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,	:	Case 161 No. 29581 MP-1322 Decision No. 19545-D
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.	:	

Appearances:

Lindner, Honzik, Marsack, Hayman & Walsh, S.C., Attorneys at Law, Ms. Phoebe M. Eaton, 700 North Water Street, Milwaukee, WI 53202, and National Right to Work Legal Defense Foundation, Inc., by Mr. Raymond J. LaJeunesse, Jr., 8001 Braddock Road, Springfield, VA 22160, on behalf of the Complainants.

Kirschner, Weinberg, Dempsey, Walters & Willig, Attorneys at Law, by Ms. Barbara Kraft, and Mr. Larry P. Weinberg, Suite 800, 1100 Seventeenth Street, Washington, D.C. 20036, and Zubrensky, Padden, Graff & Maloney, Attorneys at Law, by Mr. James P. Maloney, Suite 706, 606 West Wisconsin Avenue, Milwaukee, WI 53203, on behalf of Respondent American Federation of State, County and Municipal Employees, AFL-CIO.

Lawton & Cates, Attorneys at Law, by Mr. John H. Bowers, 110 East Main Street, Madison, WI 53703, on behalf of Respondents District Council 48 and its affiliated Locals.

Mr. Robert G. Ott, Principal Assistant Corporation Counsel, Milwaukee County, Room 303, Milwaukee County Courthouse, Milwaukee, WI 53233, on behalf of Respondent Milwaukee County.

ORDER AFFIRMING EXAMINER'S ORDER DENYING MOTION FOR APPROVAL OF NOTICE OF PENDENCY OF CLASS ACTION

The above-named Complainants having filed a Motion for Approval of Notice of Pendency of Class Action with the Examiner appointed by the Commission to hear and decide this complaint; and subsequent to the Complainants and the above-named Respondents filing their respective briefs concerning said Motion, Examiner Christopher Honeyman having, on February 7, 1983, issued his Order Denying Motion for Approval of Notice of Pendency of Class Action; and Complainants having, on

March 18, 1983, filed their Petition for Review of the Examiner's Order Denying their motion; and the Complainants and the Respondents having, on May 2, 1983, completed the submission of written arguments concerning said petition; and the Commission, having considered the record, the Petition for Review and the written arguments submitted by the parties, being satisfied that it should affirm the Examiner's Order Denying the Complainants' Motion;

NOW, THEREFORE, it is

ORDERED

That the Examiner's Order Denying Motion for Approval of Notice of Pendency of Class Action is hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S ORDER DENYING MOTION FOR APPROVAL OF NOTICE OF PENDENCY OF CLASS ACTION

BACKGROUND

This case comes to the Commission on Complainants' petition for review of an examiner's refusal to proceed in the manner of a class action or proceeding. The case generally involves alleged violations of Complainants' rights under MERA as regards Respondents' implementation of a fair-share agreement among the Respondents. The case originated as a civil action in Milwaukee County Circuit Court and was later referred to the Commission. The following chronology of this case from the initial filing of a suit in Circuit Court through its referral to the Commission is useful in putting the instant "class action" issue into perspective.

07/10/73 - The case was filed in Milwaukee County County Circuit Court. In their complaint the plaintiffs alleged in part that:

. . .

> 2. The matters hereinafter stated in this action and the matters to be litigated are of common interest to other employees of the County, who have been employed since on or about March 1, 1983, and thereafter, in certain occupations covered by the terms of the labor agreement between the County and District Council 48 and its affiliated locals, and who are not members of District Council 48 and its affiliated locals, and affect other employees described above in exactly the same manner as the named plaintiffs are affected, and that such other employees are so numerous, upon information and belief, exceeding 1500 in number, that it is impractical to bring them all before the Court as individual plaintiffs and that, therefore, these plaintiffs sue for themselves and for the benefit of all others described in this paragraph.
>
> . . .
>
> 16. Plaintiffs, and each one of them, are not and do not desire to be members of AFSCME, District 48, or any of its affiliated locals and as such, they are representatives of a class of similarly situated employees of the County of Milwaukee who are not and do not desire to be members of the defendant labor organizations. Notwithstanding this fact, they are subject to forced deductions from their wages for payment of union dues and fees as hereinafter described, and the continuation of their employment is conditioned upon such compelled deductions. All subsequent references herein to plaintiffs includes the members of the class they represent.
>
> . . .
>
> 19. Upon plaintiffs' information and belief, District Council 48 and its affiliated locals and AFSCME, as well as the Wisconsin State AFL-CIO and the Milwaukee County Labor Council, have spent and will continue to spend plaintiffs' deducted wages over their objection for purposes unrelated to collective bargaining, including but not limited to the following:
>
> . . .
>
> (B) To propagate political and economic doctrines, concepts, ideolgies, and legislative programs which are opposed by plaintiffs and the class they represent, thereby

imposing upon them conformity to those doctrines, concepts, ideologies, and programs.

. . .

(emphasis added)

Additional allegations were also made which refer to "plaintiffs and the class they represent".

As part of their prayer for relief, the plaintiffs made the following request in their complaint:

WHEREFORE, plaintiffs pray:

(1) That the Court enter an order determining that this action may be maintained as a class action;

. . .

(emphasis added)

09/07/73 - Defendant AFSCME filed a demurrer in which it demurred to all courts of the complaint on seven bases, including:

. . .

2. There is a defect of parties plaintiff because the plaintiffs do not represent a class.

. . .

11/15/74 - Circuit Court issued the following order pursuant to a motion of the Defendant AFSCME to adjourn hearing on the demurrers until Browne was decided by the Wisconsin Supreme Court:

It appearing that the decision of Browne v. Milwaukee Board of School Directors, Wisconsin Supreme Court Case #509, will have a substanital if not controlling impact upon the legal principles to be applied to the above-entitled case, and,

It further appearing that this case was argued and briefed in this branch of the Circuit Court of Milwaukee County in early 1974, and

It further appearing that the aforementioned Browne case has not yet been decided,

IT IS ORDERED:

That this matter is set for a pre-trial conference on December 11, 1974, at 8:45 A.M. to determine the status of the Browne case.

06/30/75 - The Wisconsin Supreme Court issued its decision in Browne I, which among other things, overruled the demurrer of the defendants in that case that was based inter alia, on the ground of "defect of parties" (defendants in Browne had also argued that plaintiffs did not represent a proper class). 1/

12/19/75 - The Circuit Court issued the following order in Milwaukee County:

The demurrer of the defendant is hereby overruled in all respects.

The defendant is allowed twenty days to answer or otherwise plead to the complaint.

1/ Browne v. Bd. of School Directors, 69 Wis. 2d 169, 181-83 (1975).

03/02/76 - Defendant AFSCME filed its Answer in Circuit Court wherein it made the following denial with regard to plaintiffs' claim to represent a class:

. . .

> 16. Deny each and every allegation set forth in Paragraph 16 and more especially deny that the Defendants are representatives of a class of similarly situated employees of the County of Milwaukeee and deny that there are similarly situated employees of the County of Milwaukee.

. . .

12/12/78 - The Circuit Court referred the case to the Commission.

Included as part of the Court documents sent to the Commission by plaintiffs' counsel, was the following unsigned and undated stipulation and order: 2/

> STIPULATION
>
> IT IS HEREBY stipulated and agreed by and among the attorneys for the Plaintiffs and Defendants, that the above entitled action be transferred and referred to the Wisconsin Employment Relations Commission for a determination of the issues in the Complaint and Answer heretofore filed.
>
> Dated this _____ day of _____, 1978.
>
> . . .
>
> ORDER
>
> Based upon the foregoing Stipulation, it is hereby ordered that the above entitled matter be and it hereby is referred to the Wisconsin Employment Relations Commission.
>
> Dated at Milwaukee, Wisconsin this _____ day of _____, 1978.
>
> BY THE COURT:
>
> _____
> Circuit Judge

The case was then held in abeyance pending the Commission's decision in Phase I of Browne.

03/19/82 - Amended Complaint filed wherein complainants alleged in part:

. . .

> 8. That this complaint is made by complainants for themselves and on behalf of all other present and former employees of respondent County employed since on or about March 1, 1973, in the occupations covered by the terms of the successive collective-bargaining agreements between the County and District Council 48 and its affiliated locals, who are or were not, and do or did not desire to be, members of respondent labor organizations and who are or have been subject to forced unauthorized deductions from their earnings under the "fair-share" agreements referred to in paragraph 7 above; that the employees so similarly situated as the named complainants number more than three hundred (300), and,

---

2/ The parties were advised by our letter of July 17, 1984 that the Commission was taking administrative notice of these documents and no response was received from the parties.

therefore, it is impractical to bring them all before the Commission as individual complainants.

9. That this action was brought as a class action in the Circuit Court for Milwaukee County on July 10, 1973; and that all subsequent references herein to complainants includes the members of the class they represent, as set forth in paragraph 8 above.

As relief, Complainants, in part, requested the following:

WHEREFORE, the complainants, for themselves and on behalf of the members of the class they represent, pray:

(1) that the Commission enter an order determining that this action may be maintained as a class action;

. . .

05/21/82 - Answer to Amended Complaint filed wherein AFSCME International stated:

. . .

2. AFSCME International admits the allegations in paragraphs 2, 3, 4, 5, 6; that portion of paragraph 9 alleging that this action was brought "as a class action" on July 10, 1973, but denies that a class action is proper;

. . .

3. With respect to paragraph 8 and the latter portion of paragraph 9, AFSCME International admits that this action was brought "as class action" but denies the remaining conclusory allegations in their entirety and denies that a class action is proper.

. . .

Respondents AFSCME Locals also filed an Answer to the Amended Complaint wherein they made the following answers:

. . .

8. In answering Paragraph 8 of the Amended Complaint, they are without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8 of the Amended Complaint and therefore, deny the same.

9. Admit that this action was brought "as a class action" in the Circuit Court for Milwaukee County on July 10, 1973, and deny the remaining allegations in Paragraph 9 of the Amended Complaint.

05/25/82 - Complainants filed their Motion for Order Approving Notice of Pendency of Class Action. The Respondent Unions subsequently opposed Complainants' motion. Subsequent to the parties' submission of briefs in support of their respective positions, the Examiner issued his Order Denying Motion for Approval of Notice of Pendency of Class Action.

EXAMINER'S DECISION

The Examiner first noted in his decision that at the circuit court level the Defendant Unions' demurrer to the complaint was overruled "in all respects" after the Wisconsin Supreme Court issued its decision in Browne. That demurer included an allegation that there was "a defect of parties plaintiff because the plaintiffs do not represent a class." It was then noted that from the time the Unions' demurrer were overruled till the transfer of the case to the Commission, there was no further attempt by any of the parties to define or argue the nature of the class; nor did the Court take any further action regarding the class action issue.

The Examiner distinguished this case from Browne, in that before Browne was transferred to the Commission the Circuit Court had defined the class and issued an order approving notice of pendency of class action.

In looking at judicial precedent regarding class actions cited by the parties, the Examiner concluded that no case is on point with the unique procedural situation in this case, and further, that the case law is so divergent as to show no "general drift" in favor of, or opposing, a broad construction of judicial powers in defining or assisting the formation of classes.

The Examiner noted that the only Commission case law regarding class actions is Berns v. Milwaukee Board of School Directors 3/ where the examiner ruled inadmissible evidence through which the complainants "sought to prove the existence of a class of unnamed complainants." The Examiner distinguished Berns from this case on the basis that there was not the prior court litigation in Berns as there has been in this matter.

The Examiner next noted the Complainants' contention that the Commission has the authority to permit class actions pursuant to its "substantial remedial powers to fashion remedies to effectuate the purposes of the statute . . .," and the Respondents' argument that the Complainants' request constitutes "trawling for support" and should not be permitted absent specific authorizing language in the statute. The Examiner determined, however, that the first issue that needed to be decided was whether the requested approval of the notice was an act required of him "by derivation from authority already exercised by the circuit judge in this matter." He concluded that he was unable to find in the Judge's overruling of the Unions' demurrers "a clear intent to establish a class and provide means for notice." As to the application of the Court's decision to permit a class action in Browne, the Examiner noted that briefs and arguments were extensive on the issue in that case before the Court approved the notice. Also noted is the fact that briefs were filed in Browne, and the issue decided, several years after the demurrers were overruled in this case. On that basis the Examiner concluded that "(T)he 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 Complainant's claim to represent a class."

Relative to the Complainants' argument that Browne is persuasive law that should be applied under MERA, the Examiner concluded that there are two general principles that apply which make it unnecessary to decide whether the Commission has the "'latent authority' to allow class actions . . . or whether the Legislative silence on this question in the Municipal Employment Relations Act constitutes disapproval, . . . " The principles cited by the Examiner were:

> "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."

The Examiner found no difference between the procedures approved in Browne and those sought here. Similarly, he found no "major difference" between the claims made by the complainants in the two cases. The crucial difference the Examiner did find is the present status of the case, i.e., the case is before an examiner of the Commission, not before a court. He noted that the examiner is not only constrained by the statute, which the court also applies, but also by the administrative rules of the Commission, which do not bind the courts. The three rules cited by the Examiner are ERB 10.12(2); ERB 12.02(1); and ERB 12.02(5) of the Wisconsin Administrative Code. 4/

3/ Dec. No. 14382-A (Gratz, 7/77), aff'd, Dec. No. 14382-C (WERC, 8/78) aff'd sub nom. Berns v. WERC, 99 Wis. 2d 252 (1980). It is noted that the Examiner's ruling on the class action issue was not appealed.

4/ 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 (Footnote 4 Continued on Page 8)

The Examiner concluded that although a class action might help to avoid duplicate litigation, a factor Complainants referred to in citing Sec. 803.08, Stats., "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 . . ." He decided that the interest in avoiding duplicate litigation is served "without the need to establish a formal class" by the administrative rules cited above. According to the Examiner, "(T)hese rules provide liberal opportunities for additional complainants to identify themselves individually as intervenor, or to be added to a complaint as co-complainants by amendment if they designate the original complainants to represent them," citing Berns, supra, as an example of where this was accomplished without a class action. He concluded that, therefore, the Commission's rules provide "so open a procedure for including additional complainants . . ." that there is "no compelling need for the process requested by Complainants."

In his decision, the Examiner stated he would entertain a motion to permit the addition of "such complainants as voluntarily identify themselves at any time prior to issuance of the final decision by the undersigned," however, he noted that no inference should be drawn as to the extent of the remedy such co-complainants might be entitled to, and that the question would be premature at this point.

I. ISSUE AS TO PROPRIETY OF INTERLOCUTORY REVIEW OF THE EXAMINER'S ORDER

Complainants' Position

In their Petition For Review the Complainants state they "are dissatisfied with the Examiner's Order, and request discretionary interlocutory review, on the ground that substantial questions of law and administrative policy are raised by the necessary legal conclusions underlying the Order, and that these questions require immediate review, . . ."

The Complainants make several arguments in support of their request. First, while acknowledging that an order denying class certification under the federal class action rule is not appealable as a matter of right under the federal appeallate-jurisdiction statute, the Complainants cite the Wisconsin Supreme Court's decision in Browne I, supra, as holding that interpretations of the federal statute "are not necessarily controlling with respect to class actions brought under state law." 5/ Complainants contend that the issue is "whether the Commission should review it (Examiner's Order) as a matter of discretion." They then cite Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P. 2d 732 (1967), where the California Supreme Court held that a trial court order that a case could not be maintained as a class action was an appealable "final judgement." 6/ The Complainants assert that Daar has been considered a "landmark decision" by our Wisconsin Court in the area of class action law, citing Schlosser v. Allis-Chalmers Corp., 65 Wis. 2d 153, 177 (1974). They further assert that the basis

---

4/ (Continued)

the record. Intervention may be permitted and upon such terms as the commission or the individual conducting the proceeding may deem appropriate.

ERB 12.02(1) . . . A complaint . . . may be filed by any party in interest . . .

ERB 12.02(5) AMENDMENT.

(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.

5/ At 183.

6/ At 698-99.

of the court's holding explains why the Commission should grant review of the Examiner's Order on an interlocutory basis, citing the following from the California Court's decision:

> (The order) determines the legal insufficiency of the complaint as a class suit and preserves for the plaintiff alone his cause of action for damages. In "its legal effect" * * * the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. * * * It has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed. 67 Cal. 2d at 699 (emphasis supplied).

Secondly, the Complainants contend that, as a practical matter, the fact that a few members of the class might be able to join this proceeding as intervenors or added complainants does not remove the need for immediate review since the denial of a class action is "still final" as to the much larger number of "fair-share" employes who cannot join this proceeding because they will not know the case is pending without a class notice. Further, it is asserted that "There is no guarantee that the named complainants will not settle their own claims or abandon the class action claim if immediate review is denied, leaving the class members with no later appeal." Similarly, they allege that if they prevail on the merits of their individual claims, it is unlikely Complainants will appeal solely on the class action issue. It is also argued that even if they do raise the class action issue successfully on an appeal after the Examiner's final decision, a class notice sent out at that late date would not reach those class members who have moved or died in the interim.

Lastly, the Complainants argue that it is fairer to the Respondents for the Commission to decide the issue at this point so that they (Respondents) will be able to conduct their litigation knowing whether class or individual claims are at stake.

Respondent Unions' Position

The Respondent Unions contend that the Commission should not permit an interlocutory appeal of the Examiner's Order on the basis that ERB 12.09, Wis. Adm. Code, does not authorize review of an examiner's interlocutory order on the grounds asserted by the Complainants. They assert that the grounds for review stated in ERB 12.09(2) are limited to an examiner's or Commission member's "findings of fact, conclusions of law and order," and allege that Complainants cite no authority or reasons for departing from that rule by allowing an interlocutory appeal of the Examiner's Order.

The Respondent Unions also assert that even if the order presented a substantial question of law or administrative policy, the order is in no way a final determination of the factual and legal issues and, thus, is not appropriate for appellate review. They note that the order suggests anything but finality, pointing to the Examiner's discussion of the Commission's rules regarding adding complainants and his willingness to entertain a motion in that regard. Citing federal case law based on the rationale that the trial court's ruling, like the Examiner's decision here, is subject to amendment before his final decision, 7/ the Respondents contend the order is not of the kind for which ERB 12.09 provides review.

Lastly, the Respondents contend that even if the Commission interprets ERB 12.09 as broadly as the Complainants argue, it should still disallow the appeal here, since the Complainants have not shown any prejudice to themselves by deferring resolution of the class action issue until the Examiner issues his final decision. They note in this regard the affidavits accompanying Complainants' motion as evidence of the Complainants' ability to solicit interest in their suit.

7/ The Unions cite Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980); as well as, several appellate court decisions from other states.

Discussion of Interlocutory Review Issue

As we noted recently in its order in Clinton Community School District, 8/ a party is not entitled to review of an examiner's interlocutory order as a matter of right such as may exist under ERB 12.09, Wis. Adm. Code, rather, it is a matter of the Commission exercising its inherent discretion in deciding whether or not such review is appropriate.

In this case it would appear to be in the best interest of all parties to have a decision at this point as to whether the Complainants' suit is to be maintained as a class action. As the Complainants note, this would allow the parties to conduct their litigation accordingly. Also, having a decision at this point might facilitate agreement on stipulations, since the parties would have a better idea of the scope of the potential liability or recovery.

II. CLASS ACTION ISSUE

Complainants' Position

In their Petition For Review, Complainants assert that "substantial questions of law and administrative policy are raised by the necessary legal conclusions underlying the Order." Specifically, the Complainants contend that their action "was commenced as a class action in the Circuit Court for Milwaukee County." They go on to note that the Circuit Court overruled a demurrer to the original complaint which demurrer contended, inter alia, that "the plaintiffs do not represent a class." On that basis, they contend that this case is "substantially identical" to Browne v. Milwaukee Board of School Directors, 9/ hereinafter Browne II, which was referred to the Commission from Milwaukee County Circuit Court, and which was permitted to proceed as a class action.

The Complainants take exception to the Examiner's statement that he is "unable to glean from the Court's overruling of the 1973 demurrers a clear intent to establish a class herein." They argue that the record of this case in Circuit Court establishes that the Court intended to permit the case to proceed as a class action "unless the response to a class notice later showed the absence of a substantial number of others 'fair-share' employees who oppose the use of their fees for non-bargaining purposes." According to the Complainants, the specific basis for the Court's overruling the demurrers was the decision in Browne I, 10/ which held that cases such as this could be maintained as class actions under Sec. 260.12, Stats., 11/ "unless the trier of fact determines that the named plaintiffs do not actually represent a substantial class of similarly situated nonunion employees." 12/ The Complainants then rely on the affidavits filed in support of their motion to show the existence of such a class and note that the Examiner made no finding of fact to the contrary.

Citing Sec. 111.71(1), Stats., the Complainants also disagree with the manner in which the Examiner interpreted the Commission's rules and assert that they must be read consistently with the statute from which they are derived. Sec. 111.70(4), Stats., provides that the substantive and procedural provisions of Sec. 111.07, Stats., shall govern prohibited practices cases arising under MERA. Sec. 111.07(1), Stats., in turn guarantees that the availability of a prohibited practices proceeding shall not prevent "the pursuit of legal or equitable relief in courts of competent jurisdiction." According to Complainants, the Wisconsin Supreme Court's decisions in Browne I, supra, and Browne II, 13/ acknowl-

---

8/ Dec. No. 20081-C (WERC, 7/84).

9/ 83 Wis. 2d 316 (1978).

10/ Supra, Note 1, at 181-83.

11/ Renumbered to Sec. 803.08, Stats.

12/ Citing Order, Johnson v. County of Milwaukee, No. 411-578 (Milwaukee Cir. Ct., Nov. 15, 1974); Letter from Gary A. Marsack, Esq., to Hon. Harold R. Jackson, Jr. (Jul. 31, 1975); Order, Johnson, No. 411-578 (Milwaukee Cir. Ct., Dec. 19, 1975) attached to Petition as Appendices A through C.

13/ Supra, Note 8, at 340b-41.

edged that a circuit court has jurisdiction over cases challenging a union's use of fair-share fees. Further, a class action is part of the "legal or equitable relief" to which complainants are entitled in a circuit court in such a case as this. Since this case was commenced as a class action in Circuit Court, and the Examiner's decision was not based upon the absence of the prerequisites for a class action established by Sec. 803.08, Stats., his denial of the right of the Complainants to continue their suit as a class action deprives them of due process of law. They then cite from the Court's per curiam decision in Browne II that "plaintiffs' claims may be maintained before W.E.R.C. in the form of the class action that has already been commenced in the circuit court," 14/ notwithstanding any inability of the Commission to hear class actions in proceedings originating before it.

The Complainants next argue that, contrary to the Examiner's conclusion, the use of the procedures under the Commission's rules providing for the addition of complainants by intervention or amendment of the complaint does not serve the interest of avoiding duplicate litigation as effectively as the class action device. The basis of their argument is that there are probably hundreds, if not thousands, of potential class members, and that the named complainants know only a small number of those individuals. According to Complainants, unless a class notice is circulated, only a relatively few of those individuals will know of the instant proceeding and come forward to join it. Therefore, "the potential for future duplicate litigation remains substantial."

Asserting that the Wisconsin class action provision is the same as California's and that the Wisconsin Supreme Court looks to California decisions on that provision as precedent in interpreting the class action provision, 15/ the Complainants argue that avoiding duplicate litigation is not the most important purpose served by a class action. They then cite the rationale given by the California court in Daar, supra, for permitting that case to proceed as a class action:

> (A)bsent a class suit, recovery by any of the individual taxicab users is unlikely. The complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically infeasible. Joinder of plaintiffs would be virtually impossible in this case. It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover the amount of their overpayments is to be prefered over the foregoing alternative. 67 Cal. 2d at 715. (emphasis supplied).

The Complainants assert that the same rationale applies in this case.

The Complainants also attack the Examiner's reliance on his conclusion that the admission of a class will not guarantee there will not be duplicate litigation since potential complainants who do not opt to join the action would not be bound by its outcome. While agreeing that this might be true in a "limited sense," 16/ they argue that it does not follow that a class action cannot proceed because the defendants cannot be assured in advance that all class members would be foreclosed from further proceedings. According to the Complainants, the Examiner "has 'confused the question of jurisdiction of the court to proceed with the question of whether a judgement in a class suit is res adjudicata on all members of the class,' " citing Pipkorn v. Village of Brown Deer, 9 Wis. 2d 571, 580 (1960); and Daar, supra, at 706. They also contend that while all class members would not opt in, by approving a class action and thereby increasing the number of employes participating in this case, the likelihood of later additional prohibited practices proceedings would be reduced.

14/ Ibid at 341.

15/ Citing Schlosser, supra, at 176-77.

16/ The Complainants suggest in a footnote that class members who do not opt in "would have problems of estoppel, statute of limitations, and the stare decisis effect of a final Commission decision on the proportion of permissible and impermissible expenditures." Citing California case law.

Regarding the merits of their original motion, the Complainants refer the Commission to the arguments made in their Motion and their Reply in Support of Motion, as well as the authority cited therein.

Respondent Unions' Position

The Respondent Unions contend that the basis of the Complainants' lawsuit is that the Unions have spent their fair-share fees for purposes unrelated to collective bargaining and contract administration over their objection, citing Amended Complaint at Paragraph 13. They assert that Complainants now seek an interlocutory ruling that a class of unnamed non-members are entitled to relief regardless of whether they object to the Union's use of their fees and ask the Commission to order that all those non-members be notified of this proceeding. The Unions contend that the Commission should reject the Complainants' argument on the same basis stated by the Examiner.

The Respondent Unions next argue that critical to the Complainants' argument that denial of a class action impairs the rights other fair-share payers, is the premise that it is the unions' collecting and spending of the fair-share fees that violates MERA. They assert that the Commission cannot find that all fair-share payers in the unit are similarly aggrieved and entitled to relief unless it agrees with the Complainants' premise. The Respondent Unions cite Browne II, supra, in support of their argument that such is not the law of this case, noting that the fair-share provisions of MERA were held to be constitutional. They assert that in Browne II both the trial court 17/ and the Wisconsin Supreme Court 18/ suggested a remedy for any use of objecting non-members fees for impermissible purposes, i.e., accounting and reimbursement.

Next, the Respondent Unions note that the Wisconsin courts have also construed MERA as providing broader protections to non-member plaintiffs than do the statutes considered in the federal cases, and assert that, consistent with that construction of MERA, the Commission has decided which categories of expenditures may not be financed from the Browne plaintiffs' fees and has stated it will fashion remedies for such use of those fees. However, there is nothing in this case or Browne that suggests that the Commission should grant remedies to classes of persons not before it.

Relative to the Complainants' argument that the Circuit Court's decision to permit Browne to proceed as a class action requires that this case be allowed to proceed as a class action before the Commission, the Respondent Unions argue that the reasons given by the Examiner for rejecting that argument are sound. They note that the Circuit Court overruled the Union's demurrers in this case without benefit of briefs or oral argument on this issue five years before the Wisconsin Supreme Court referred Browne to the Commission and allowed it to proceed as a class action. Hence, that ruling cannot be considered as precedent for class actions before the Commission. They assert the Examiner correctly reasoned that inspite of the Commission's broad authority to fashion remedies, due consideration must be given to its rules regarding adding complainants. In that respect, they note with approval the Examiner's reasoning that the court rule permitting class actions does not expand the Commission's powers any more than the Commission's rules bind the courts.

Regarding the danger of a multiplicity of suits if a class action is not allowed, the Unions assert the "danger" is based on a presumption that all non-members object to the Union's use of their fees, again arguing that a non-member must object in order to be entitled to a remedy, citing International Association of Machinists v. Street, 19/ Brotherhood of Railway and Steamship Clerks v. Allen, 20/ Abood v. Detroit Board of Education 21/ and Olson, et.al. v.

17/ Citing the Milwaukee County Circuit Court's May 29, 1977 slip opinion at 28.

18/ Citing 265 N.W. 2d at 565.

19/ 367 U.S. 740 (1961).

20/ 373 U.S. 113 (1963).

21/ 431 U.S. 209 (1977).

Communications Workers of America. 22/ They contend that, furthermore, they are not arguing that they must be protected from future suits by other objecting non-members, and concede that the final decision in this case and Browne will dictate their future conduct towards objecting non-members.

The Respondent Unions also assert that the rights of other unnamed non-members will not be prejudiced by not permitting this case to proceed as a class action. The extent of the relief an objecting employe is entitled to is the issue to be decided in Browne, and what the Complainants do here will not affect the rights of other objecting non-members to seek that relief.

According to the Respondent Unions, since other fair-share payers are free to file prohibited practice charges regarding the alleged use of their fees for impermissible purposes, the only issue here is how the Complainants can increase their numbers in this case. Since the Commission's rules permit the intervention of additional parties, and the Examiner has invited application for complainant status prior to his final decision, the argument for a class action should be rejected.

Recognizing the Commission's broad authority under Sec. 111.07(4), Stats., to fashion remedies in prohibited practices cases, the Respondent Unions assert that what the appropriate remedy will be in this case and Browne is an issue to be decided by the Commission in its final decision in Stage II. According to the Respondent Unions, allowing a class action here would be more than determining a remedy for objecting non-members, since at the very least it would presume that all non-members object to the Unions' use of their fee. Even more, however, an interlocutory order permitting this case to proceed as a class action would require that the Commission accept the Complainants' definition of the prohibited practice in this case. They contend that definition is inconsistent with the law in this case and Browne, and the Commission should not consider, at this time, relief for a class of unnamed individuals not parties to this proceeding. It is contended that if the Complainants want to add parties to their suit, they should have to use the Commission's existing rules and procedures.

The Respondent Unions also refer the Commission to their earlier arguments in opposition to the Motion wherein they asserted that a class action "is improper under the Commission's rules and existing case law in this area."

Discussion of Class Action Issue

The Complainants and the Respondent Unions have made numerous arguments, both before the Examiner and in their briefs to the Commission, regarding the propriety of a class action suit in fair-share cases arising under MERA. In our view the decision of the Wisconsin Supreme Court in Browne I, supra, is controlling in that respect.

In Browne I the Court upheld the trial court's overruling of the union's demurrer on the ground of defect of parties (arguing that the plaintiffs did not represent a proper class). In Browne II, supra, in its per curiam decision on complainant's motion for rehearing, the Court held:

> In this case, as in all cases where questions of primary jurisdiction occur, both the trial court and the administrative agency have concurrent jurisdiction. Browne v. Milwaukee Bd. of School Directors, 69 Wis.2d 169, 175, 230 N.W.2d 704 (1975). The trial court may therefore retain jurisdiction until W.E.R.C. makes its factual determination concerning fair share dues. The plaintiffs' claims may be maintained before W.E.R.C. in the form of the class action that has already been commenced in the circuit court. 83 Wis. 2d at 340b-41. (emphasis added)

This holding was in response to the complainants' argument that the circuit court proceedings would have to be stayed pending the determination of the factual issues by the Commission or they would be prejudiced by the inability of the Commission to hear class actions.

22/ Civil No. 82-3443 (NJ 1983), where the District Court denied plaintiffs' motion to approve a class action.

The defendant unions in Browne made essentially the same arguments to the Court as the Respondent Unions make in this case. Similarly, there is little difference between the claims made by the Complainants in this case and those made by the plaintiffs in Browne, and as the Examiner noted, the procedure sought by the Complainants is the same as that sought in Browne. The Complainants assert that the two cases are essentially the same and that, therefore, like the Complainaints in Browne, they should be permitted to maintain their suit in the form of a class action before the Commission.

The Examiner correctly noted that there is a difference in the posture of the two cases when they came to the Commission. Unlike the circumstances in Browne, the Circuit Court did not issue an order in this case approving a class action prior to referring the case to the Commission. The order in Browne was issued by the Circuit Court after the parties argued their respective positions on the class action issue, and almost two years after the Wisconsin Supreme Court upheld the Circuit Court's overruling of a similar demurrer by the defendant in that case. In Browne the class action had already been approved by the Court, the notice circulated and the class identified when that case came to the Commission. Conversely, in this case, after the Circuit Court overruled the Unions' demurrer, no further action was taken on the class action issue before the Cirucit Court referred the case to the Commission.

In order to understand the status of this case upon it referral, it is necessary to determine the effect of the Circuit Court's overruling of the demurrer. At the time this case was filed in Circuit Court a demurrer was a procedural device for objecting to alleged defects appearing on the face of a complaint. 23/ The functional equivalent of the demurrer is currently a motion to dismiss under Sec. 802.06(2), Stats.

A demurrer to a complaint admits the facts which are well pleaded, but denies that they have the legal consequences asserted by plaintiffs. 24/ As the Court noted in its decision in Schuler v. Bahr: 25/

> On demurrer it is the duty of this court to accept the allegations of the complaint as true. A demurrer to a complaint admits all facts well pleaded, but denies that those facts have the legal consequences asserted by the plaintiff. When this court reviews a trial court's order on demurrer, it is obliged to construe the complaint liberally and to uphold it if it expressly or by reasonable inference states any cause of action. Sec. 263.07, Stats.; Sec. 263.27; Estate of Mayer (1965), 26 Wis. 2d 671, 677, 133 N.W. 2d 322.

23/ The statute authorizing the use of a demurrer to attack the pleading, Sec. 263.06, Stats., provided as follows:

> 263.06 Demurrer to complaint. There shall be but a single demurrer to the complaint in which the defendant subject to the provisions of ss. 263.11 and 263.12 shall join any or all of the following objections to defects appearing upon the face of the complaint:
>
> . . .
>
> (4) That there is a defect of parties, plaintiff or defendant; or
>
> . . .

The device of a demurrer was expressly abolished in 1974 by Sec. 802.01(3), Stats., when the rules of civil procedure in Wisconsin were modernized; however, that was after the demurrer was filed by the Unions in this case.

24/ International Foundation of Employee Benefits Plans, Inc. v. City of Brookfield, 74 Wis. 2d 544, appeal after remand, 95 Wis. 2d 444, aff'd 100 Wis. 2d. 66.

25/ 41 Wis. 2d 473, 476 (1969).

Further explanation was provided by the Court in Riedy v. Sperry 26/ where it held:

> In the posture of a demurrer, now denominated as a motion to dismiss under the revised code of civil procedure of the State of Wisconsin, only the allegations of the complaint are tested. Whether the facts pleaded can be proved or whether defenses may be pleaded and proved that may vitiate the complaint are not questions before the court on demurrer.
>
> . . .
>
> In ruling on a demurrer, a complaint should be liberally construed with a view to achieving substantial justice and a complaint is entitled to all reasonable inferences in its favor. Schweiger v. Loewi & Co., 65 Wis.2d 56, 58, 221 N.W.2d 882 (1974). A demurrer will be overruled if the complaint, expressly or by reasonable inference, states any cause of action. De Bauche v. Knott, 69 Wis.2d 119, 230 N.W. 2d 158 (1975). In reaching its determination on demurrer, the court is confined to the allegations of the complaint. Boehm v. Wheeler, 65 Wis. 2d 668, 223 N.W.2d 536 (1974). The trial court cannot hypothesize whether the plaintiff can prove the allegations in the complaint. That is the function of the trier of the fact, and the judge does not have that function at the demurrer stage of the action. He must assume that the facts pleaded are true. (emphasis added)

In summary, the facts pleaded in the complaint are accepted as true only for the purpose of ruling on the demurrer. The effect of overruling a demurrer is discussed at 71 C.J.S. PLEADING, Sec. 266:

> However, the overruling of a demurrer does not finally dispose of the case. It does not obviate the necessity of proving by evidence the facts pleaded, or preclude demurrant from controverting such facts, unless he refuses to plead further, and goes no further than to declare that the pleading is not wholly bad; it does determine that on proper proof the pleader may recover, but not that he is absolutely entitled to recover if he proves his case as laid. 71 C.J.S. at 252-53.

Applying the above statements of the law to the Circuit Court's overruling of the Unions' demurrers in this case, it appears that the effect of the ruling was to permit the Complainants to proceed with their law suit vis a vis dismissing the complaint on the basis of the pleadings. The ruling did not reach the merits of the claims in the complaint, including the claim that Complainants represent a class of similarly situated non-member employes. As the Court pointed out in Browne I, supra:

> . . . It may well be that the allegation that these plaintiffs represent a substantial class, composed of numerous employees in addition to themselves, will be proved factually incorrect if tested in the trial court. That question is not, however, before us on demurrer. Until, in the trial of this case, it may be determined that the named plaintiffs are not representatives of the class, the class action should be permitted to proceed. 69 Wis. 2d at 183.

Given the nature of the demurrer as a device for attacking the pleadings and the limited effect that overruling a demurrer has, the Circuit Court's overruling of the Unions' demurrer in this case cannot be considered to be effectively equivalent to that Court's express approval of the suit in Browne as a class action. The distinction in the posture of the two cases upon being referred to the Commission is critical in our view. In the Browne case the complainants had an order from the Circuit Court expressly approving the suit as a class action

---

26/ 83 Wis. 2d 158, 165-66 (1978); see also Anderson v. Continental Insurance Company, 85 Wis. 2d 675, 683 (1978).

after the issue had been fully argued, whereas, as the Examiner noted, in this case the most that can be concluded from the Court's overruling the Unions' demurrer is that it declined to dismiss the suit in toto on the basis of the Complainants' pleadings, including their claim to represent a class. That terse preliminary ruling does not appear to us to be a sufficient basis for concluding that the Complainants' suit was referred to the Commission as a class action which they now have the right to maintain before this agency.

Having concluded that unlike Browne this case did not come to the Commission as a class action already approved by a court, it is necessary to determine whether this Commission has the authority to approve a class action on its own in a case before it.

The law regarding the authority and powers of administrative agencies is clear. In Browne II the Wisconsin Supreme Court held that:

> . . . An agency or board created by the legislature only has those powers which are expressly or impliedly conferred on it by statute. Such statutes are generally strictly construed to preclude the exercise of power which is not expressly granted. Racine Fire & Police Comm. v. Stanfield, 70 Wis.2d 395, 399, 234 N.W. 2d 307 (1974). 83 Wis. 2d at 333.

This has continued to be the law, as can be seen from the Court's recent decision in Kimberly-Clark Corp. v. Public Service Commission: 27/

> The PSC, as an agency created by the legislature, has only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates. Elroy-Kendall-Wilton Schs. v. Coop. Educ. Serv., 102 Wis. 2d 274, 278, 306 N.W.2d 89 (Ct. App. 1981).

Therefore, it is necessary to review the statutes from which the Commission derives its power to hear and decide prohibited practices cases arising under MERA.

A starting point for determining the Commission's statutory authority in this area is Sec. 111.70(4)(a), Stats., which provides as follows:

> (4) POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:
>
> (a) Prevention of prohibited practices. Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.
>
> . . .

Section 111.07, Stats., in turn provides in relevant part:

> 111.07 Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.
>
> . . .

27/ 110 Wis. 2d 455, 461-62 (1983); see also Brown County v. Department of Health and Social Services, 103 Wis. 2d 37 (1981).

(2) (a) Upon the filing with the commission by any party in interest of a complaint in writing, on a form provided by the commission, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employe, or their representative, shall be made a party upon application. The commission may bring in additional parties by service of a copy of the complaint. Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon. . . . (emphasis added)

As can be seen from the foregoing statutory provisions, the legislature has expressly prescribed the procedures to be followed in prohibited practices cases before the Commission, including the procedure for becoming a party in such cases. Those procedures do not expressly permit the filing of a class action complaint on behalf of unnamed persons. Thus, it must be determined whether the Commission is granted such authority by necessary implication.

In determining whether a statute is to be construed as necessarily implying a thing, the Wisconsin Supreme Court has adopted the following definition of "necessary implication:"

> "Necessary implication refers to a logical necessity; it means that no other interpretation is permitted by the words of the Acts construed; and so has been defined as an implication which results from so strong a probability of intention that an intention contrary to that imputed cannot be supported." 28/

Similary, in discussing when a statute will be found to imply a power 82 C.J.S. STATUTES, Sec. 327 states the following:

> . . . A power not expressly granted by statute is implied only where it is so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the legislature. The implied power must be necessary, not merely convenient. . . . 82 C.J.S. at 631.

The above view is apparently shared by the Wisconsin Supreme Court, as it has held that:

> . . . Any reasonable doubt as to the existence of an implied power in an agency should be resolved against the exercise of such authority. 29/

Moreover, in State ex rel. Thompson v. Nash, 30/ the Court specifically addressed the applicability of judicial rules and procedures to administrative agencies, and held:

> In 1931 and again in 1933 this court utilized its rule-making power to amend sec. 326.12 Stats. See 204 Wis., page ix, and 212 Wis., page xix. This action on our part is inconsistent with appellant's theory that the statute is applicable to administrative-agency proceedings, since such

---

28/ Sturzl Construction Company, Inc., v. City of Green Bay, 88 Wis. 2d 403, 407 (1979), citing U.S. v. Jones, 204 F. 2d 745, 754 (7th Cir. 1953), cert. denied 346. U.S. 854.

29/ Kimberly-Clark Corp., supra, at 462.

30/ 27 Wis. 2d 183,189-90 (1964). See also, Transamerica Financial Corp. v. Department of Revenue, 56 Wis. 2d 57, 69 (1972); State ex rel. Wasilewski v. Board of School Directors, 14 Wis. 2d 243, 268 (1961).

agencies are creatures of the legislature, apart from the judicial branch of state government. Our rule-making power does not extend to prescribing procedures to be followed by administrative agencies. In Gray Well Drilling Co. v. State Board of Health (1953), 263 Wis. 417, 58 N.W. (2d) 64, we stated:

> "The functions of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute. It is not the province of courts to prescribe rules of procedure for administrative bodies, as that function belongs to the legislature. The legislature may either prescribe rules for pleadings and procedure before such bodies, or it may authorize the administrative board or agency to prescribe its own rules." (emphasis added)

Given the liberal procedures in Sec. 111.07(2)(a), Stats., and relatedly, ERB 12.02, Wis. Adm. Code, for adding complainants, as well as the provision in ERB 10.12(2), Wis. Adm. Code, which permits intervention, it would not appear necessary or proper to imply the power to authorize a class action complaint of prohibited practices in order to effectuate the purposes of MERA.

Therefore, based upon the absence of any express authority in MERA or Sec. 111.07, Stats., to authorize class actions; the lack of a need to imply such authority due to the existing methods of adding complainants available under the statute and the Commission's administrative rules; the application of the rule that reasonable doubt as to the existence of an implied power of an administrative agency should be resolved against the exercise of such power; and the general inapplicablity of judicial procedures to administrative agencies, we conclude that the Commission is without the power to approve or authorize on its own a complaint of prohibited practices as a class action. 31/

Since the instant complaint was not formerly approved as a class action by the Circuit Court when it was referred to the Commission, and for all the foregoing reasons we have concluded that the Commission does not have the authority to approve the complaint as a class action, we have affirmed the Examiner's order denying the Complainants' Motion for Approval of Notice of Pendency of Class Action, albeit not for all of the same reasons cited by the Examiner.

Dated at Madison, Wisconsin this 20th day of March, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

31/ This does not mean, however, that the Commission is not required to entertain a complaint as a class action where the action is referred to the Commission after having been commenced and approved in that form in circuit court. This conclusion is based both upon the Wisconsin Supreme Court's holding in its per curiam decision in Browne II and the preservation of the right in Sec. 111.07(1), Stats., to seek legal or equitable relief in courts of competent jurisdiction. Such relief as Complainants seek here, however, must be sought and obtained from the courts, rather than this Commission.