STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ERVIN HEWITT and DUANE PETERSON, Complainants, BOARD OF EDUCATION FOR JOINT SCHOOL DISTRICT NO. 3, HARTLAND, WISCONSIN, HARTLAND EDUCATION ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL AND NATIONAL EDUCATION ASSOCIATION, Respondents.	Case 1 No. 26912 MP-1161 Decision No. 18577-C
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-C
JEAN EKBLAD, Complainants, vs. NORTHWEST UNITED EDUCATORS, Respondent.	Case 3 No. 29016 MP-1284 Decision No. 19307-C
DALE POEPPEL, P. WILLIAM GREER, THOMAS J. VOGT, KATHRYN KUMMER, DEBRA HOLSCHBACH, JANE KLINZING, DONNA NICOLLAI, CATHY LADER, ELMER J. THOMPSON, MARLENE REEDER, DARLEEN FREESE, LYNN WINTER, SUSAN J. REINKE, CHERYL L. PRICE, LINDA LERNBRICH, GENE TAYLOR, EVELYN PROPP, DENNIS DIDERICH, LINDA W. POLGLAZE, LAWRENCE HOOD, DONAVAN JONES,	Case 11 No. 30570 MP-1397

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

Ervin Hewitt and Duane Peterson having, on October 10, 1980, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that the Board of Education for Joint School District No. 3, Hartland, Wisconsin, and Hartland Teachers Education Association, and Wisconsin Education Association Council, and National Education Association, have committed prohibited practices within the meaning of the Municipal Employment Relations Act, hereinafter MERA; and Kathleen A. Chentnik, Janet M. D. Hulbert, Gladies B. Mumm, Boby J. Frings, Penelope L. Niesen and Donna F. Ward having on January 5, 1981, filed a complaint with the Commission alleging that Richfield Education Association has committed a prohibited practice within the meaning of MERA; and Jean Ekblad having, on December 21, 1981, filed a complaint with the Commission alleging that Northwest United Educators has committed a prohibited practice within the meaning of MERA; and the Commission having appointed Amedeo Greco of its staff as Examiner in the above-entitled matters; and because of the unavailability of Amedeo Greco, the Commission having, on August 16, 1982, appointed Christopher Honeyman to replace Examiner Greco; and the Complainants in those matters having, on April 19, 1982, filed a Motion to Compel Discovery; and the Examiner having, on December 6, 1982, issued an Order Consolidating Cases and Granting Motion to Compel Discovery; and Dale Poeppel, P. William Greer, Thomas J. Vogt, Kathryn Kummer, Debra Holschbach, Jane Klinzing, Donna Nicollai, Cathy Lader, Elmer J. Thompson, Marlene Reeder, Darleen Freese, Lynn Winter, Susan J. Reinke, Cheryl L. Price, Linda Lernbrich, Gene Taylor, Evelyn Propp, Dennis Diderich, Linda W. Polglaze, Lawrence Hood, and Donavan Jones having, on October 28, 1982, filed a prohibitive practice complaint with the Commission wherein it was alleged that the Board of Education, Clinton Community School District, Clinton, Wisconsin, Clinton Education Association, Wisconsin Education Association Council, and National Education Association, had committed prohibited practices within the meaning of MERA; and the Commission, having appointed Stephen Schoenfeld, a member of the Commission's staff, to act as Examiner in the matter to make and issue Findings of Fact, Conclusions of Law and Order; and on December 6, 1982, Complainants in Clinton, by counsel, having filed a motion to place in escrow, pending the final determination of this matter, the full "share fees" being collected from the earnings of each of the Complainants; and Examiner Schoenfeld having, on January 10, 1983, issued an order in Clinton denying Complainants' motion; and the Complainants in Clinton having, on January 25, 1983, filed a motion with the Commission to consolidate that case with the pending cases in Joint School District No. 3, Village of Hartland, Richfield Education Association, and Northwest United Educators, which cases had previously been consolidated; and that motion having been accompanied by a stipulation to such consolidation of the cases signed by the Attorney for Complainants and the Attorney for the Respondent Associations in Clinton, wherein the parties stated they agreed that this case be consolidated with the others for the purposes set forth in the order issued by Examiner Honeyman in those other cases on December 6, 1982, (Order Consolidating Cases and Granting Motion to Compel Discovery, Dec. Nos. 18577-B, 18578-B, 19307-B); and on January 31, 1983, the Complainants in Clinton having filed with the Commission a Petition For Review of the Examiner's order denying their motion to escrow their full fair-share payments; and on February 9, 1983, the Commission having issued an Order consolidating Clinton with the other previously consolidated cases, and having thereby substituted Examiners, as requested in the parties' stipulation (Dec. No. 20081-B); and the Commission having, on July 20, 1984, issued in Clinton an Order Denying Motion to Escrow Fair-Share Payments (Dec. No. 20081-C); and on December 17, 1984, the Complainants in Clinton having filed with the Commission a Motion For Reconsideration of Order Denying Motion to Escrow-Fair-Share Payments in light of the U.S. Supreme Court's decision in Ellis v. Railway Clerks; 1/ and prior to further developments in these matters, the U. S. Supreme Court having, on March 4, 1986, issued its decision in Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986), hereinafter Hudson, wherein the Court held that certain constitutional requirements must be met prior to a union collecting a service fee from nonmembers; and, on May 20, 1986, Complainants in these cases having filed a request, in light of Hudson, that after hearing, the Commission issue final findings of fact, conclusions of law and order in the matter, and along with said request Complainants having submitted proposed findings, conclusions and order and supporting written argument; and Complainants having further requested that said

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1/ 104 S. Ct. 1883 (1984).

hearing be scheduled within the statutory 40 day period from the date of filing of its request provided for in Sec. 111.07, Stats.; and the Commission having considered the Hudson decision and the Complainants' requests for hearing and final decision and being satisfied that a show cause order and notice of hearing are appropriate in the matters;

NOW, THEREFORE, the Commission makes and issues the following:

ORDER AND NOTICE

1. That on or before June 30, 1986, Respondents shall file with the Commission and serve on the appropriate Complainants a statement of cause, if they have any, why the Commission ought not, in light of the Hudson decision (and the state of the record in this matter,) forthwith issue an order:

a. requiring all Respondents to immediately cease and desist from enforcing/honoring any fair share agreement affecting the bargaining units involved in these matters;

b. requiring Respondents to refrain from enforcing/honoring a fair share agreement affecting the bargaining units involved in these matters until the Commission has determined, after a hearing, that the Hudson conditions precedent to fair share collections have been met;

c. requiring Respondent Unions to immediately make the Complainants whole with interest for all fair share deductions taken from them since one year prior to the filing of the respective complaints.

2. That the absence of timely filing of a statement setting forth sufficient cause for the Commission not to do so may result in the Commission's immediate issuance of an order including some or all of the elements described in (1) above.

3. That unless all parties agree on a different hearing date or that no hearing is needed, a hearing shall be conducted in this matter on July 8, 1986, 1986, beginning at 10:00 a.m., at the main 3rd Floor hearing room at the Commission's offices located at 14 W. Mifflin Street, Madison, Wisconsin.

a. The purpose of the hearing shall be to adduce such evidence and arguments as any party may have with regard to any cause stated by any Respondent in timely response to the show cause order in (1), above, and further with regard to any other respects in which any Respondent may take issue with Complainants' request for final findings, conclusions and orders dated May 16, 1986 and filed May 20, 1986.

b. In addition to being controlled by procedural requirements in Ch. 111, Stats., this proceeding also is a class 3 proceeding within the meaning of Ch. 227, Stats.

c. The legal authority and jurisdiction under which this hearing is to be held are Secs. 111.07 and 111.70(4)(a), Stats.

d. The pleadings on file are deemed to state the matter asserted with specificity.

Dated at Madison, Wisconsin this 16th day of June, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

No. 18577-C
No. 18578-C
No. 19307-C
No. 20081-D

JOINT SCHOOL DISTRICT NO. 3, VILLAGE OF HARTLAND, et. al.
RICHFIELD EDUCATION ASSOCIATION
NORTHWEST UNITED EDUCATORS
CLINTON COMMUNITY SCHOOL DISTRICT, et. al.

MEMORANDUM ACCOMPANYING ORDER TO SHOW CAUSE AND NOTICE OF HEARING

The status of these cases is as noted in the Preface to the Order to Show Cause and Notice of Hearing. As noted below, Hudson clarifies the requirements of the First Amendment to the U.S. Constitution in matters regarding union security provisions in the public sector. It identifies constitutionally required safeguards that must be established before a union may collect a service fee from nonmembers (objecting or otherwise).

Because the Wisconsin Supreme Court made it clear in Browne v. Milwaukee Board of School Directors, 83 Wis.2d 316 (1978) that the fair-share provisions of MERA are to be interpreted in such a way as to be consistent with the requirements of the First Amendment to the U.S. Constitution, Browne, at 332, and because Hudson was grounded on the First Amendment, Hudson clearly has an impact on the ultimate outcome herein as well as on the availability of immediate relief of the various kinds herein.

In light of the decision in Hudson the Complainants filed a request that the Commission, after a hearing within the statutory forty (40) day time limit, issue final findings of fact and conclusions of law and orders. Complainants request an order:

(a) requiring Respondent unions to return to Complainants with interest at a rate of 12% per annum from the date of deduction until the date of return, all fair-share monies received by them from said employes since one year prior to the filing of the complaints;

(b) requiring the Respondent employers to cease and desist from making fair-share deductions from the earnings of all nonunion employes in the respective bargaining units in which Complainants are employed that are in excess of a proportionate share of the costs of the collective bargaining process and contract administration within the meaning of Section 110.70(1)(h), Wis. Stats.;

(c) requiring Respondent unions to cease and desist from inducing the respective employers to make fair-share deductions from the earnings of all nonunion employes in the bargaining units in which Complainants are employed that are in excess of a proportionate share of the costs of the collective bargaining process and contract administration within the meaning of Section 110.70(1)(h), Wis. Stats.; and,

(d) requiring the respondent employers to cease and desist from making any fair-share deductions from the earnings of all nonunion employes in the respective bargaining units in which Complainants are employed until the Commission, after hearing upon request of any respondent, has determined that respondents have provided for: an adequate advance explanation to all nonunion employes of the basis for the fair-share fee, verified by an independent certified public accountant; a reasonably prompt opportunity for employes to challenge the amount of the fee before an impartial decisionmaker; and an escrow, for at least the amounts determined by the impartial decisionmaker reasonably to be subject to dispute, while such challenges are pending.

HUDSON DECISION

Hudson involved a challenge on constitutional grounds to the union's procedure for determining the amount to be deducted under an agency shop provision in the labor agreement between the union and the municipal employer (school board) and the procedures for handling objections by nonmembers covered by the provision. The inclusion of such an agency shop or "fair-share" provision in a labor agreement between a union and a school board was authorized by a state statute which read as follows:

> Where a collective bargaining agreement is entered into with an employee representative organization, the school board may include in the agreement a provision requiring employees covered by the agreement who are not members of the representative organization to pay their proportionate share of the cost of the collective bargaining process and contract administration, measured by the amount of dues uniformly required by members. In such case, proportionate share payment shall be deducted by the board from the earnings of the non-member employees and paid to the representative organization. Ill. Rev. Stat., ch. 122, para. 10-22.40a (1983).

Based upon its financial records for the fiscal year ending June 30, 1982, the union determined that a nonmember's proportionate share of the cost of collective bargaining and contract administration for the 1982-83 school year was 95% of union dues. The 95% figure was computed by dividing the union's income for the year into the amount of its expenses unrelated to bargaining or contract administration. The figure arrived at was 4.6%, which the union rounded to 5% to provide a "cushion".

The union established a procedure for considering objections by nonmembers which provided that: (1) No objection could be raised before the deduction was made; (2) after the deduction a nonmember could object to the amount deducted by writing the union's President within thirty days of its decision; (4) if the objector disagreed with the decision, he/she could appeal within thirty days to the union's Executive Board; and (5) if the objector disagreed with the Executive Board's decision, the union's President would select an arbitrator from a list provided by the Illinois Board of Education and the union was responsible for paying for the arbitrator. If an objection was sustained at any step, the union would immediately reduce the amount for future deductions from all nonmembers and rebate the appropriate amount to the objector. The school board accepted the union's 95% figure and began making deductions. The union did make some effort to inform nonmembers of the deductions and of the deduction and protest procedures.

In a unanimous decision the Court held in Hudson that:

> The procedure that was initially adopted by the Union and considered by the District Court contained three fundamental flaws. First, as in Ellis, a remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose. "(T)he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." Abood, 431, U. S., at 224 (concurring opinion). . . .
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> Second, the "advance reduction of dues" was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share. In Abood, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.'" (sic) Abood, 431 U. S., at 239-240, n. 40, quoting Railway Clerks v. Allen, 373 U. S. 113, 122 (1963). Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. . . .
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> Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by

an impartial decisionmaker. Although we have not so specified in the past, we now conclude that such a requirement is necessary. The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner.

. . .

Hudson, 106 S. Ct. at 1075-76.

The union also voluntarily escrowed 100% of the plaintiffs' fees and indicated it would not object to the entry of a judgment requiring it to maintain an escrow system in the future. The union argued that by voluntarily escrowing 100% it avoids the risk that dissenters' fees could temporarily be used for impermissible purposes, and thereby eliminates any valid constitutional objections to its procedure. In rejecting the union's argument the Court held that:

> Although the Union's self-imposed remedy eliminated the risk that nonunion employees' contributions may be temporarily used for impermissible purposes, the procedure remains flawed in two respects. It does not provide an adequate explanation for the advance reduction of dues, and it does not provide a reasonably prompt decision by an impartial decisionmaker. We reiterate that these characteristics are required because the agency shop itself impinges on the nonunion employees' First Amendment interests, and because the nonunion employee has the burden of objection. The appropriately justified advance reduction and the prompt, impartial decisionmaker are necessary to minimize both the impingement and the burden.
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> Thus, the Union's 100% escrow does not cure all of the problems in the original procedure. Two of the three flaws remain, and the procedure therefore continues to provide less than the Constitution requires in this context.
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> Id., at 1077-78.

Regarding the need for an escrow arrangement while a challenge is pending the Court stated:

> We need not hold, however, that a 100% escrow is constitutionally required. Such a remedy has the serious defect of depriving the Union of access to some escrowed funds that it is unquestionably entitled to retain. If, for example, the original disclosure by the Union had included a certified, public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories. . . .
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> Id., at 1078.

At footnote 23 the Court indicated what would be required to justify escrowing less than the entire fee:

> If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.
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> Id., at 1078.

The Court summarized its decision in Hudson as follows:

> We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate

> explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.
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> Id., at 1078.

ORDER TO SHOW CAUSE

It appears from the Court's decision in Hudson that the procedural safeguards the Court held to be constitutionally required must be established before fair-share deductions may be made from the pay checks of nonmembers. The Court clearly held that a rebate procedure is constitutionally inadequate. Since, as we noted above, the Wisconsin Supreme Court held in Browne that MERA is constitutional on its face, it follows that MERA must be construed to at least require the same procedural safeguards held by the Court in Hudson to be constitutionally required.

Prior to Hudson it has been steadfastly held that broad injunctive relief that would completely cut-off the flow of funds to a union from dissenting employes was not appropriate. See Machinists v. Street, 367 U.S. 740 (1961); Railway Clerks v. Allen, 272 U.S. 113 (1963) and our discussion of those cases in Clinton Community School District, Dec. No. 20081-C (WERC, 7/84) at 10-14; Browne, 82 Wis.2d at 339-40; Champion v. State of California, 738 F.2d 1082, 1085 (9th Cir. 1984), cert. denied 105 S. Ct. 1230 (1985); and Robinson v. State of New Jersey, 741 F.2d 598, 615-16 (3rd Cir. 1984), cert. denied 105 S. Ct. 1228 (1985).

In its decision in Hudson the U.S. Supreme Court has held that the First Amendment requires that certain procedural safeguards must be established before a fair-share fee may be collected. In discussing why the union's procedure was flawed in that case the Court cited the following from Justice Steven's concurring opinion in Abood:

> . . . (T)he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining. Abood, 431 U. S., at 244 (concurring opinion). . . .
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> Hudson, 106 S. Ct. at 1075.

Among the procedural safeguards the Court held to be constitutionally required is the escrow of "amounts reasonably in dispute" while challenges are pending. Id., at 1078. The Court also held, however, that the union's escrowing of 100% of the fair-share fees, without the existence of the other required safeguards, does not eliminate the constitutional objections to the procedure. Id.

While the Court reaffirmed its concern regarding depriving the union of access to the fair-share fees, in that it found it unnecessary to hold that 100% escrow is constitutionally required while a challenge is pending, the Court was also careful to point out that:

> If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.
> Id., at 1078, n.3.

We conclude from the above-cited portions of the Court's decision in Hudson that the Court is requiring that a union be denied access to the fair-share fee, except as to that amount it can adquately demonstrate is not reasonably in dispute, while the fee is being challenged; and further, that even the escrowing of the entire fair-share fee does not adequately protect the First Amendment rights of the nonmembers covered by the fair-share agreement, if the other required procedural safeguards are not present.

There being to date no assertions from the Respondent Unions' that their objections and rebate procedures satisfy the procedural safeguards which the Court has held the Constitution requires to be established before fair-share deductions may be made, we deem it appropriate at this time to order the Respondents to show cause why the Commission should not immediately grant the Complainants' request for a cease and desist order prohibiting the Respondents from future enforcement of the fair-share provision until it is determined the Respondents have established the procedural safeguards required by the Court's decision in Hudson.

We are issuing this Order to Show Cause rather than an immediate cease and desist order in recognition that it is possible that the Respondent Unions have adopted and established fair-share procedures that would satisfy the requirements of Hudson. The Respondent Unions must be permitted the opportunity to assert and establish whether or not they have established such procedures before a cease and desist order may be issued. Should the Respondent Unions fail to assert that they have established the requisite procedures, or admit that they have not, or fail to timely respond to this Order, the Commission will issue an immediate cease and desist order.

We have stated in our order that unless a timely statement of sufficient cause for our not doing so is filed, we may also immediately order the Respondent Unions to refund with interest 2/ the fair-share deductions taken from the Complainants since one year prior to the filing of the respective complaints. If and to the extent that Respondents take issue with these elements of relief, they should so state in their statement of cause.

Dated at Madison, Wisconsin this 16th day of June, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

2/ With regard to the pre-decision and post-decision interest requested, we do not see any basis for deviating from our decision in Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) to grant pre-decision and post-decision interest at the rate set forth in Sec. 814.04(4), Stats., at the time the complaint was filed. In Wilmot we concluded the Wisconsin Supreme Court's decision in Anderson v. State of Wisconsin, Labor and Industry Review Commission, 111 Wis.2d 245 (1983) and the Court of Appeals decision in Madison Teachers Incorporated et. al. v. WERC, 115 Wis.2d 623 (Ct. App. IV 1983), requires administrative agencies such as this Commission to grant pre-judgment interest as part of make whole relief regardless of when the complaint was filed and regardless of whether such relief was expressly requested. Wilmot, at 8, 10. The rate set forth in Sec. 814.04(4), Stats., was 7 percent per annum, regardless of whether the date the action was filed in circuit court or the date the case was referred to the Commission is used.