share fee determination by the impartial decisionmaker;
- 2) Must delete the reference to filing a "charge" with the Commission, i.e., it must make clear what the procedure is that the fair-share fee payor has to follow to object or challenge;
- 3) Must treat "latecomers" no differently than other fair-share employes as far as the right to object/challenge, i.e., as far as practical, those new hires and employes who quit the union subsequent to the notice and dissent period must be given the same right to object or challenge;
- 4) Must delete the certified mail requirement and the Five Dollar filing fee; and
- 5) Must provide adequate financial information as to the expenditures of the local unions.

On October 27, 1987 the Respondent Unions filed their Motion For Approval of Hudson Notice To Nonmember Fair Share Payors, to which they attached a copy of their amended notice. The Complainants have had the opportunity to review the Unions' Motion and amended notice and have responded in opposition to approving the Unions' notice and procedures.

Complainants

The Complainants contend that there are still several problems with the Respondent Unions' amended notice. Specifically, Complainants contend that, as to

the "latecomers", the amended notice does not make clear that "challengers" as well as "objectors" will be given an advance rebate and assert that this could discourage challenges. They offer specific language to correct that problem.

Complainants also note that the date for the close of the thirty-day objection and challenge period would have to be modified to give the fair-share employes a thirty-day period after receipt of notice. 3/

Next, Complainants cite what they feel are two problems with the Unions' corrected procedure. First, they assert that the procedure does not provide for a "reasonably prompt decision" by an impartial decisionmaker and the accompanying requirements noted by the Commission. This is so because the procedure set out in the notice does not include any time limits on the arbitration proceedings and does not specify that challengers will be given access to relevant information, time to prepare, and advance notice of hearing. Second, Complainants contend that the proper escrow arrangement required by the Commission is not provided for in the corrected notice in that it does not state that the monies will be turned over to a neutral third party and there is no evidence that this has in fact been done. The amended notice, at page 25, simply states that the union "shall place an amount equal to the difference between the fees collected from the Challenger and that portion of the fees advanced rebated in an interest-bearing escrow account."

Complainants also contend that approval of the Respondent Unions' amended notice and procedures should be withheld because the Unions have not provided any "evidence" that the Unions' governing authorities have approved them.

Lastly, Complainants note that the Respondent Unions have refused/failed to comply with the Commission's order to escrow all fair-share fees being deducted from all fair-share employes in the bargaining units represented by the Respondent Locals. They further assert that the Respondent Unions have failed to escrow interest even for the challengers. According to the Complainants, the Respondent Unions are in contempt of a "mandatory injunction" of the Commission and they should not be permitted to seek the Commission's approval of their proposed new notice and procedure until they first purge themselves of that contempt by fully complying with the existing orders. "The general rule is, that the court will not hear a party in contempt, coming into court to take any advantage of proceedings in the cause . . ." Mead v. Norris, 21 Wis. 310, 315, 316, 321 (1867); also citing, Am. Jur. 2nd and C.J.S., "a party in contempt for a real and substantial, not merely technical, disobedience of an injunction will not be heard on a motion for its dissolution until the contempt is purged." 17 Am. Jur. 2nd Contempt, paragraph 106, at 92-93. Also cited is American Steel and Pump Corporation, 32 Wis.2d 555, 558-59 (1966), where the appeal was dismissed "because of the contumacious contempt of the appellants in defying the injunctive order of the Circuit Court." Thus, Complainants contend that the Respondent Unions' motion must be denied.

Respondent Unions

The Respondent Unions reply that "the Complainants, with one exception, propose no modification to the Respondents' notice but merely articulate reasons for the changes that the union has already proposed. The one change proposed by the Complainants, (sic) . . . adds nothing to the protections afforded nonmember fee payers (sic). In fact the Complainants do not state why the unions' language is inadequate or why their change is necessary."

It is asserted that the Complainants raise no objection to the notice itself, rather, they have raised objections to the Unions' conduct. Such objections are irrelevant to the issue of the adequacy of the notice and should be dismissed. Further, the relief sought by Complainants for the alleged objectionable conduct is not the issuance of an adequate notice, but, in effect, an injunction against issuing such a notice until the Unions "have acted in a manner acceptable to the Complainants." Such relief would be inconsistent with the Commission's Order and would violate the fair-share fee payors' constitutional and statutory rights.

3/ The Unions concede that the dates will have to be changed.

Regarding Complainants' objection as to the lack of an affidavit stating that the notice has been approved, the Respondent Unions assert that "the mechanics of internal union governance and operations are irrelevant to the issue before the Commission. The question of whether the Unions' Hudson procedure 'is established and operating' will be demonstrated by the Unions' action and not by an affidavit."

As to Complainants' contention that approval of the notice should be withheld because the Unions are in contempt of the Commission's Order, the Respondent Unions reply that there has been no finding by a court that they are in contempt. The Unions assert they will oppose any finding of contempt based on their view that the Commission's Order, with respect to requiring the escrow of the fair-share fees of non-Complainants and non-objecting fee payors, is "overly broad, beyond the Commission's jurisdiction, and inconsistent with the balance between the rights of non-members and the rights of unions recognized by the U.S. Supreme Court." Citing, Hudson, 106 S.Ct. at 1074; Abood v. Detroit Board of Education, 431 U.S. 209, 237 (1977); Railway Clerks v. Allen, 373 U.S. 113, 120 (1963); and I.A.M. v. Street, 367 U.S. 740, 771 (1961). The Respondent Unions also contend that the "defacto injunction" requested by Complainants against implementation of "a constitutionally adequate Hudson notice and challenge procedure would be inconsistent with the Commission's order and the rights of non-members." They assert that they are not seeking relief from the Commission's Order, but only the approval of the modifications to its notice ordered by the Commission. According to the Unions, it is the fair-share payors who will benefit from the modifications, not the Unions. Therefore, the Commission's ruling on the motion will not be to the Respondents' "advantage." Citing Mead v. Norris. Further, the escrow of all fees paid by all non-members ordered by the Commission "was not intended as substantive relief but merely as an interim safeguard of the non-members' rights until adequate procedures were put into place by the union." Complainants have attempted to elevate this temporary relief into the "ultimate remedy" for the inadequate notice. The ultimate relief ordered in this proceeding, however, is the establishment of a procedure and the issuance of a notice that complies with the Hudson safeguards, and the notice is a "key element" of the procedure. Thus, the Respondent Unions assert that their motion for approval of their notice ought to be granted.

Discussion

Upon review of the Respondent Unions' proposed notice we conclude that the notice makes sufficiently clear that an "objecting" fair-share fee payor has waived his/her right to any benefit resulting from the determination of the proper fee amount by the impartial decisionmaker. The proposed notice also no longer contains a reference to filing a "charge" with the Commission and the certified mail requirement and the Five Dollar filing fee for dissenters have been deleted. Regarding the need for financial information pertaining to the locals, we conclude that the proposed notice contains an adequate breakdown of the expenditures of the Respondent Locals and verification by an independent auditor of the figures in their major categories of expenses.

As Complainants note, that portion of the proposed notice dealing with employes who become subject to a fair-share agreement after the dissent period has ended does not expressly state that those who "challenge" will receive an advance rebate. By specifying that those who "object" will receive an advance rebate while being silent in that regard as to those who "challenge", the notice is confusing as to the right of a latecomer who "challenges" to an advance rebate. We agree with Complainants that the confusion could tend to discourage latecomers from electing to "challenge." However, as we stated in our decision, we do not find it necessary or desirable to draft specific language that the Unions must adopt, rather, we will note the problem areas and explain why the wording used is deficient. In this case the proposed notice must be clarified with regard to advance rebates for latecomers who elect to "challenge" the Unions' calculations. Until the notice is clarified in that respect, it cannot be approved.

Complainants contend that the notice must also specifically provide that the escrow arrangement includes turning the monies over to a neutral third party, and must expressly provide that the fee determination will be reasonably prompt and that challengers will be given adequate access to information, adequate time to prepare for hearing and sufficient advance notice of the hearing. While such

specifics in the notice might be helpful, as we noted in our decision, as long as the notice is sufficiently clear as to how a "challenger" is to proceed, that is sufficient. 4/ The proposed notice, under section "C. Escrow of Fairshare Fees", states that: "Upon receipt of a written challenge AFSCME Council 48 shall place an amount equal to the difference between the fees collected from the Challenger and that portion of the fees advanced rebated in an interest bearing escrow account. . . ." That statement is sufficiently clear for the purpose of the notice. As to the escrow requirement and the other procedural requirements noted by Complainants, it is the actual escrow arrangement that has been established 5/ and the actual operation of the Unions' fair-share procedures which must produce those results, that are critical.

There is also an issue as to whether the Respondent Unions must submit evidence that their proposed notice and procedures have been officially adopted by the Unions. We note in this regard that the Commission is required by its Order to "determine" whether the Unions are prepared to provide adequate notice and whether they have established the proper fair-share procedures. 6/ While it was not felt that a hearing was necessary in order to rule on the Respondent Unions' motion, that does not excuse the Unions from having to submit evidence in some form as to their amended notice and procedures. So that the Commission can make a proper determination as to whether the Respondent Unions' proposed notice and their procedures are adequate, the Unions will be required to submit, at a minimum, the corrected notice and a sworn affidavit by an appropriate representative of the Unions that these are the notice and procedures they will provide. Until the corrected notice and such an affidavit is submitted, the Commission cannot approve the Unions' notice and procedures.

Complainants also contend that the Respondent Unions are in contempt of the Commission's Order insofar as the Unions refuse to escrow the fair-share fees of non-complainants and non-dissenters, and that, therefore, the Unions may not seek the Commission's approval of their notice and procedures. The Respondent Unions contend that this issue is not relevant here and deny they are in contempt, asserting that the Commission's Order is overly broad in that respect.

The Commission has moved for enforcement of its Order pursuant to Sec. 111.07(7), Stats., which provides in relevant part:

(7) If any person fails or neglects to obey an order of the commission while the same is in effect the commission may petition the circuit court . . . for enforcement of such order and for appropriate temporary relief or restraining order. . . . Said action may thereupon be brought on for hearing before said court. . . . Upon such hearing the court may confirm, modify, or set aside the order of the commission and enter an appropriate decree. . . .

Section 111.07(10), Stats., provides:

(10) Commencement of proceedings under sub. (7) shall, unless otherwise specifically ordered by the court, operate as a stay of the commission's order.

Therefore, the Respondent Unions cannot be considered "in contempt" of our Order.

4/ Dec. No. 18408-G, 19545-G at 47 and 50.

5/ We note that our Order requires that separate escrow accounts be established for the two cases. Id., at 20 and footnote 16.

6/ Id., paragraphs 6 and 7 of the Order, at 20-21.

Although we do not condone the Respondent Unions' refusal and/or failure to comply with portions of our Order, we have concluded that it would be inappropriate to delay the correction of the Unions' fair-share notice and procedures by refusing to rule on the Unions' motion until they comply with our Order.

Based on the foregoing, we have concluded that when the Respondent Unions provide the Commission with evidence that they have (1) made the corrections in the proposed notice, and (2) adopted the notice and procedures as the ones to be provided to their fair-share fee payors, the Commission will then approve the notice and procedures. We have indicated that evidence in the form of the corrected notice and accompanying affidavit will be considered sufficient.

Dated at Madison, Wisconsin this 4th day of February, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian
Herman Torosian, Commissioner

A. Henry Hampe
A. Henry Hampe, Commissioner