STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DALE POEPPEL, P. WILLIAM GREER, THOMAS J. VOGT, KATHRYN KUMMER, DEBRA HOLSCHBACH, JANE KLINZING, DONNA NICOLLAI, CATHY LADER, ELMER J. THOMPSON, MARLENE REEDER, DARLEEN FREESE, LYNN WINTER, SUSAN J. REINKE, CHERYL L. PRICE, LINDA LERNBRICH, GENE TAYLOR, EVELYN PROPP, DENNIS DIDERICH, LINDA W. POLGLAZE, LAWRENCE HOOD, DONAVAN JONES, Complainants, vs. BOARD OF EDUCATION, CLINTON COMMUNITY SCHOOL DISTRICT, CLINTON, WISCONSIN; CLINTON EDUCATION ASSOCIATION, WISCONSIN EDUCATION ASSOCIATION COUNCIL, AND NATIONAL EDUCATION ASSOCIATION, Respondents.	Case XI No. 30570 MP-1397 Decision No. 20081-C

Appearances:

Mr. Willis B. Ferebee, Attorney at Law, 1129 North Jackson Street, Room 309, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainants.

Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, appearing on behalf of the Respondents.

ORDER DENYING MOTION TO ESCROW FAIR-SHARE PAYMENTS

Complainants having, on December 6, 1982, filed a motion requesting that the Commission issue an interlocutory order requiring that the full amount of the fair-share fees being collected from the Complainants be placed in escrow, pending the final determination in this case, and also requesting that a hearing be held on their motion; and on January 3, 1983, Complainants having submitted written argument in support of their motion, and on that same date, Counsel for Respondent Associations having submitted written argument in opposition to Complainants' motion; and the Examiner appointed by the Commission to hear and decide the complaint having, on January 10, 1983, issued an order denying Complainants' motion; 1/ and Complainants having, on January 31, 1983, filed a Petition For

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1/ On January 25, 1983, Complainants filed a motion with the Commission to consolidate this case with the pending cases in Joint School District No. 3, Village of Hartland; Richfield Education Association; and Northwest United Educators, which cases had previously been consolidated. This motion was accompanied by a stipulation to such consolidation of the cases signed by the Attorney for Complainants and the Attorney for the Respondent Associations. The parties' stipulation stated they agreed that this case be consolidated with the others for the purposes set forth in the order issued by Examiner Honeyman in those other cases on December 6, 1982 (Order Consolidating Cases and Granting Motion to Compel Discovery, Decision No. 18577-B, 18578-B, 19307-B). On February 9, 1983, the Commission issued its Order Substituting Examiner and Consolidating Cases, as requested in the parties' stipulation (Decision No. 20081-B).

Review of the Examiner's order denying their motion to escrow full fair-share payments, along with written argument in support of said petition; and the Respondent Associations having, on March 24, 1983, submitted written argument in opposition to said petition; and the Commission, being fully advised in the premises of the parties, makes and issues the following

ORDER

That the Complainants' motion for an interlocutory order requiring the escrowing of the full fair-share amount be, and the same hereby is, denied.

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO ESCROW FAIR-SHARE PAYMENTS

BACKGROUND:

On October 28, 1982, the Complainant employes filed a complaint of prohibited practices with the Commission alleging that the Respondent Board and the Respondent Associations have required, and continue to require, Complainants to contribute fair-share fees in excess of their proportionate share of the cost of collective bargaining and contract administration in violation of the Municipal Employment Relations Act (MERA). Subsequently, on December 6, 1982, an examiner was appointed to hear and decide the case, and the Complainants filed their motion requesting that the Commission "issue an interlocutory order requiring the Respondents to place in escrow, pending the final determination of this matter, the full 'share fees' extracted by the Respondents from the earnings of each of the Complainants herein." In their motion, Complainants also requested that a hearing be held on the motion.

In support of their motion to escrow, the Complainants alleged that the Respondent Associations knowingly certified overstated fair-share amounts to be deducted from the Complainants for both the 1981-82 and 1982-83 school years. Although the Respondent District initially refused to deduct the amount certified by the Clinton Education Association (CEA) for the 1981-82 school year since it was the equivalent of full dues, 2/ the District subsequently began the deductions pursuant to a grievance arbitration award issued in September of 1982. It is alleged that during this time the Respondents Wisconsin Education Association (WEA) and National Education Association (NEA) were involved in a rebate arbitration with a fair-share employe in the Sauk Prairie school system who had invoked the Association's internal rebate procedures. In May of 1982, in the course of that rebate arbitration, counsel for the NEA and WEA admitted that approximately 11% of the total expenditures by the NEA and WEA for the 1979-80 and 1980-81 school years were spent for purposes held to be improper by the Commission in Phase I in the Browne 3/ and Gerleman 4/ cases. The independent arbitrator in the Sauk Prairie rebate arbitration subsequently found that the amount was 15%, rather than 11%. According to the Complainants, since the per capita fees charged by the NEA and WEA are uniform throughout the nation and this state, respectively, this means that where fair-share employes were required by WEA affiliates to pay fair-share fees equal to full dues, at least 11% to 15% of those fees were spent for purposes improper under MERA during those years. The Complainants then asserted that, on December 21, 1982, counsel for the NEA and the WEA proposed that the decision in the Sauk Prairie rebate arbitration be used as a benchmark by the parties in this case and at the same time indicated that the budgets for expenditures for the NEA and WEA for the subsequent years were relatively similar to those considered by the rebate arbitrator. Despite these admissions by the NEA and WEA as early as May of 1982, this information was not conveyed to the Clinton grievance arbitrator. Furthermore, in the fall of 1982, the CEA certified as the fair-share amount for the 1982-83 school year an amount equal to full dues. It was asserted that by doing so, the Associations acted in full disregard of MERA and the collective bargaining agreement and deprived the Complainants of their earnings.

The Complainants contended that it was not the intent of the Legislature to permit a union to take more than it is entitled to and return a portion at some indefinite date. The actions of the Associations have been shown to be "less than open and above board," and such a condition should not be permitted to continue pending the final outcome of the case. At the least, the fair-share being deducted from the Complainants' pay should be placed in escrow so that the

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2/ According to Complainants, the 1981-82 school year was the first year in which the fair-share provision was in effect.

3/ Milwaukee Board of School Directors, Decision No. 18408 (WERC, 2/81).

4/ Milwaukee Board of School Directors, Decision No. 16635-A (WERC, 5/82).

Association cannot benefit from the erroneous certifications. The Complainants asserted that escrowing those fees will not prevent the Associations from performing their representational duties, since it would only mean the escrowing of approximately $10,000 out of budgets of $4,000,000 and $62,000,000 for the WEA and NEA, respectively.

The Respondent Associations took the position that Complainants' motion to escrow should be denied. In support of their position, the Associations argued that the issue of the appropriateness of escrowing contested fair-share funds had already been decided by the Commission in its decision in Browne. 5/ Further, that the Commission's decision in Browne was consistent with the prior decisions of the Circuit Court and State Supreme Court in that same case. According to the Associations, a primary basis for the resolution of the issue in Browne by the courts and the Commission was that "it would be 'pure speculation' to determine what percentage of fair-share funds have been spent for impermissible activities and therefore 'the required danger of irreparable injury justifying such an order' could not be determined." Citing, Browne, at 34.

The Respondent Associations conceded that, due to the Sauk Prairie rebate arbitration, some of the speculation as to the amount of money to be rebated had been removed. In his written response to the motion, counsel for the Associations indicated that, on that basis, the Associations voluntarily decided to escrow an amount of money consistent with that rebate award. 6/ The Associations contended that by voluntarily doing so, "any remaining vitality in complainants' motion" was eliminated, and that to require any additional amounts to be escrowed would be even greater speculation than that which had already been rejected.

EXAMINER'S DECISION:

Without a hearing, but after receiving written argument from the parties regarding the Complainants' motion to escrow the full fair-share amount, the Examiner issued an order denying the Complainants' motion. In doing so, the Examiner relied on the prior decision of the Commission in Browne, 7/ stating:

> "The Wisconsin Employment Relations Commission in Browne vs. Milwaukee Board of School Directors (18408) 2/81, resolved the issue concerning the appropriateness of escrowing contested fair share monies. In refusing to require the escrowing of fair share deductions, the Commission set forth a position that was consonant with the prior circuit and supreme court's resolution of the identical issue in Browne. In said decision the Commission said:
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> > The Commission is not granting the Complainants' request that it issue an interlocutory order requiring the escrowing of fair-share deductions of the Complainants and the class of employes that they represent pending final determination of the issues herein for the same reason given by the trial

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5/ Supra, Note 3, at 34.

6/ We note, however, that at the same time counsel for the Associations also indicated the following:

> It should be noted that the Association specifically reserves the right to reduce the amount of money to be escrowed from the NEA portion of the employe's fair-share assessment. As indicated in Appendix B, the Wisconsin Education Association Council voluntarily conceded significant sums of NEA expenditures as rebatable simply because it was not cost effective to bring witnesses in from Washington, D.C. to testify to the nature of certain expenditures. The Association initially has decided to escrow the same percentage of the employe's fair-share assessment as Mr. Krinsky found rebatable; however, it is doubtful whether the Association will continue to do so.

7/ Supra, Note 5.

> court in the proceeding before it, and which was approved by the Supreme Court, namely, that it would be pure speculation to determine what percentage of fair-share funds have been spent for impermissible activities, and therefore, we are unable to determine "the required danger of irreparable injury" justifying such an order. (Footnotes omitted)
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> Complainants have failed to site(sic) any persuasive authority which would convince the Examiner to depart from the Commission's decision in Browne. For these reasons, the Examiner has denied the Complainants' motion herein."

PETITION FOR REVIEW:

Complainants

In their petition for review, the Complainants contend that the Examiner erred in denying their motion to escrow, and that, as a result thereof, a substantial question of law and administrative policy is raised. The Complainants make several arguments in support of their petition for review. First, it is asserted that the Examiner erred in not providing a hearing on the Complainants' motion, despite their request for such a hearing. The Complainants note that in Browne v. Milwaukee Board of School Directors, 8/ the Wisconsin Supreme Court held that a "motion to escrow will be judged by the same standards as a temporary injunction. . . ." 9/ They then cite the following language in Sec. 111.07(4), Stats., as entitling them to a hearing on their motion:

> . . .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. . . .

The Complainants next contend that the Examiner erroneously considered the escrow issue in this case to be identical to the issue concerning escrow decided by the courts and Commission in Browne. In that regard, they note that the decision of the Circuit Court was based on that Court's view that, without any factual basis on the point, it could only speculate as to what percentage of the fair-share funds were spent outside the confines of MERA. The Complainants allege that in this case they were able to demonstrate that the speculation does not range from 0 to 100%. They assert that the admissions of the Respondents WEA and NEA in the Sauk Prairie rebate arbitration, and the arbitrator's decision in that case, establish that at least 11% to 16% of the fair-share monies received by them for the fiscal years of 1979-80 and 1980-81 were spent outside the confines of MERA. The Complainants then cite a letter from the Associations' counsel indicating that the Associations had decided to use the percentages established by the rebate arbitrator as benchmarks in determining the amount to be rebated for the 1982-83 school year.

The Complainants also argue that neither MERA, nor the Supreme Court's decision in Browne, 10/ permit the collection of an amount equal to full dues as the fair-share fee with a rebate at some future date. They assert that for a rebate procedure to be valid, the statute would have to be construed to authorize "that which it simultaneously makes a prohibited practice." Therefore, according to the Complainants, if the Commission denies their motion to escrow, it permits the Associations to continue their prohibited practices.

Respondent Associations

Regarding the Complainants' claim that they are entitled to a hearing on their motion, the Respondent Associations assert that neither the rules for the issuance of temporary injunctive relief, nor Sec. 111.07(4), Stats., support the

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8/ 83 Wis. 2d 316 (1978).

9/ Ibid at 336.

10/ Ibid at 333-34.

Complainants' claim. The Associations argue that the general rules for the issuance of temporary injunctive relief apply to the Complainants' motion to escrow. Those rules require that, in order to obtain injunctive relief, the requesting party must affirmatively demonstrate a right to such relief in his pleadings. Citing, Sec. 813.02(1), Stats. According to the Associations, the prerequisites for obtaining injunctive relief are substantial. Citing, Wisconsin Association of Food Dealers v. City of Madison, 97 Wis. 2d 426 (1980).

Arguing that the same prerequisites apply to the Complainants' motion, the Associations assert that ". . .general Wisconsin practice does not guarantee a hearing as a matter of right on all motions for a temporary or permanent injunction. A court, in its discretion, may grant a hearing; however, it is not required to do so. If the pleadings do not establish a reasonable basis for granting interim relief, then a hearing would not be required, nor would it even be appropriate."

The Respondent Associations contend that Sec. 111.07(4), Stats., is consistent with the above view and that the Complainants are not guaranteed a hearing under that statutory provision. Rather, Sec. 111.07(4) provides that such interim relief cannot be granted without first having a hearing. That section does not, however, require a hearing if the interim relief is not granted. The statute recognizes the difference in the two situations. Granting the interim relief changes the status quo, and a hearing is therefore required, while denying such relief maintains the status quo and no hearing is required. Whether the Complainants are entitled to a hearing on their motion to escrow the entire fair-share fee depends on whether their pleadings adequately set forth a basis for such relief. They further assert that under the principles established in Browne, the Complainants' motion "failed to raise a substantial claim for interim relief."

The Respondent Associations also allege that the Commission "rarely, if ever" issues interlocutory orders, even after an examiner's decision on the merits. This includes cases where, unlike here, individuals are subjected to considerable hardships in the interim, e.g., an employe has been discharged for what has initially been determined to be unlawful reasons. According to the Associations, if the Commission finds that interim relief is necessary in this case, then to treat unions and employers alike, it must grant interim relief in cases like the example set forth above.

Regarding the application of the prior decisions of the courts and Commission in Browne, the Associations contend that neither Complainants' motion, nor their underlying complaint, offer any basis for distinguishing their motion from the motion that was rejected in Browne. They note in that regard that the Complainants' motion is for the escrowing of the full fair-share fee based upon the allegation that some of the fair-share fee is spent for impermissible purposes. The Associations assert that the Commission's decision in Browne established that the allegation that some of the fair-share fee is spent for impermissible purposes does not justify escrowing the entire fee.

The Associations concede that the decision in the Sauk Prairie rebate arbitration creates an inference that affiliates of the WEA spend at least a portion of their budgets for purposes unrelated to collective bargaining. They do not, however, agree that fact is material to Complainants' position, since the trial court in Browne made a similar assumption, but still refused to grant the relief requested pending a determination of the exact amount being impermissibly spent. They also assert that the Complainants failed to point out that the Respondent Associations have voluntarily escrowed $30.00 of each Complainant's annual fair-share assessment in order to be consistent with the rebate arbitration award. 11/

11/ Respondents admit that their voluntary escrowing can only be established by resort to the letters between counsel; however, they note that the figures cited by Complainants from the Sauk Prairie decision are generated from those same letters. They assert that if the letters are sufficient to substantiate the rebate awarded in Sauk Prairie, they are also sufficient to substantiate their voluntary escrowing of the funds.

The Associations also argue that the Complainants ignore the basis of the decisions in Browne in asserting that since the Associations certified a fair-share amount equal to full dues, and the Sauk Prairie rebate arbitration established that some of the fair-share fees are spent for impermissible purposes, then the fair-share provision must be unlawful. According to the Associations, even if it were true that they were administering the fair-share provision in an illegal manner, that alone would not entitle the Complainants to the relief sought. The Complainants must affirmatively establish both a probability of success on the merits and irreparable injury. At most, Complainants' argument only goes to the issue of success on the merits; however, that component has not been the primary basis for the courts' and the Commission's rejection of such interim relief in fair-share cases. In Browne, both the courts and the Commission implicitly assumed the union spent some of the fair-share money for impermissible purposes, but refused to escrow all of the fair-share fees. The courts and the Commission felt that, given the inability of the trier of fact to determine the precise amount to be rebated, it would be unfair to the unions to escrow all the fair-share fees prior to a determination of that amount. Hence, Complainants' arguments ignore the actual basis of the decisions in Browne and do nothing to significantly advance either of Complainants' positions.

It is suggested by the Associations that the issue of whether a union may certify a fair-share fee amount equal to full dues, when it knows at the time that a portion of that amount will be spent for purposes unrelated to collective bargaining, raised by the Complainants' arguments for their motion, would be better addressed in a separate proceeding, such as a declaratory ruling pursuant to Sec. 227.06(1), Stats. They assert that the importance of that legal issue, along with the delay and confusion that would be caused by intertwining that issue with the many factors that need to be considered in deciding whether Complainants are entitled to their requested interim injunctive relief, requires that the issue be dealt with separately. 12/

DISCUSSION:

Prior to discussing the merits of the Complainants' Petition for Review, we note that a party is not entitled to review of an examiner's interlocutory order as a matter of right. The Commission has discretion in deciding whether or not to entertain such an appeal. 13/ Due to the significance of the issue raised by their motion to escrow and the apparent confusion regarding with whom such a motion should be filed, 14/ we have chosen to entertain the Complainants' Petition for Review.

12/ Counsel for the Respondent Associations has directed our attention to the arguments in the Association's brief in Winter Jt. School District No. 1, 1695-C (4/81), should we wish to consider this issue. Counsel for the Complainants asserts that the issue is not "ripe for adjudication" at this point in the proceeding, but that it will be after the hearing in this case, and therefore, it will not be necessary to proceed on the issue under Chapter 227, Wis. Stats.

13/ G & H Products, Inc., Decision No. 17630-B (WERC, 1/82); Jefferson Board of Education, Decision No. 13648-B (WERC, 1/76).

14/ In this instance, since the Complainants' motion was filed subsequent to the appointment of the Examiner, the motion was routed to the Examiner upon its receipt in our offices in accord with our normal procedures. Although the motion moved "this Commission" to issue an interlocutory order requiring the escrowing the amount being deducted as the fair-share fee from Complainants' earnings, neither Complainants nor Respondents indicated any objection or surprise relative to the Examiner's hearing and deciding the motion.

Motions For Interlocutory Relief Must Be Filed
With The Full Commission

For the reasons discussed below, we conclude that motions for interlocutory orders granting injunctive relief pursuant to Sec. 111.07(4), Stats., must be filed with the full Commission, since it is only the full Commission, as opposed to an examiner, that has the authority to grant such relief under that statutory provision. 15/

The Complainants rely on Sec. 111.07(4), Stats., for both the authority to grant the requested relief and their right to a hearing on their motion. That provision reads in relevant part:

. . .

> 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.

. . .

The key words are "Pending the final determination by it . . . the commission may . . ." It is our conclusion that those words indicate that only the full Commission, and not an examiner, is granted authority to make interlocutory orders granting interim relief under this section. The bases for that conclusion are twofold: (1) Section 111.07(4), Stats., and ERB 12.07, Wis. Adm. Code, 16/ use the term "the commission" as opposed to "the commission, commission member, or examiner" used in other sections of the statutes and the administrative rules; and (2) Only the Commission makes "final" determinations.

Although it is true that the term "the commission" is used in other subsections of Sec. 111.07 and has been construed so as to include individual Commissioners and examiners in those cases, 17/ both the context in which the term is used in the relevant phrase and its use in the applicable administrative rule indicate that the term is intended to refer to the Commission as a body.

Chapter ERB 12, Prevention of Prohibited Practices Pursuant to Section 111.70, Stats, Wis. Adm. Code, deals with the general procedures relative to prohibited practices proscribed by MERA. A review of Chapter ERB 12 reveals that the administrative rules in that chapter use the terms "commission," "commission member," and "examiner" with considerably greater precision than do the statutes. 18/ Where the rules are intended to refer to, or authorize action

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15/ This case does not involve, or therefore address, a situation in which the Commission authorizes an individual to exercise the Commission's final decision-making authority pursuant to Sec. 227.09(3)(a), Stats.

16/ ERB 12.07 is the accompanying administrative rule in this area and reads as follows:

> ERB 12.07 Interlocutory findings of fact, conclusions of law and order. The commission may, after the close of the hearing and pending the final determination by it of any controversy, make and issue interlocutory findings of fact, conclusions of law and order, when it deems that such will effectuate the policies of s. 111.70, Stats., which may be enforced in the same manner as final orders.

17/ For example: Sections 111.07(2) and (3), Stats.

18/ See, for example, ERB 12.06:

> ERB 12.06 Findings of fact, conclusions of law and order. (1) ISSUANCE. After the close of the hearing, or upon granting a motion for dismissal of a complaint, the commission, or single member or examiner, if authorized to do so, shall make and file findings of fact, conclusions of law and order. Following a

(footnote continued on page 9)

by, the Commission or an individual Commissioner or an examiner, they specify the same. ERB 12.07, the administrative rule relating to the making and issuing of interlocutory findings of fact, conclusions of law and order, specifies "the commission." The use of that term alone, without reference to single commission members or examiners, creates an inference that ERB 12.07, and hence, Sec. 111.07(4), Stats., are only intended to authorize such interlocutory action by the Commission.

Returning to Sec. 111.07(4), that statutory provision provides "(p)ending the final determination by it . . . the commission may ., . ." (emphasis added). Pursuant to Secs. 111.07(5) and (6), Stats., 19/ and ERB 12.08 and 12.09, Wis. Adm. Code, 20/ only the Commission as a body has the ability to make "final" determinations. Pursuant to those provisions, an examiner's decision may be appealed to the Commission and is not considered a final order of the Commission until the twenty days have run for the parties to file a petition for review of the examiner's decision or for the Commission to act on its own motion to modify or change the award. Thus, the context in which the term is used lends additional support to the conclusion that Sec. 111.07(4), Stats., only authorizes the Commission, as a body, to grant interim relief, since only the full Commission is able to make a "final determination."

18/ (footnote continued)

> hearing conducted by a single member or examiner on behalf of the commission, where the single member or examiner has not been authorized to issue findings of fact, conclusions of law and order, the single member or examiner, as the case may be, shall prior to the issuance of findings of fact, conclusions of law and order by the commission, participate in discussions with the commission where the credibility of a witness or witnesses is a substantial element in the proceeding.
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> . . .

19/ Section 111.07(5), Stats., provides in relevant part:

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time.
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> . . .

Section 111.07(6), Stats., provides:

> (6) The commission shall have the power to remove or transfer the proceedings pending before a commissioner or examiner. It may also, on its own motion, set aside, modify or change any order, findings or award (whether made by an individual commissioner, an examiner, or by the commission as a body) at any time within 20 days from the date thereof if it shall discover any mistake therein, or upon the grounds of newly discovered evidence.

20/ ERB 12.08 Setting aside, modifying, changing or reversing findings of fact, conclusions of law and order. The commission on its own motion, or the single member or examiner having authority to issue findings of fact, conclusions of law and order, on his own motion, as the case may be, may set aside, modify, change or reverse any findings of fact, conclusions of law and order, at any time within 20 days from the date of the issue and mailing

(footnote continued on page 10)

Due to the understandable confusion regarding with whom a motion for interlocutory relief should be filed, and the apparent lack of any real purpose that would be served at this point by requiring the Complainants to refile their motion with the full Commission, we have considered and addressed below the merits of Complainants' motion to escrow their full fair-share fee.

Motion to Escrow "Full" Fair-Share Fee

In their Petition For Review, the Complainants assert that the Examiner erred in denying their motion to escrow the full fair-share fee, and that he also erred in not granting their request for a hearing before deciding their motion. 21/

In Browne, the Wisconsin Supreme Court reviewed the trial court's decision to deny a similar motion to escrow and held:

> The escrow remedy requested is similar to an injunction because it would have the effect of enjoining the unions from using all fair-share funds pending the outcome of the litigation. The motion to escrow will be judged by the same standards as a temporary injunction because the reasons used to support the remedy and the remedy itself are equivalent to a temporary injunction.
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> The power to grant a temporary injunction lies within the discretion of the trial court. The trial court's decision concerning an injunction will not be reversed unless the discretion has been abused.
> (At 336)

Section 813.02(1), Stats., sets forth the conditions under which temporary injunctions are granted and provides as follows:

> 813.02 Temporary injunction; when granted
> (1) When it appears from his pleading that a party is entitled to judgment and any part thereof consists in restraining some act, the commission or continuance of which during the litigation would injure him, or when during the litigation it shall appear that a party is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

20/ (footnote continued)

thereof, if any mistake is discovered therein or upon grounds of newly discovered evidence, provided, in case of the single member or examiner, no petition for review has been filed with the commission.

ERB 12.09 Review of findings of fact, conclusions of law and order issued by single member or examiner. (1) Right to file, time. Within 20 days from the date that a copy of the findings of fact, conclusions of law and order of the single member or examiner was mailed to the last known address of the parties in interest, any party in interest, who is dissatisfied with such findings of fact, conclusions of law and order, may file a written petition with the commission, and at the same time cause copies thereof to be served upon the other parties, to review such findings of fact, conclusions of law and order. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings of fact, conclusions of law and order, it may extend time another 20 days for filing the petition for review.

21/ Again, the Complainants cite Sec. 111.07(4), Stats., and assert that the words "after hearing" in that subsection entitle them to a hearing on their motion as a matter of right.

The Court noted in Browne that injunctive relief is "not to be issued lightly" and went on to enumerate examples of when injunctive relief is appropriate. 22/ That Court, in a more recent case, reiterated the conditions under which such relief may be granted: 23/

> Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of a lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile.

We read the Court's decision as only requiring a hearing when it appears from the party's pleadings that he is entitled to the relief requested. In other words, a hearing is only necessary if the relief is to be granted. This requirement is presumably due to the likely impact the granting of such injunctive relief will have on the litigants. Conversely, if on the face of the requesting party's pleadings they are not entitled to the relief requested, a hearing is not required. The decision as to whether a party is entitled to injunctive relief lies within the discretion of the trial court. We interpret Sec. 111.07(4), Stats., in a similar fashion. Section 111.07)4) provides that "the commission may . . . make interlocutory findings and orders. . .". The decision to grant or deny interlocutory relief is discretionary with the full Commission and the right to a hearing on a request for such relief is dependent on whether the pleadings of the requesting party state a sufficient basis for granting such relief. Therefore, in order to decide whether the Complainants are entitled to a hearing on their motion, it is necessary to determine whether the escrowing of the full-share fee is appropriate as interlocutory relief based on their pleadings.

In Browne, the Wisconsin Supreme Court interpreted Sec. 813.02(1), Stats., as showing "that a party may not obtain injunctive relief that he would not be permanently entitled to if he prevailed on the merits of the claim." (At 337-38). For the reasons discussed below, we conclude that the escrowing of the entire fair-share fee would not be appropriate as permanent relief even if the Complainants are successful on the merits of their complaint, and that, therefore, such relief is not available to Complainants on a temporary basis. The above conclusion is based upon the guidance gleaned from the decisions of our State Supreme Court and those of the U.S. Supreme Court.

In reviewing the trial court's denial of a similar motion, the Court, in Browne, discussed the decisions of the U.S. Supreme Court in International Association of Machinists v. Street 24/ and Brotherhood of Railway Workers v. Allen 25/ and concluded:

> Street, supra and Allen, supra stand for the proposition that employees who are compelled to pay union dues are still required to pay those dues pending a determination of what portion of those dues are being used for statutorily impermissible purposes.
> (At 340).

22/ At 337.

23/ Wisconsin Association of Food Dealers v. City of Madison, 97 Wis. 2d 426, 429 (1980).

24/ 367 U.S. 740 (1961).

25/ 373 U.S. 113 (1963).

The Court considered, but rejected as unpersuasive, Robbinsdale Education Association v. Teacher's Local 872, 239 N.W. 2d 437 (Minn. 1976), cited by the complainants in Browne as a precedent for granting a motion to escrow the entire fair-share fee. In Robbinsdale, the Minnesota Supreme Court interpreted a public employe fair-share statute as permitting any fair-share payer to bring an action for injunctive relief in a district court. Under the Minnesota court's interpretation, the complaining employe could have the use of the fair-share fee enjoined until the union proved that the amount of the fee was proper. The Wisconsin Supreme Court based its rejection of Robbinsdale on the Minnesota court's reliance on its construction of a statute, not present in Wisconsin, to sanction the use of injunctive relief.

In both Street and Allen, the U.S. Supreme Court rejected as inappropriate remedies that would cut-off the flow of all funds from the objecting employes to the union. In Street the Court concluded that to completely deprive the unions of these funds would be counter to the purpose and policies of the Railway Labor Act, stating:

> Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put. Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry.
>
> . . .
>
> The complete shutoff of this source of income defeats the congressional plan to have all employees benefited share costs in the realm of collective bargaining, Hanson, 351 U.S. at p. 235, and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations"
>
> . . .
>
> (367 U.S. 740 at 771, 772).

The Court then suggested two possible remedies:

> One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. . . . A second remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed.
> (Id. at 774, 775).

Again, in Allen, the Court reiterated its concern with the possible impact on the union's ability to carry out its responsibilities if the flow of funds to the union from the objecting employes is halted:

> . . .
>
> We think that lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, dissenting employees (at least in the absence of special circumstances not shown here) can be entitled to no relief until final judgment in their favor is entered.
>
> . . .
>
> (373 U.S. at 120).

The Court suggested an "advance reduction" scheme as an appropriate form of relief and as a method of avoiding the problem in the future. 26/ The Court described such a scheme as a reduction of future exactions by the same proportion that union political expenditures bear to total union expenditures.

Subsequently, in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Court again recognized the significant responsibilities that come with a union's designation as the exclusive bargaining representative and the purposes served by the policy of allowing unions and employers to bargain a requirement that all of the represented employes contribute to the cost of that representation. 27/ While Abood involved a public employer and public employes, the Court considered the government interests advanced by the Michigan agency shop statute to be "much the same as those promoted by similar provisions in federal labor law." 28/ In considering what would be an appropriate remedy if the appellants proved their allegations in Abood, the Court stated:

> . . .the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the union's ability to require every employee to contribute to the cost of collective bargaining activities.
>
> . . .
>
> (431 U.S. at 237).

The Court then noted with approval its prior rejection of broad injunctive relief in Street and Allen, 29/ and suggested that resorting to the union's voluntary internal rebate procedure might be appropriate. 30/

Finally, in Ellis v. Brotherhood of Railway Clerks, 31/ a recent case involving the Railway Labor Act and the use of an objecting employe's fees for purposes unrelated to collective bargaining or contract administration, the Court held that a "pure rebate approach" is inadequate as a remedy. The Court found that such a procedure results in an "involuntary loan" and reasoned:

> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation.
> (104 S. Ct. at 1890).

We view the legislative policy behind the adoption of the 1971 amendments to MERA permitting fair-share agreements to be similar to the federal policy reflected in Section 2, Eleventh, of the Railway Labor Act and defined by the Court in Street and Allen, i.e., that the goal of peaceful and stable labor

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26/ Ibid at 122.

27/ 431 U.S. 209, 221.

28/ Ibid at 224.

29/ Ibid at 240-41.

30/ Ibid at 238.

31/ 104 S. Ct. 1883 (1984).

relations is best achieved by a system which provides for exclusive representation 32/ and which permits the negotiation of a device (fair-share agreements) whereby all of those employes who benefit from such representation may be required to pay their proportionate share of the cost of that representation (collective bargaining and contract administration). 33/ We note from the guidance provided us by the Wisconsin Supreme Court in Browne, and the U.S. Supreme Court's succession of decisions in this area, that broad injunctive relief which would completely cut-off the flow of funds from the objecting employees to the union has consistently been considered inappropriate as a remedy. The rationale for this rule is that the union, as the certified exclusive bargaining representative, has the continuing responsibility to fairly represent all of the employes in the bargaining unit, members and nonmembers alike, and halting the flow of money from the objecting employes could interfere with the union's ability to carry out its representative functions and responsibilities.

We do not construe the Court's reference to an "interest-bearing escrow account" in Ellis to mean the escrowing of the entire amount being collected from an "objecting employe," since to do so would have essentially the same impact on a union as would enjoining the collection of the money in the first place. The Court took care to specify that it was holding a "pure" rebate procedure to be inadequate and then discussed advance reduction of dues or interest-bearing escrow accounts as possible alternatives that would place "only the slightest additional burden, if any, on the union." 34/ Nowhere in the Court's decision is there any indication that its concern with a union's ability to carry out its representative functions, as exhibited in its prior decisions, has waned, or that it now considers preventing a union from using any of the money collected from objecting employes as being only a "slight" burden.

Moreover, the Court suggested advance reduction of dues and/or interest-bearing escrow accounts as alternatives to the Union's exacting and using, and then refunding, that portion of the fee that it was not allowed to exact in the first place. In other words, the Court viewed as the harm to be avoided the taking and using of that portion of the fees that would be spent for "activities that are outside the scope of the statutory authorization." To require the escrowing of the entire fee would exceed what is necessary to avoid the harm.

While escrowing the full fair-share fee of objecting non-member employes would still require those employes to pay, and thereby satisfy the concern regarding "freeloaders," it still has the practical effect of completely checking the flow of those funds to the union for its use in fulfilling its responsibilities. Thus, the primary basis for rejecting a broad injunction against the collection of any fair-share fees from objecting employes also applies to the escrowing of all fair-share fees being paid by objecting employes. For that reason, we reject the escrowing of the full fair-share fee as a remedy, be it on a temporary or a permanent basis.

32/ In addition to permitting the negotiation of fair-share agreements, the 1971 amendment to MERA created Sec. 111.70(4)(d)1, Stats., which provides in part:

> (d) Selection of representatives and determination of appropriate units for collective bargaining. 1. A representative chosen for the purposes of collective bargaining by a majority of the municipal employes voting in a collective bargaining unit shall be the exclusive representative of all employes in the unit for the purpose of collective bargaining.
>
> . . .

33/ Berns v. WERC, 99 Wis. 2d 252, 264-266 (1980); Milwaukee Federation of Teachers, Local No. 252 v. WERC, 83 Wis. 2d 588, 595, 596 (1978).

34/ Ellis, supra, at 1890.

Therefore, by their pleadings, the Complainants have requested as interim injunctive relief that which they would not be entitled to on a permanent basis even if they prevailed on the merits of their claim. It is for that reason, rather than the basis stated by the Examiner, 35/ that we conclude that the Complainants' motion to escrow the full amount of the fair-share fee being deducted from their earnings, pending the final decision in this case, must be denied. Accordingly, since on the face of their motion the Complainants have requested relief to which they are not entitled, there is no necessity for a hearing on their motion.

Dated at Madison, Wisconsin this 20th day of July, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

35/ The correspondence between Counsel for the Respondent Associations and Counsel for the Complainants regarding the Associations' offer to use the figures found by the arbitrator in the Sauk Prairie rebate arbitration as a basis for voluntarily escrowing such percentages, indicates that some amount of the fair-share fee being collected from the Complainants is being used for purposes not allowed under MERA. Arguably, that correspondence indicates at least a minimum percentage of the fees are being so used; however, in their arguments in support of their respective positions, both parties question the accuracy of the percentages found by the Sauk Prairie arbitrator, and they are careful to reserve the right to challenge those percentages as being too high or too low. We offer no opinion at this time on our willingness to rely on such rebate awards as a basis for granting interim injunctive relief.