STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SAUK PRAIRIE FAIR SHARE MEMBERS SAUK PRAIRIE SCHOOLS, Wis. 53583, 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-E

ORDER GRANTING MOTION FOR CONSOLIDATION, ORDER TO SHOW CAUSE AND NOTICE OF HEARING

The above-named Complainants having, on February 24, 1982, filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that the above-named Respondents had committed, and were committing prohibited practices within the meaning of the Municipal Employment Relations Act, herein MERA; and the Commission having, on March 19, 1982, appointed Linoel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and the matter having been set for hearing on June 9, 1982; and on May 24, 1982 Complainants having filed a Motion to consolidate said complaint with complaint cases: Hewitt, et al. vs. Board Of Education for Joint School District No. 3, Hartland, Wisconsin, Case 1 No. 26912 MP-1161; Chetnik vs. Richfield Education Association, Case 1 No. 27171 MP-1176; Ekblad vs. Northwest United Educators, Case 3 No. 29016 MP-1284, which involve different parties and in which Examiner Crowley had not been assigned as an Examiner for the Commission; and Counsel for Respondents Sauk Prairie Education Association, South Central United Educators and Wisconsin Education Association Council having by letter dated May 25, 1982, opposed such motion; and the Examiner having on June 4, 1982, issued an Order Denying Motion to Consolidate (Dec. No. 19467-A), and hearing on said complaint having been held in Sauk City, Wisconsin, on June 9, 1982; and evidence having been presented at that hearing on two issues, namely, that Respondents allegedly interfered with the rights of non-member employes by denying to them certain participation in Union proceedings, and that Respondents allegedly made fair-share deductions which were in excess of the proportionate share of the cost of collective bargaining and contract administration; and the parties having completed the filing of briefs on the first issue by February 21, 1983; and the Examiner having, on March 31, 1983, issued Initial Findings of Fact, Initial Conclusions of Law and Order dismissing certain allegations in Complainants' complaint (Dec. No. 19467-B), aff'd by operation of law Dec. No. 19467-C (WERC, 4/83), and pursuant to the agreement of the parties, the allegation in the complaint with respect to fair share deductions having been held in abeyance; and Complainant Ronald Jordi, having, on or about October 4, 1979, initiated proceedings, pursuant to Respondent Wisconsin Education Association Council's internal rebate procedure, to determine the appropriate fair share amount; and said rebate procedure having provided as its final step, the arbitration of disputes as to the appropriate fair share amount; and the parties having invoked this step and on an unspecified date in 1981, having selected Edward B. Krinsky to arbitrate said dispute; and as of the June 9, 1982, hearing on the instant complaint, Arbitrator Krinsky having not yet issued a decision pursuant to the rebate procedure; and the Respondents having, at the hearing on the complaint on June 9, 1982, made a motion to hold the hearing in abeyance until such time as Arbitrator Krinsky issued his Award and then to limit the introduction of evidence solely to the validity of the Arbitrator's Award rather than allowing a trial de novo on the issue of fair share amounts; and the Complainants having opposed said motion; and Arbitrator Krinsky having issued an Award on September 20, 1982; and the parties having filed written arguments in support of their respective

positions, the last of which was received on May 23, 1983; and the Examiner having, on June 24, 1983, issued an Order Denying Motion to Limit Introduction of Evidence and Indefinitely Postponing Hearing (Dec. No. 14967-D) pending the Commission's final decision in Browne, et al vs. Milwaukee Board of School Directors Case 99 No. 23535 MP-892) ; and 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 the pending, and previously consolidated 1/ aforementioned cases in Joint School District No. 3, Village of Hartland, Richfield Education Association, Northwest United Educators, and Clinton Community School District, Case 11 No. 30570 MP-1397 2/ 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 in those cases having further requested that said hearing be scheduled without delay; and the Respondent Associations in this case having, on May 23, 1986, filed a Petition For Consolidation requesting that this case be consolidated with the previously consolidated cases of Joint School District No. 3, Village of Hartland, Richfield Education Association, Northwest United Educators and Clinton Community School District; 3/ and on May 28, 1986 the Commission having given all of the affected parties the opportunity to respond to the request for consolidation filed by Respondent Associations; and Counsel for the Complainants in the four previously consolidated cases having, on June 3, 1986, advised the Commission in writing that they do not object to the requested consolidation; and on June 18, 1986 Counsel for the Complainants in this case having advised the Commission writing that they object to the requested consolidation; and Counsel for Respondent Associations having, on June 18, 1986, filed a written response to the objection of the Sauk Prairie Complainants; and the Commission having considered the parties' positions and arguments with respect to consolidation, the decision of the U.S. Supreme Court in Hudson, the complaint in this proceeding and the pending request in the previously consolidated cases for hearing and final decision, and being satisfied that an order consolidating these cases and that a show cause order and a notice of hearing in this matter are appropriate;

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

ORDER AND NOTICE

1. That this matter be, and same hereby is, consolidated pursuant to Wis. Adm. Code, Section ERB 10.07, for purposes of hearing with the following previously consolidated cases which have been scheduled for hearing on July 8, 1986:

JOINT SCHOOL DISTRICT NO. 3
VILLAGE OF HARTLAND, et al
Case 1 No. 26912 MP-1161

NORTHWEST UNITED EDUCATORS
Case 3 No. 29016 MP-1284

RICHFIELD EDUCATION ASSOCIATION
Case 1 No. 27171 MP-1176

CLINTON COMMUNITY SCHOOL DISTRICT
Case 11 No. 30570 MP-1397

2. That on or before June 30, 1986, Respondents in this case shall file with the Commission and serve on the 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 Respondents to immediately cease and desist from enforcing/honoring any fair share agreement affecting the bargaining unit involved in this matter;

1/ Dec. No. 18577-B, 18578-B, 19307-B (Honeyman, 12/82).

2/ The Commission having on February 9, 1983 issued an Order Substituting Examiner and Consolidating Cases (Dec. No. 20081-B) wherein Clinton was consolidated with the previously consolidated pending cases.

3/ An amended Petition For Consolidation correcting the caption was filed on May 29, 1986.

b. requiring Respondents to refrain from enforcing/honoring a fair share agreement affecting the bargaining unit involved in this matter 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 complaint.

3. 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 (2) above.

4. 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 (2), above, and further with regard to any other respects in which Respondents may take issue with Complainants' request for relief contained in the Complaint filed in this matter on February 24, 1982;

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.

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of June, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

SAUK PRAIRIE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER
GRANTING MOTION FOR CONSOLIDATION,
ORDER TO SHOW CAUSE AND NOTICE OF HEARING

The status of this case is as noted in the Preface to these Orders and Notice of Hearing.

ORDER GRANTING MOTION FOR CONSOLIDATION

The Respondent Associations have requested that this case be consolidated with the other fair-share cases pending before the Commission and involving current affiliates of the National Education Association (NEA) and Wisconsin Education Association Council (WEAC). According to the Respondent Associations, the cases should be consolidated for the following reasons. First, WEAC has the identical rebate procedure in Sauk Prairie as it does in the other four locals whose procedures are also in issue. Secondly, the NEA and WEAC assessments are uniform throughout the state, and here, will be rebatable in the same, or nearly the same, percentage in all affiliates in the state. Therefore, this case will be decided de facto in the other cases and "substantial collateral estoppel issues will emerge" if this case is litigated "out of sequence." Lastly, if the case is not consolidated with the others it will result in a duplication of efforts by all parties and the Commission.

The Complainants in this case note that on December 31, 1985, they filed a lawsuit in Federal District Court against the same Respondents as are named in this case. Complainants state that the Respondents/Defendants have filed a motion with the Federal Court asking the Court to abstain from asserting jurisdiction and defer to the Commission proceedings and that Complainants have opposed that motion. Due to their position in Federal Court, Complainants oppose consolidating their case pending before the Commission with the other aforementioned pending cases, asserting that the matters pending in this case, as well as others, are properly before the Court and should remain there for a decision on the constitutional issues raised in their suit.

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 and the pending previously consolidated cases, as well as on the availability of immediate relief of the various kinds herein.

In light of the decision in Hudson the Complainants in the cases with which this case has been hereby consolidated have filed a request that the Commission, after a prompt hearing issue final findings of fact and conslusions of law and orders. Among the allegations in their complaint filed February 24, 1982 Complainants in this case alleged the following:

> For the past three years the SPEA has been certifying the amount to be deducted from a Fair Share Member as "equivalent" to that which is withdrawn from a full SPEA member. In Wisconsin State Statute 111.70 part "h" (fair share agreement) it clearly states that the amount required of a Fair Share Member must be a proportionate share of the bargaining process.

The issues raised in the instant complaint, other than as to the fair-share amount and rebate procedures, were decided by Examiner Crowley after hearing and argument in his Initial Findings of Fact, Initial Conclusions of Law and Order. The Examiner's decision was not appealed and those issues are no longer before the

Commission. Subsequent to the Examiner's decision the parties in this case proceeded to litigate before the Examiner regarding the Respondent Associations' challenge and rebate procedures and the issue of the fair-share amounts. That litigation temporarily culminated in Examiner Crowley's Order Denying Motion to Limit Introduction of Evidence and Indefinitely Postponing Hearing. The Examiner postponed hearing on those remaining issues pending the Commission's final decision in Browne, et al vs. Milwaukee Board of School Directors (Case 99 No. 23535 MP-892). 4/

In their complaint the Complainants in this case sought the following general relief:

> We encourage your office to make a thorough and prompt investigation into this matter so as to stop the unions from interpreting Fair Share in any way they deem necessary. The protection of everyones group (fair share members) and individual rights are at stake. We eagerly await your reply.

It appears to the Commission that the remaining issues in this case are among those issues raised in the Hartland, Richfield, Northwest United Educators and Clinton cases, that the relief sought in those cases would fall within the scope of the relief requested here, and that failure to consolidate this case with the others would likely result in an unnecessary duplication of effort and expense on everyone's part. We have, therefore, concluded that consolidation is appropriate. The Complainants in this case have also initiated an action in federal district court regarding fair-share issues. Their preference to proceed in that forum, and to have their complaint be held in abeyance by the Commission, is not a sufficient reason for ignoring the similarities in these cases or the inefficiency that would likely result if consolidation were not ordered at this time. If the Complainants prefer to proceed only in federal court, they should formally so advise the Commission by means of a motion to withdraw their complaint pursuant to ERB Section 12.02(4), Wis. Adm. Code.

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".

4/ Dec. No. 19467-D, at page 3.

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.
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> . . .

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 issue 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 5/ 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 20th day of June, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

5/ In Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) we granted pre-decision and post-decision interest at the rate set forth in Sec. 814.04(4), Stats., at the time the complaint was filed. We concluded in that decision that 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., at the time the instant complaint was filed was 12 percent per annum.