STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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 ANN C. TEBO, 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 CLXI No. 29581 MP-1322 Decision No. 19545-A

ORDER DENYING MOTION FOR APPROVAL OF NOTICE OF PENDENCY OF CLASS ACTION

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 Ann C. Tebo, who are employes of Milwaukee County, having filed a complaint alleging that Milwaukee County, and American Federation of State, County and Municipal Employees, and its District 48, and the Director of District 48, Joseph Robison, and its affiliated Locals Nos. 594, 645, 882, 1055, 1654 and 1656, have committed prohibited practices within the meaning of the Municipal Employment Relations Act; and the Commission having appointed Christopher Honeyman as Examiner in this matter; and Complainants having filed a Motion for Order Approving Notice of Pendency of Class Action; and Complainants and Respondent Unions having filed briefs concerning said Motion; and the Examiner having considered the arguments of the parties, and being satisfied that said Motion should be denied;

NOW, THEREFORE, it is

ORDERED

That the Motion for Order Approving Notice of Pendency of Class Action filed in the above-entitled matter is denied.

Dated at Madison, Wisconsin this 7th day of February, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION FOR APPROVAL OF NOTICE OF PENDENCY OF CLASS ACTION

The history of this case to date is summarized in the Initial Findings of Fact and Initial Conclusions of Law issued separately today by the undersigned, and need not be repeated here. It will therefore be referred to only as necessary. The Complainants' Motion for Order Approving Notice of Pendency of Class Action was filed on May 28, 1982, but is predicated on the original complaint filed in this matter in Milwaukee County Circuit Court on July 10, 1973. In that complaint, Complainants claimed to represent not only themselves but also a group of unnamed employes who were similarly situated in that, like Complainants, they were not members of any of Respondent Unions, but were subject to involuntary pay deductions under the "fair share" clause in the collective bargaining agreements then in effect between Respondent County and various of Respondent Unions.

On August 29, 1973 the County filed with the Milwaukee County Circuit Court a Demurrer to the complaint, on the grounds that "the allegations thereof are insufficient to constitute a cause of action". On September 10, 1973, Respondent Unions filed with the same Court a Demurrer to the complaint which contended, in addition to the general contention made by the County, that "there is a defect of parties plaintiff because the plaintiffs do not represent a class". On December 19, 1975, the Court entered an Order that the Demurrers were overruled "in all respects", without further comment. And on December 12, 1978, the Court entered an Order referring this proceeding to the Wisconsin Employment Relations Commission, without any party having in the interim attempted further to define or argue the nature or limits of the alleged class.

The apparent lethargy of this matter's progress through the Court is easily explained. Two other cases of a very similar nature were filed at approximately the same time in the same Court. These matters, Browne, et al. v. Milwaukee Board of School Directors, et al. and Gerleman, et al. v. Milwaukee Board of School Directors, et al., were treated as the leading cases in this area of law in Wisconsin. In particular, Browne, which involved some of the same Respondent Unions as this matter, became the test case for a number of propositions in this highly complex area of litigation. Like this matter and Gerleman, Browne was subsequently referred to the Commission by the Court. Unlike this case, the Court in Browne had previously, on October 19, 1977, issued an Order Approving Notice of Pendency of Class Action. In that Order, the Court determined that Browne could be maintained as a class action "consisting of all former and current "fair share" secretarial, clerical and technical employes of the Milwaukee School Board as of March 1, 1972, and subsequent thereto who notify the Court in writing that they wish to be included as a class member no later than December 31, 1977 . . ." The Court ordered that counsel for the plaintiffs be supplied with a list of the names and last known addresses of all prospective class members and that counsel for plaintiffs send an approved Notice of Pendency of Class Action, which was signed by the judge, to all prospective class members. Complainants herein essentially contend that the Examiner has and should exercise authority to approve and order distribution of a similar notice.

The briefs filed in support of and opposition to the Motion are thorough and comprehensive in their citation of precedent from wide-ranging jurisdictions. Unfortunately, no case cited by either party is precisely on point in the unique procedural situation prevailing in this case; and the opinions expressed therein are sufficiently divergent, with each viewpoint articulated well, that the undersigned can glean no general drift either in favor of or against a broad construction of judicial powers in defining or assisting the formation of classes. The Commission has not addressed any questions relating to the class in Browne, as the class in that matter was already delineated by the Court. The single Commission precedent on this question is Berns et al. v. Milwaukee Board of School Directors et al. In that case, the examiner did not allow the matter to proceed as a class action, stating 1/ as follows:

1/ Decision No. 14382-A, 7/77, Examiner Marshall L. Gratz.

> The original complaint in this matter, filed on February 23, 1976, named only Berns and Browne as complainants but further alleged that it was being filed on behalf of all other employes represented by respondent local who are subject to fair-share deductions.
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> Hearing convened on May 13, 1976. Over complainants' objections, respondent unions were permitted to answer orally on the record, denying that they had committed the prohibited practices alleged and asserting that Browne and Berns' attempt to expand the complainant group beyond themselves into a class proceeding was not proper under Sec. 111.07 (2)(a), Stats.
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> During the testimony of complainants' first witness, the examiner ruled inadmissible evidence by which complainants sought to prove the existence of a class of unnamed complainants. The examiner so ruled on the ground that, absent an allegation that Berns, Browne and/or their counsel was authorized by the members of the alleged class to institute the instant proceeding on their behalf, such unnamed individuals cannot be deemed parties in interest within the meaning of Sec. 111.07. The examiner offered complainants the opportunity to take an adjournment for purposes of amending their complaint to add parties-complainant by the process noted in Sec. 111.07 (2)(a), which provides: "(a)ny other person claiming interest in the dispute or controversy . . . shall be made a party upon application". The hearing was thereupon adjourned for that purpose.
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> An amended complaint was filed, accompanied by sixty-one individually signed applications for party status. Each application expressly ratified Berns' and Browne's prior actions and authorized Berns and Browne and their attorney to represent them in the instant matter. As finally amended, sixty-three individual complainants are named including Berns and Browne.
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> . . .

The Commission subsequently affirmed 2/ the examiner's decision without comment on this point; and this ruling was not among those issues raised in subsequent litigation of Berns, in which the Commission's decision was affirmed by the Wisconsin Supreme Court.

But the factual situation in Berns did not include prior court litigation, as does this matter. Complainants contend that the authority for the Commission to permit class actions is implicit in its broad remedial powers, and cite in particular this language from Sec. 111.07(4), Wis. Stats.:

> Pending the final determination by it of any controversy before it the commission may, after hearing make interlocutory findings and orders which may be enforced in the same manner as final orders. Final orders may * * * require the person complained of to * * * take such affirmative action * * * as the Commission deems proper.

Complainants go on to cite as follows in support of the general proposition that the Commission has broad remedial powers:

> (t)here is no doubt that the WERC has substantial remedial powers to fashion remedies to effectuate the purpose of the statute * * *," including "the purposes set forth in the municipal labor law in respect to prohibited practices."

2/ Decision No. 14382-C, 8/78.

Board of Education v. WERC, 52 Wis. 2d 625, 635,191 N.W.2d 242, 247 (1971); WERC v. City of Evansville, 69 Wis. 2d 140, 158-59, 230 N.W.2d 688, 698-99 (1975). "In furtherance of public policy when there are unfair labor practices * * * the (Commission) by reason of its disinterested position is authorized to order the remedy most consistent with the public interest." Appleton Chair Corp. v. Carpenters, Local 1748, 239 Wis. 337, 343, 1 N.W.2d 188, 191 (1941).

Respondent Unions argue to the effect that the class action request constitutes barratry, or trawling for support, and should not be countenanced in the absence of specific authorizing language in the Statute.

The first question which must be answered is whether the approval of the requested Notice of Pendency of Class Action is an act required of the undersigned by derivation from authority already exercised by the circuit judge in this matter. The undersigned is unable to glean from the Court's overruling of the 1973 Demurrers a clear intent to establish a class and provide means for notice. It is apparent that briefs and arguments were extensive in the Browne case in that Court before the notice was approved in Browne. Also, that notice was not approved, nor were the briefs even filed, until several years after the Demurrers were overruled in this matter. To conclude that the one-sentence ruling on the Demurrers represented an approval of the precise form of the class and notice requested by Complainants would be an improbable extension of a very preliminary legal ruling, and would render nonsensical the subsequent comprehensive discussion engaged in by the parties in Browne. The most that can be said from the overruling of the Demurrers is therefore that the Court declined to dismiss this matter in toto based on the Complainants' claim to represent a class.

Complainants argue that the Court's decision to approve a similar notice in Browne is persuasive law which should be applied, under the same statute, by the undersigned in this case. With respect to this contention it is necessary to note immediately two general principles. One is that even where an administrative agency is considered to have great latitude in creating novel procedural or remedial rules, that latitude is not usually exercised where existing procedures can accomplish largely the same result. The other is that such latitude as an administrative agency may have does not necessarily parallel that which may be exercised by a court, even in a situation of overlapping jurisdiction.

It would appear, certainly, that there is no difference between the procedures sought and approved in the Browne case and those sought here. Also, there is no major difference between the claims made by the Complainants in the two cases, the nature of the employer, or the circumstances by which the fair share clause came to be challenged in both cases. There is, however, a difference in the present status of the cases. In particular, an examiner of the WERC is constrained not only by the statute which, of course, the court also applies, but also by the Rules of the Commission, which are not binding on the court. Three rules in particular are relevant to this matter:

> ERB 10.12(2) TO INTERVENE. Any person desiring to intervene in any proceeding, shall, if prior to hearing, file a motion with the commission. Such motions shall state the grounds upon which such person claims an interest. Intervention at the hearing shall be made by oral motion stated on the record. Intervention may be permitted and upon such terms as the commission or the individual conducting the proceeding may deem appropriate.
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> ERB 12.02(1) . . . A complaint . . . may be filed by any party in interest . . .
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> ERB 12.02(5) AMENDMENT.
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> (a) Who may amend. Any complainant may amend the complaint upon motion, prior to hearing by the commission; during the hearing by the commission if it is conducting the hearing, or by the commission member of examiner authorized by the board to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

Class actions may help to avoid duplicate litigation, a principle referred to by Complainants in citing Sec. 803.08, Wis. Stats.: ". . . when the question before the court is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue . . . for the benefit of the whole." But the admission of a class cannot guarantee that there will be no duplication, as potential complainants who do not opt to join the class are not bound by the outcome of the class litigation. 3/ And under the rules cited above, the interest in avoiding duplicate litigation is served without the need to establish a formal class. These rules provide liberal opportunities for additional complainants to identify themselves individually as intervenors, or to be added to a complaint as co-complainants by amendment if they designate the original complainants to represent them. It is also worth noting that in Berns the complainants found sixty-one named individuals joining them without a class action being accepted or an approved notice being circulated.

It is unnecessary, therefore, for the undersigned to decide whether the Commission has the 'latent authority' to allow class actions, as argued by Complainants, or whether the legislative silence on this question in the Municipal Employment Relations Act constitutes disapproval, as Respondent Unions contend. The fact that the Commission's rules provide for so open a procedure for including additional complainants is sufficient to persuade the undersigned that there exists no compelling need for the process requested by Complainants.

It is consistent with Berns and with the rules noted above, however, to permit the addition of such complainants as voluntarily identify themselves at any time prior to issuance of the final decision by the undersigned. A motion to that effect will be entertained, if submitted, at hearing. The undersigned is aware that a number of individuals not presently identified as Complainants have submitted affidavits to the effect that they wish to be included as Complainants. But no inference should be drawn from these comments concerning the question of the extent of remedy such co-complainants might be entitled to; that question is premature at this time, as the second stage of this proceeding has not yet commenced.

For these reasons the Motion for Approval of Notice of Pendency of Class Action has been denied.

Dated at Madison, Wisconsin 7th day of February, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner

3/ See f.i. Baker v. the Michie Company, 93 F.R.D. 494 (W.D. Va 1982) at p. 495.