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 PALSGROVE, 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 Decision No. 18408-M
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 Decision No. 19545-M

Appearances:

See Page Two

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John H. Bowers, 214 West Mifflin Street, Madison, Wisconsin 53703, on behalf of the Respondent Unions.
Kirschner, Weinberg & Dempsey, Attorneys at Law, by Mr. John J. Sullivan, 1615 L Street, N.W., #1360, Washington, D.C., 20036, on behalf of the Respondent Unions.
Mr. Raymond J. LaJeunesse, Jr., National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Suite 600, Springfield, Virginia, 22160, on behalf of the Complainants.

ORDER

The Respondent Unions having, on March 27, 1989, submitted to the Commission their Notice To All Nonmember Fair-share Payors for the period

July 1, 1987 through June 30, 1988; and the Complainants having, on April 27 and July 17, 1989, filed written argument in opposition to the approval of said Notice; and the Respondent Unions having, on June 30, 1989, submitted a sworn affidavit in support of their request that the Commission approve the Notice and on July 27, 1989, filed written argument in support of their motion; and the Commission having considered the Respondent Unions' Notice and request and the positions of the parties, and being satisfied that the Respondent Unions' Notice should be approved;

NOW, THEREFORE, it is

ORDERED

That the Respondent Unions' Notice To All Nonmember Fair-share Payors be, and same hereby is, approved.

Given under our hands and seal at the City of Madison, Wisconsin this 18th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

MILWAUKEE PUBLIC SCHOOLS
MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER

On March 27, 1989 the Respondent Unions submitted the attached "Notice To All Nonmember Fairshare Payors" to the Commission. This is the third notice that the Respondent Unions have submitted to the Commission for approval pursuant to our Order of April 24, 1987. 1/ The previous notices submitted by the Respondent Unions were rejected for various reasons, including the failure to provide evidence that the notice and procedures had been duly adopted by the Unions' governing bodies and the financial data utilized in the notice. 2/ The instant notice was not accompanied by a formal motion that it be approved or supporting affidavits; however, the Respondent Unions subsequently have filed a supporting affidavit and characterize their submission as "application to the Commission for approval" of their notice.

Complainants

Complainants filed argument opposing the approval of the Respondent Unions' "Notice to All Nonmember Fairshare Payors." Complainants first note that the Respondent Unions did not initially make any express request for approval of their notice, and contend that if the Respondent Unions desire that the Commission issue an order approving the notice, they should file a proper motion in writing as required by ERB 10.11(1) Wis. Adm. Code. Secondly, it is asserted that the Respondent Unions failed to submit any supporting affidavits in order to meet the Commission's minimum evidentiary requirement set forth in the Commission's February 4, 1988 and April 20, 1988 orders in these cases.

1/ Decision Nos. 18408-G, 19545-G.

Our order of April 24, 1987, provided in relevant part:

> 6. That the Respondent Unions in Browne v. Milwaukee Board of School Directors, AFSCME, District Council 48 and Local 1053, their officers and agents, shall continue the advance rebate for "objectors" and "challengers," and immediately escrow in an interest-bearing account any and all fair-share fees deducted from, and not advance rebated to, all fair-share fee payors in the bargaining unit represented by Respondent Local 1053, including Complainants, from the date of the decision of the U. S. Supreme Court in Chicago Teachers Union v. Hudson, March 4, 1986, plus interest at the rate of seven percent (7%) per annum on the fees collected from all such fair-share fee payors, from the date such fees were taken until they are placed in escrow, until the Commission has determined, by hearing had at the request of any of the Respondent Unions in Browne or by the agreement of the parties, that the Respondent Unions are prepared to provide adequate notice to all fair-share fee payors in the bargaining unit and have established the proper fair-share procedures. Upon such a determination by the Commission, or agreement by the parties, and after the approved notice has been distributed and the time to "object" or "challenge" has run: (1) the fees that have been collected from the fair-share fee payors who have not filed a "challenge" under the corrected notice and procedures, (plus any amount of the fees deducted from "challengers" not reasonably in dispute, provided the breakdown into chargeable and nonchargeable categories has been verified by an independent auditor,) will be disbursed in accordance with the revised and approved procedures, (2) the fair-share fees thereafter collected shall be disbursed or escrowed in accordance with the revised and approved procedures, and (3) the fees of those fair-share fee payors who have filed "challenges" under the corrected notice and procedures, as well as Complainants, shall remain in escrow until the impartial decisionmaker has rendered his/her decision on the amount of the fair-share fee chargeable to those who elected to challenge, with such determination to date back to the date of the decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson.

At 20-21

A similar order in our decision addressed the Respondent Unions in Johnson.

2/ Decision Nos. 18408-J, 19545-J (2/88); Dec. Nos. 18408-K, 19545-K (4/88); Dec. Nos. 18408-L, 19545-L (7/88) (Motion For Reconsideration).

The Complainants also contend that even if the Respondent Unions file the necessary motion and supporting affidavits, the notice should not be approved as it is still constitutionally inadequate. Noting that the Respondent Unions utilized the financial data for the accounting periods 3/ that ended prior to the period for which the fee is calculated, July 1, 1987 - June 30, 1988, Complainants assert that the Unions should have used the actual figures for that period in the notice and to calculate the fee. According to Complainants, the holding in Chicago Teachers Union v. Hudson 4/ and Tierney v. City of Toledo 5/ that a union may calculate the fair-share fee on the basis of its expenses for the preceding year is based on the premise "that notice of the basis for a compulsory fee would be given before any portion of the fee is collected, i.e., at or before the beginning of the Union's fiscal year." The courts recognized the practical reasons for a union's using its expenses of the preceding year to calculate the fee under those circumstances. It is contended that, even so, as First Amendment rights are implicated, the method of calculating the fee "must be narrowly drawn" in order to minimize the infringement on the objector's constitutional rights and the burden on the exercise of those rights 6/ and, therefore, only "a limited degree of imprecision is tolerable in calculating a service fee." Lehnert v. Ferris Faculty Association, 643 F.Supp. 1306, 1328 (W. D. Mich. 1986). The Complainants assert that in this case, as in Lehnert, the circumstances contemplated by the court in Hudson do not exist, since the period for which the fee has been calculated has ended. In Lehnert the District Court held that a union cannot constitutionally base its fee on budgeted figures where the fiscal year for which the fee was calculated had already ended. 643 F.Supp. 1327-28. The Complainants assert that a union's spending patterns vary not only from budgets, but from year to year and that in this case the Unions' actual data is available since the fee period in question ended more than nine months ago. While the Commission held in its July 12, 1988 decision in these cases that the Respondent Unions may rely on their expenses for the most recently completed accounting periods that ended prior to June 30, 1987 to compute their fee for the July 1, 1987 through June 30, 1988 period, that period had then just ended. It was reasonable at the time to assume that the actual expenditure data was not available for the period in question. That assumption is no longer valid due to the Respondent Unions' delay in submitting a revised notice and procedure. The situation for the period in question is now identical to that of the period running from the date of the U. S. Supreme Court's decision in Hudson through June 30, 1987, for which the Commission noted the Unions' actual expenses were available, and for which the Unions should be required to provide notice based upon those actual expenses. The use of the actual data will reduce the risk of error in calculating the fee for the July 1, 1987 - June 30, 1988 period and will increase the likelihood that nonmembers will have sufficient information to make "an intelligent and informed" decision as to whether or not to object. Damiano, 830 F.2d at 1370. Further, since the Respondent Unions must use this same data to calculate the fee for the July 1, 1988 - June 30, 1989 fee period, it will not be burdensome on the Unions to require its use for the fee period in question.

The Complainants' latest response reiterates the foregoing argument and also takes issue with Respondents' claim that use of the Unions' actual expenses to calculate the fee would result in a higher fee than the fee amount in the notice. The Respondent Unions have not provided any evidence to support their claim and ignore the fact that there were also elections in 1988 and that election campaigns begin many months prior to election day. Hence, it is possible that nonchargeable expenses would be the same or greater for 1987-88 as 1986-87. Further, since the Respondent Union's must use their actual expenses for the period March 4, 1986 to June 30, 1987, the use of their actual expenses to calculate the fee for the July 1, 1987 - June 30, 1988 period will not eliminate the 1986 election season from the cycle as Respondent Unions claim. The Complainants also note that the Respondent Unions have yet to comply with the Commission's order that they give a revised notice for the period running from the date of the Court's decision in Hudson through June 30, 1987. According to Complainants, the Unions' own calculations show that the fee charged for that period was in excess of the amount the Unions have not calculated to be chargeable and that had that information been given to the fair-share payors there would have been far more objectors and challengers than there were in response to the earlier inadequate notice. Therefore, the Notice should not be approved and the Commission should require the Respondent Unions to either:

(1) submit a notice based on actual expenses for the fee

3/ The various Respondent Unions have different accounting periods which had ending dates that varied from October 31, 1986 to May 31, 1987.

4/ 475 U.S. 292, 305-07 (1986).

5/ 824 F.2d 1497, 1503 (6th Cir. 1987).

6/ Citing, Damiano v. Matish, 830 F.2d 1363, 1369 (6th Cir. 1987).

> period in question; or, (2) prove at a hearing before the Commission that a fee based on actual expenses would be greater than that calculated in the notice already given to nonmembers, but waive collection of the difference in return for being permitted not to give a new notice to all nonmembers (in which event challengers should be given an opportunity to withdraw their challenges).

Complainants also request that the Commission pursue compliance with its order requiring the notice for the period from the date of Hudson to June 30, 1987.

Respondent Unions

The Respondent Unions replied to the Complainants' first two arguments by stating they would file the appropriate pleadings and affidavits. As to the Complainants' argument that the Respondent Unions must base their fee and notice on their actual expenses for the period in question, the Respondent Unions assert that the Commission decided that issue in its April 24, 1987 decision in these cases in rejecting the same argument Complainants made at that time. Further, basing the fee for the period in question on the Unions' actual expenses for that period would result in a higher fee than that set forth in the notice. The fee amount in the notice is based on expenses incurred in part during the 1986 election period, while the fee period in question had less political activity and "relatively less nonchargeable union political expenses." While these variations would even out over the course of the electoral cycle, Complainants' proposal would eliminate the 1986 election season from the cycle to the fair-share payors' detriment. Further, the Court held in its decision in Hudson that "absolute precision" could not be expected, and permitted unions to base their fee on their expenses for the preceeding year. Hudson, 106 S. Ct. at 1076, n. 18. Therefore, the notice should be approved.

DISCUSSION

We first note that the Complainants' first two objections to the notice being approved have been satisfied by the Respondent Unions' submission of June 30, 1989.

The Complainants have also objected to the Unions' notice being approved on the basis that the fee and the financial information provided in the notice are based on the data from the Unions' most recently completed accounting periods that ended prior to the period for which the fee was collected (July 1, 1987 -June 30, 1988), rather than being based on the actual financial data for that fee period. The Complainants reason that using the actual data for the period is required in this instance because it is more accurate and because it is now available to the Unions.

We find the Complainants' argument to be much the same as one they made earlier in these cases. Relying on Lehnert, supra, the Complainants argued in mid-1988 that there was no reason the notice for July 1, 1987 - June 30, 1988, could not be based on the Unions' most recently completed fiscal years, including the fiscal years that ended in October and December of 1987, since by that time in 1988 the information was available to those Unions. We addressed the issue as follows in our July 12, 1988 decision in these cases:

> The Respondent Unions' Hudson notice submitted for the Commission's approval contains financial information for AFSCME International, District Council 48 and its affiliated locals. With respect to AFSCME and a number of the affiliated locals, the financial information is for the accounting period ending December 31, 1986. The financial information provided for District Council 48 is for the accounting period ending October 31, 1986, and in the case of some of the locals the information provided is for accounting periods ending March 31, 1986, April 30, 1986 and May 31, 1986. This information is provided in the Unions' notice as the basis for the fair-share fee to be charged to nonmembers for the period June 30, 1987 (sic) - June 30, 1988.
>
> We held in our decision of April 20, 1988 that while Hudson permits the Unions to use their expenses for the prior year to calculate the service fee, the financial information provided in the notice, and upon which the fair-share fee is based, must be from the Unions' most recently completed fiscal years. Further, to be considered timely, the notice based on the information must be issued within twelve months of the end of the fiscal period from which the financial information is taken. With respect to those locals with fiscal years ending in March, April or May, the information in the Unions' notice, and upon which the fair-share fee for June 30, 1987 (sic) - June 30, 1988

is based, is for accounting periods (fiscal years) ending in 1986. Therefore, the information in the notice is not for their most recently completed fiscal years which ended prior to June in 1987, and is not within twelve months of the end of those fiscal periods. Thus, to be sufficient, the notice must include the various accounting periods ending October 31, 1986 through May 31, 1987. The Unions may wish to consider establishing common accounting periods for future years to facilitate compliance with our Orders.

The Complainants contend that the Unions must not only use their expenses for the accounting periods ending in 1987 but also recalculate the fee based on those expenses. While that might be optimum, the Commission recognizes that time continues to pass as the parties and the Commission attempt to "work out the bugs" in the Unions' notice and procedures. Given the time that passes during the approval process after the notice has been submitted for approval and that the fee is calculated for a set period, it would be impracticable and unnecessary to require the Unions to both update their information and recalculate the fee as time passes. Under an adequate notice and procedure, any imprecision in the calculation of the fee based on the Unions' expenses for their most recently completed accounting periods should be adequately addressed by the opportunity of "challengers" to submit the calculation of the fee amount to review by an impartial decisionmaker. Therefore, rather than requiring that all of the Unions use their expenses for their accounting periods ending in 1987 to recalculate a fee figure, we will permit the Unions to rely on their expenses for their most recently completed accounting periods that

> ended prior to June 30, 1987 to compute and provide notice for the fair-share fee to be charged for the period June 30, 1987 (sic) to June 30, 1988.

Decision Nos. 18408-L, 19545-L at 4-5 (footnotes omitted).

The notice submitted meets the requirements set forth above, and for the reasons stated therein we find that those requirements should ensure that the Complainants are adequately informed as to the basis for the calculation of the fee that was collected for the period in question. A number of courts have held that the purpose of the notice required by the U.S. Supreme Court in Hudson is to provide the fair-share fee payors with adequate information about the basis of the fee so that they are able to make an informed decision whether or not to object, rather than to ensure the accuracy of the fee. Hudson v. Chicago Teachers Union, 699 F.Supp. 1334, 1340 (N.D. Ill. 1988); Gwirtz v. Ohio Education Ass'n., 704 F.Supp. 1481, 1484 (N.D. Oh. 1988); Hohe v. Casey, 695 F.Supp. 814, 819 (M.D. Pa. 1988).

In Gwirtz the plaintiffs claimed that the unions' notice was inadequate because the unions did not use an accounting method that plaintiffs argued would be the "most effective" means of explaining the fee's calculation.

In rejecting the plaintiffs' argument that the unions must use the "least restrictive" method available to disclose its financial information in the notice, the court held in Gwirtz:

> The plaintiffs argue that the Court is required to order the least restrictive means available for the Union to disclose its finances and in this case the means is the SAS 14 Special Report. The Court disagrees and instead agrees with the Second Circuit in Andrews v. Education Association of Cheshire, 829 F.2d 335 (127 LRRM 2929) (2d Cir. 1987), where the Second Circuit stated that "We do not believe that Hudson stands for the proposition that a union's procedures are constitutionally infirm unless they constitute the least restrictive process imaginable. When the union's plan satisfies standards established by Hudson, the plaintiffs should be upheld even if its opponents can put forth some plausible alternative less restrictive of their right not to be coerced to contribute funds to support political activities that they do not wish to support." Andrews, 829 F.2d at 340.

704. F.Supp. at 1485.

As we were in our previous decisions in these cases, and as were the courts in Andrews and Gwirtz, we are concerned that the Unions' notice and procedures be sufficient to meet the requirements of Hudson, and not whether they represent the optimum means available. The Respondent Unions' notice would have been sufficient nine months ago because using the financial information from the Unions' most recently completed fiscal years would provide adequate information for fair-share payors to decide whether or not to object or to challenge the calculation of the fee. The passage of nine months does not change things in that respect. As we noted in our previous decision, "Under an adequate notice and procedure, any imprecision in the calculation of the fee based on the Unions' expenses for their most recently completed accounting periods should be adequately addressed by the opportunity of "challengers" to submit the calculation of the fee amount to review by an impartial decisionmaker." Decision Nos. 18408-L, 19545-L at 5.

As Complainants have noted, we did make the following statement in our previous decision:

> We also note that the notice submitted does not address that time period beginning with the date of the Supreme Court's decision in Hudson (March 4, 1986) to June 30, 1987. The Unions' actual expenses should be available for that period and by our Order of April 24, 1987, in these cases the Respondent Unions must provide adequate notice to all
>
> fair-share fee payors they represent and permit them to dissent for the period beginning with the date of the decision in Hudson.

Decision Nos. 18408-L, 19545-L at 5 (footnotes omitted).

We made that statement in recognition of the fact that the period in question would be only a part of a regular fee period, as well as the fact that the Respondent Unions would have to produce their actual data for the time period preceding that period in preparation for the Stage II hearing in these

cases. 7/ It was on those bases, rather than a conclusion that actual data for the period in question must be used in the notice whenever it is available, that we concluded it was appropriate that the actual data be used. 8/

Based upon the foregoing, it is concluded that the instant "Notice to All Nonmember Fairshare Payors," and the procedures as set forth therein, submitted by the Respondent Unions for the fair-share fee period of July 1, 1987 - June 30, 1988, meets the applicable requirements set forth in the U.S. Supreme Court's decision in Hudson.

Dated at Madison, Wisconsin this 18th day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairman

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

7/ In Stage II the fees properly chargeable to the Complainants for the period of January 1, 1983 up to March 4, 1986 will be determined by the Commission.

8/ We also note that compliance with our order requiring a new notice for the period from March 4, 1986 through June 30, 1987 is presently being pursued and is presently one of the issues pending before the Court of Appeals.