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, and the 12 additional complainants whose joinder was moved 11-16-83 and not opposed by Respondents.		
Complainants,	:	Case 161 No. 29581 MP-1322 Dec. No. 19545-E
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.		

ORDER TO SHOW CAUSE AND NOTICE OF HEARING

The Complainants having filed an amended complaint on March 19, 1982 with the Wisconsin Employment Relations Commission alleging that the abovenamed Respondents had committed and were committing prohibited practices within the meaning of the Municipal Employment Relations Act (herein MERA); and the Commission having appointed Christopher Honeyman as Examiner in the matter on April 15, 1982; and on April 26, 1982, Respondent County having filed a cross-complaint alleging Respondent Unions had committed and were committing prohibited practices within the meaning of MERA and further asserting that Respondent County's monetary liability, if any, should be imposed on Respondent Unions by reason of a hold harmless agreement; and, on August 13, 1982, the parties having filed with the Examiner a stipulation disposing of certain factual issues; and on February 7, 1983, the Examiner having issued Initial Findings of Fact and Initial Conclusions of Law (Dec. No. 19545-B and Order Denying Motion for Approval of Notice of Pendency of Class Action (Dec. No. 19545-A); and on April 13, 1983, the Examiner having issued an Order Granting a Motion for Indefinite Postponement of Hearing in the matter (Dec. No. 19545-C); and on March 20, 1984, the Commission having affirmed the Examiner's Dec. No. 19545-A (Dec. No. 19545-D); and on May 24, 1984, in Dec. No. 18408-B (WERC, 5/84), the Commission having issued an Order Granting Motion to Compel Discovery in Browne et. al. v. Milwaukee Board of School Directors, et. al. involving certain matters factually in common with the instant matter; and prior to further developments in the matter, the U. S. Supreme Court having, on March 4, 1986, issued its decision in Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986), herein Hudson, wherein the Court held that certain constitutional requirements must be met prior to a union collecting a service fee from nonmembers; and, on April 16, 1986, in light of Hudson, Complainants having filed and served on Respondents Requests for Admissions with Interrogatories and Request for Production of Documents in the Event of Other Than Unqualified Admissions specifying a return date of approximately May 16, 1986; and on April 23, 1986, Complainants having filed a request, in light of Hudson, that after hearing, the Commission make final findings of fact, conclusions of law and order in the matter, along with proposed findings, conclusions and order and a supporting written argument; and Complainants having further requested that said

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

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

ORDER AND NOTICE

1. That on or before May 23, 1986, Respondents shall file with the Commission and serve on Complainants a statement of cause, if they have any, why the Commission ought not, in light of the Hudson decision and the state of the record in this matter, forthwith issue an order:

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

b. requiring Respondent 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; and

c. Except to the extent that refund payments have been previously made and stipulations limiting amounts due for certain years from certain of Respondent Unions have been previously entered: requiring Respondent Unions to immediately make the original Complainants whole with interest for all fair share deductions taken from them since the initial implementation of such fair share agreements, and requiring Respondent Unions to immediately make the 12 Complainants added by motion filed on November 16, 1983 without objection whole with interest for fair share deductions taken from them since the date one year preceding November 16, 1983.

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

3. That unless all parties agree on a different hearing date or that no hearing is needed, a hearing shall be conducted in this matter on Friday, May 30, 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 either party may have with regard to any cause stated by any Respondent in timely response to the show cause order in (1), above, and further with regard to any other respects in which any Respondent may take issue with Complainants' request for final findings, conclusions and orders dated April 21, 1986 and filed April 22, 1986.

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

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

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

4. Pursuant to Sec. 804.11(1)(b), Stats., the return date specified in the abovenoted Requests for Admissions with Interrogatories and Request for Production of Documents in the Event of Other Than Unqualified Admissions shall be, and hereby is, extended to May 23, 1986.

Dated at Madison, Wisconsin this 9th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER TO SHOW CAUSE

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

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

In light of the decision in Hudson the Complainants served interrogatories with request for documents on the Respondents seeking to determine whether the Respondents had established the procedural safeguards required by Hudson for the implementation of a fair-share agreement. Shortly thereafter, the Complainants filed a request in light of Hudson that the Commission, after a hearing within the statutory forty (40) day time limit, issue final findings of fact and conclusions of law and orders. The orders requested can be summarized as follows:

> (1) That the complaint be amended to add the sixteen (16) individuals named in Complainants' Motion to Add Complainants filed on November 16, 1983, as co-complainants;
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> (2) That the Respondent Unions be required to return to all Complainants, with interest at the rate of seven percent (7%) per annum from the date of commencement to the date of return, all fair-share fees received by Respondent AFSCME International from the Complainants that have not already been returned and seventy-five percent (75%) of all fair-share fees received by Respondents District Council 48 and the Local Unions from Complainants that have not already returned, from the commencement of the deductions through December 31, 1982, and all fees received from the Complainants thereafter, and that the Respondent Unions be required to pay the Complainants interest at the rate of seven percent (7%) per annum on all monies previously returned to Complainants from the date of deduction till the date of refund;
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> (3) That the Respondent Board cease and desist from deducting from the earnings of all nonunion employes in the bargaining unit involved that are in excess of a proportionate share of the costs of collective bargaining and contract administration, and that Respondent Unions cease and desist from inducing the Board to do so; and
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> (4) That the Respondent Board cease and desist from making any fair-share deductions from the earnings of all nonunion employes in the bargaining unit involved until the Commission has determined, after hearing upon any Respondent's request, that the Respondents have provided for: "an adequate advance explanation to all nonunion employees of the basis for the fair-share fee, verified by an independent certified public accountant; a reasonably prompt opportunity for employees to challenge the amount of the fee before an impartial decisionmaker; and an escrow, for at least the amounts determined by the impartial decisionmaker reasonably to be subject to dispute, while such challenges are pending."

HUDSON DECISION

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

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

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

The union established a procedure for considering objections by nonmembers which provided that: (1) No objection could be raised before the deduction was made; (2) after the deduction a nonmember could object to the amount deducted by writing the union's President within thirty days of the first deduction; (3) after the initial objection the union's Executive Committee would consider the objection and notify the objector 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.'" 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. . . .

. . .

Finally, the original Union procedure was also defective because it did not provide for a reasonably prompt decision by an impartial decisionmaker. Although we have not so specified in the past, we now conclude that such a requirement is necessary. The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner.

. . .

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

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

. . .

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.

Id., at 1077-78.

Regarding the need for an escrow arrangment 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. . . .

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.

In their Answer to Amended Complaint the Respondent Unions asserted as affirmative defenses the existence of an internal union rebate procedure that had been in operation since 1974 and which the Unions asserted constitutes a bar to any further relief to the Complainants. 1/

Prior to Hudson it had 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, 373 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, 83 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.

1/ Answer to Amended Complaint filed by Respondent Local Unions and District Council 48 and named individual officers, "Second Defense", paragraphs 27 through 34, May 21, 1982; Answer to Amended Complaint filed by Respondent AFSCME International, "Affirmative Defense", on May 21, 1982.

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 adequately 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.

Given the Respondent Unions' admissions in their pleadings regarding their objections and rebate procedures and the procedural safeguards which the Court has held the Constitution requires to be established before fair-share deductions may be made, we deem it appropriate at this time to order the Respondents to show cause why the Commission should not immediately grant the Complainants' request for a cease and desist order prohibiting the Respondents from future enforcement of the fair-share provision until it is determined the Respondents have established the procedural safeguards required by the Court's decision in Hudson.

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

We have stated in our order that unless a timely statement of sufficient cause for our not doing so is filed, we may also immediately order the Respondent Unions to refund with interest 2/ the heretofore unrefunded portions of fair-share deductions taken from the original Complainants since the inception of fair-share and taken from the twelve Complainants added without objection by the November 16, 1983, Motion to Add Complainants since the one year preceding November 16, 1983, except to the extent of stipulations limiting amounts refundable for certain years from certain Respondent Unions. 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 9th day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Marshall L. Gratz, Commissioner

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Danae Davis Gordon, Commissioner

2/ See Footnote 2 Page 6.

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