STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ERVIN HEWITT and DUANE PETERSON, Complainants, vs. BOARD OF EDUCATION FOR JOINT SCHOOL DISTRICT NO. 3, VILLAGE OF HARTLAND, WISCONSIN; HARTLAND EDUCATION ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL AND NATIONAL EDUCATION ASSOCIATION, Respondents.	Case 1 No. 26912 MP-1161 Decision No. 18577-F
KATHLEEN A. CHENTNIK, JANET M. D. HULBERT, GLADIES B. MUMM, BOBY J. FRINGS, PENELOPE L. NIESEN and DONNA F. WARD, Complainants, vs. RICHFIELD EDUCATION ASSOCIATION, Respondent.	Case 1 No. 27171 MP-1176 Decision No. 18578-F
JEAN EKBLAD, Complainant, vs. NORTHWEST UNITED EDUCATORS, Respondent.	Case 3 No. 29016 MP-1284 Decision No. 19307-F
DALE POEPPEL, P. WILLIAM GREER, THOMAS J. VOGT, KATHRYN KUMMER, DEBRA HOLSCHBACH, JANE KLINZING, DONNA NICCOLAI, CATHY LADER, ELMER J. THOMPSON, MARLENE REEDER, DARLENE FREESE, LYNN WINTER, SUSAN J. REINKE, CHERYL L. PRICE, LINDA LERNBRICH, GENE TAYLOR, EVELYN PROPP, DENNIS DIDERICH, LINDA W. POLGLAZE, LAWRENCE HOOD, DONAVAN JONES, Complainants, vs. BOARD OF EDUCATION, CLINTON COMMUNITY SCHOOL DISTRICT, CLINTON, WISCONSIN; CLINTON EDUCATION ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL AND NATIONAL EDUCATION ASSOCIATION, Respondents.	Case 11 No. 30570 MP-1397 Decision No. 20081-G
SAUK PRAIRIE FAIR SHARE MEMBERS SAUK PRAIRIE SCHOOLS, WI, Complainants, vs. SAUK PRAIRIE SCHOOL BOARD, SAUK PRAIRIE EDUCATION ASSOCIATION, SOUTH CENTRAL UNITED EDUCATORS, WISCONSIN EDUCATION ASSOCIATION COUNCIL, Respondents.	Case 22 No. 29357 MP-1312 Decision No. 19467-H

Appearances:

Mr. David T. Bryant, Staff Attorney, National Right to Work Legal Defense Foundation, Inc., 8001 Braddock Road, Springfield, Virginia, 22160, on behalf of the Complainants in all of the cases except Sauk

Prairie School District.

Mr. Walter L. Harvey, Attorney at Law, Center Tower, Suite 1850, 650 Town Center Drive, Costa Mesa, California, 92626, on behalf of the Complainants in Sauk Prairie School District.

Mr. Bruce Meredith, Staff Counsel and Ms. Valerie Gabriel, Associate Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin, 53708-8003, on behalf of the Respondents.

SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 1, 1987, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-captioned cases. A portion of the Commission's decision concluded Respondent Associations had committed prohibited practices within the meaning of Sec. 111.70(3)(b)1, Stats. by exacting a fair share fee from Complainants and other fair share fee payors in the absence of constitutionally required procedural safeguards. To remedy the prohibited practices, Respondent Associations were ordered to take certain action. Among other matters, Respondent Associations were advised by the Commission's decision that the fair share arbitration process upon which Respondent Associations had embarked but not completed prior to the Commission's ruling was not valid and that a new arbitration proceeding was required.

On September 21, 1987, Respondent Associations filed a petition for rehearing with the Commission pursuant to Sec. 222.49, Stats. The petition asked the Commission to reconsider its decision as to the invalidity of the arbitration proceeding. The Commission granted the petition on October 21, 1987 as to the question of:

> Whether the Commission erred in holding that the Mueller arbitration was invalid and that Complainants are entitled to a new arbitration.

The parties then engaged in extensive settlement efforts which to date have proven unsuccessful. Ultimately, Respondent Associations advised the Commission that they desired to have a decision issued as to the matter before the Commission on petition for rehearing. By March 20, 1990, the parties stipulated to the receipt of certain evidence relating to the Mueller arbitration. The parties completed their submission of written argument on June 25, 1990.

Having reviewed the record and considered the matter, the Commission makes and issues the following Supplemental Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On September 18 and 19, November 3, 4 and 5 and December 18, 19 and 20, 1986, certain Complainants represented for the purposes of collective bargaining by Clinton Education Association, Hartland Education Association, Richfield Education Association and Northwest United Educators participated, as challengers, in hearing convened by Arbitrator Robert J. Mueller pursuant to the Revised Non-Member Fair Share Rebate Procedure promulgated by the Wisconsin Education Association in April 1986. During hearing on September 18, 1986, the representative of participating Complainants advised Mueller as follows:

> . . .
>
> THE ARBITRATOR: Are we ready to proceed then?
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> MR. BRYANT: Now, just to make clear, I, by participating here, I am not agreeing in any way that this is a procedure which complies with Hudson, among other things, that the Fair Share people did not have anything to do with your appointment. This has nothing to do against you personally, it's just the manner in which --
>
> THE ARBITRATOR: I understand that.
>
> MR. BRYANT: You were appointed. That may or may not be legally correct, and I simply want clear that I'm reserving my rights to raise such issue.
>
> MR. MEREDITH: I realize that. Let me -- maybe we should put one more thing in. That's our Fair Share Rebate Procedure. Let's do it as Joint 2.

. . .

2. During the hearing before Mueller, WEAC presented information regarding its actual expenditures for the period of September 1, 1985 through August 31, 1986 and participating Complainants had the opportunity to review and contest the validity of the expenditure information and to argue to Mueller as to the portion of said expenditures fair share fee payors could properly be required to contribute.

CONCLUSIONS OF LAW

1. Complainants who participated in the Mueller Arbitration thereby received expenditure information which should have been but was not contained in the defective notice portion of the Wisconsin Education Association's Revised Non-Member Fair Share Rebate Procedure.

2. Complainants who participated in the Mueller Arbitration would receive no additional remedial benefit from the new notice and arbitration proceeding presently required by Paragraph 4 of our September 1, 1987 Order.

ORDER 2/

Paragraph 4 of our September 1987 Order is amended through addition of the following underlined language at the conclusion of said paragraph:

> 4. That the Respondent Associations, their officers and agents, shall, to the extent they are not already doing so, immediately properly escrow in an

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2/ Please find footnote 1/ on page 4.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

interest-bearing account 19/ any and all fair-share fees deducted from all fair share fee payors in respective bargaining units in these cases represented by the Respondent Local Associations and Respondent NUE, including Complainants, from the date of the U.S. Supreme Court's decision in Chicago Teachers Union v. Hudson, March 4, 1986, plus interest at the rate of twelve percent (12%) 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 Associations or by the agreement of the parties, that the Respondent Associations are prepared to provide adequate notice to all fair-share fee payors in the bargaining units 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 dissent and to accept the offered rebate or to "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. However, Respondent Associations are not obligated to provide those Complainants who participated in the Mueller Arbitration with a corrected notice and additional arbitration proceeding for the period of March 4, 1986 through August 31, 1987.

Given under our hands and seal at the City of Madison, Wisconsin this 13th day of February, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

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

On September 1, 1987, the Commission issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matters. Among other matters, we therein concluded that WEAC's April 1986 "Revised Non-Member Fair-Share Rebate Procedure" did not provide all of the constitutionally required procedural safeguards set forth in Chicago Teachers Union v. Hudson, 106 S.Ct. 1066 (1986), and that an arbitration proceeding premised upon the flawed procedure was invalid. In our Memorandum at page 85-86 we commented:

> The Respondent Associations have contended that the Mueller Arbitration should be considered valid and that they should not be required to provide a new arbitration in its place. We have found that the information contained in the Respondent Associations' April 24, 1986 notice was defective because it did not contain audited financial information for Respondents NEA and WEAC and contained no financial information whatsoever for the Respondent UniServs or Local Associations. 52/ We remain persuaded at this point that a new arbitration is needed where the notice provided to the fair-share fee payors was defective. We are convinced that it would be inappropriate to impose upon Complainants the results of the arbitration held under the notice and procedures that they had successfully challenged, and that it would be inequitable to impose such a result merely because Complainants could have participated in the arbitration had they wished.
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> 52/ To some extent those deficiencies might explain the relatively small number of fair-share payors who registered their dissent after receiving the April 24, 1986 notice alluded to by the Respondent Associations in asserting the relatively small impact of any defects in its notice.

On September 21, 1987, WEAC filed a Petition for Rehearing with the Commission contending in part that because certain Complainants had participated in the arbitration proceeding, the Commission should reconsider the portion of its holding quoted above. Following receipt of argument, the Commission granted the petition for rehearing as to:

> Whether the Commission erred in holding that the Mueller arbitration was invalid and that Complainants are entitled to a new arbitration.

Thereafter the parties 3/ engaged in settlement efforts which have proven unsuccessful to date. The parties ultimately submitted written argument on the petition for hearing, the last of which was received on June 25, 1990.

POSITIONS OF THE PARTIES

WEAC

WEAC summarizes its argument thusly:

> Despite initial defects in the Respondent unions' notice of fair share fees to the Complainants, Complainants have waived their objections to the notice by their subsequent participation in the extensive arbitration proceedings. The purpose and intent of the notice were met when the Complainants mounted their

3/ Respondent Districts have not taken any position as to the petition for rehearing.

> challenge to the Association's representation fees. Further, all previously omitted information was made available and subject to cross-examination by counsel from the National Right to Work Committee. No special appearance or specific objection to the notice was made at the arbitration. Absent a showing of prejudice to the Complainants, the defects in the notice constitute harmless error. Indeed, the outcome of the decision to challenge the fees upon receipt of the notices actually benefited the Complainants as compared to the outcome of a decision not to challenge.
>
> A second arbitration would produce precisely the same results at great expense to the parties involved. No harm has been done which can, in any conceivable way, be remedied by further proceedings. The Commission should reconsider and rescind its conclusion that Complainants not be bound by the arbitration in which they participated.

More specifically, WEAC argues that when the Commission issued its decision in September 1987 holding the Mueller Award invalid, the Commission based its conclusion upon the determination in Browne v. Milwaukee Board of School Directors, Dec. No. 18408-G (WERC, 4/87) that:

> 72/ We note that a new dissent period and a new arbitration will be required and their application will date back to date of the decision in Hudson. This action should in no way be taken to reflect on the integrity of Arbitrator Weisberger, as it is the union's, rather than the arbitrator's, responsibility to see that the notice and procedures are adequate.

However, WEAC asserts that its arbitration proceeding is materially distinguishable from the proceeding invalidated by the Commission in Browne because, with the exception of the Sauk Prairie Complainants, all of the Complainants participated in the WEAC arbitration proceeding. WEAC argues that those Complainants who participated waived any claim based upon the defective notice the Commission found to exist. It contends that a finding of waiver is supported by general jurisprudence applicable to civil proceedings and seems especially appropriate where the Complainants had access to all the financial information not present in the WEAC notice and the parties spent substantial time and resources fully litigating the merits of the dispute.

WEAC contends that the Seventh Circuit Court of Appeals decision in Gilpin v. AFSCME, 875 F.2d 1310 (1989) squarely holds that the result of an otherwise valid fair share arbitration proceeding is not nullified by defective notice where the employes who did not participate could show no harm. Here, WEAC argues that participating Complainants were not harmed by the defective notice. WEAC also cites the decision of the New Jersey Public Employment Relations Commission in Mallamud v. Rutgers Council of AAUP Chapters AB-84-13 (4/86) holding that defective notice did not entitle objecting employes to refunds of fair share fees. WEAC contends that participating Complainants can show no harm from the defective notice given their full access to all information during the hearing.

WEAC alleges that the Commission should not be deterred from giving the Mueller Award some effect by the potential for inconsistent determinations from different arbitrators as to appropriate fair share fee amount. WEAC argues conflicting adjudications are an inherent part of the adversarial system under American jurisprudence and always possible in fair share litigation where access to different forums is possible. Further, WEAC contends that in the context of the instant litigation, upholding the Mueller Award may not produce another arbitration proceeding because the Sauk Prairie Complainants may again not chose to participate in any subsequent arbitration.

SAUK PRAIRIE COMPLAINANTS

Noting that they did not participate in the Mueller arbitration, Sauk Prairie Complainants did not file written argument on the rehearing issue.

REMAINING COMPLAINANTS

Complainants urge the Commission to reject WEAC's argument that any defect in the WEAC notice has been waived. Complainants assert that during the

Mueller proceeding they specifically reserved the right to raise defects in the WEAC procedure in collateral proceedings. They also argue that the Seventh Circuit Court of Appeals in Hudson v. Chicago Teachers Union, 743 F.2d 1187 (1984), specifically held that the extent of participation is remedially irrelevant if the procedure is constitutionally flawed. Complainants contend that the Commission in Browne seemingly adopted this Hudson position when an arbitration proceeding under a defective AFSCME procedure was invalidated even for those who "challenged" the AFSCME fee under the procedure. Complainants also note that, in any event, they are not "bound" by the Mueller Award even should waiver be found because they remain free to challenge the arbitration result in other forums.

Complainants urge the Commission to see the issue on rehearing as being one of determining the appropriate remedy for a proven prohibited practice. Complainants continue to argue that a return of all fees taken under a flawed procedure is appropriate in addition to the required establishment of a constitutional procedure in the future. However, to the extent that the Commission has already rejected a portion of this relief, Complainants urge the Commission to retain the requirement of a new arbitration proceeding for all Complainants as part of its remedy herein.

DISCUSSION

In our September 1987 decision, we summarized our remedy as follows:

> (14) Retroactive relief is appropriate in these cases and consists of ordering the Respondent Associations to properly escrow an amount equal to the fair-share fees paid by Complainants since one year prior to the filing of the respective complaints 25/ up to March 4, 1986, the date of the U.S. Supreme Court's decision in Hudson, plus interest at the rate of twelve percent (12%) per annum from the date the fees were taken to the date the funds are placed in escrow in compliance with this Order, with the Commission 26/ in subsequent proceedings to determine the proper disburse-ment of the escrow monies based on the chargeable/non-chargeable proportions of the fees for each of the years involved; and
>
> (15) The appropriate prospective relief is an order that the Respondent Associations immediately correct their notice and procedures to comply with Hudson, properly escrow in an interest-bearing account all fair-share fees deducted, from all fair-share fee payors in the covered bargaining units, including Complainants, plus interest at the rate of twelve percent (12%) per annum on all such fees collected from the date of the Supreme Court's decision in Hudson until they have been placed in escrow; after the Commission has determined and declared that the Respondent Associations have established the procedures required by Hudson and after adequate notice has been given and the time for "objecting" or "challenging" has run, the fees in escrow, and those procedures, and the fees of the "challengers," including Complainants, will remain in escrow until their disbursement is authorized by the decision of an impartial decisionmaker as regards the period dating back to the date of the decision in Hudson. Upon such a determination the escrowed monies are to be disbursed in accord with said decision, including the bank interest earned during the escrow. Complainants are to be deemed "challengers" in any such proceedings.

25/ One year prior to the date complainants were added to the complaints in those cases where they were added after the applicable complaint was filed.

26/ Or other impartial decisionmaker if the parties so agree.

The impact which our decision herein has on this previously ordered remedy is limited to the question of whether those Complainants who participated in the Mueller proceeding nonetheless continue to be entitled to a new arbitration proceeding under our decision following WEAC's correction of

their notice and procedure. 4/ For those Complainants who did not participate in the Mueller proceedings and for any other non-Complainant fair share fee payors in the covered bargaining units, WEAC remains required by our Order to seek Commission approval of an amended notice and procedure before proceeding to utilize its internal procedure for the period commencing March 4, 1986, the date of the Supreme Court's Hudson decision. Further, as we noted in footnote 33 at page 46 of our September 1987 decision, an award premised on an invalid Hudson procedure cannot be used as a valid basis for a partial escrow.

A valid Hudson notice provides fair share fee payors with information sufficient to allow them to determine whether they wish to challenge a labor organization's view as to the amount of money fair share payors can be compelled to tender to the labor organization for the costs of collective bargaining and contract administration. A valid Hudson proceeding before an impartial decision-maker then allows those who decide to challenge the labor organiz-ation's view an initial opportunity to fully litigate the precise level of fair share payments which are appropriate.

Here, despite the defective WEAC notice, certain Complainants challenged WEAC's fair share fee level and during eight days of hearing before Arbitrator Mueller, received, reviewed and litigated evidence as to the actual expenditures upon which a fair share fee was to be determined. During the hearing, partici-pating Complainants received information in far greater detail than an appro-priate Hudson notice would need to provide.

Under such circumstances, participating Complainants have already received expenditure information which should have been provided by the defective WEAC notice. A new notice would not benefit them further. Nor would participating Complainants benefit by having access to another arbitration proceeding during which the same information would be presented to another arbitrator.

We acknowledge that at the commencement of the Mueller hearing, partici-pating Complainants did state that by participating they were not conceding that the WEAC procedure was valid. However, such a disclaimer does not alter the reality that by participating Complainants received the benefit provided by a portion of our remedy.

Thus, we are satisfied that it is appropriate to modify our remedial order to the effect that participating Complainants are not entitled under our September 1987 Order to a new notice and arbitration proceeding for the period of March 4, 1986 through August 31, 1987.

Dated at Madison, Wisconsin this 13th day of February, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

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Herman Torosian, Commissioner

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William K. Strycker, Commissioner

4/ The Mueller Award applied to the period of September 1, 1985 through August 31, 1987. Pursuant to our Order, the determination of the amount properly chargeable to all Complainants for the period prior to March 4, 1986 is immediately subject to Commission determination. Thus, Respondents have no obligation and Complainants have no right under our Order to a pre-Hudson arbitration proceeding. We continue to stand ready to conduct a remedy hearing as to this pre-Hudson period.