STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| WISCONSIN EDUCATION ASSOCIATION COUNCIL and GATEWAY TECHNICAL EDUCATION ASSOCIATION, | : | |
| Complainants, | : | Case XXVI<br>No. 30635 MP-1408 |
| vs. | : | Decision No. 20209-A |
| GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, and GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT BOARD, | : | |
| Respondents. | : | |

Appearances:

Johnson, Cullen & Weston, Attorneys at Law, by Mr. Lee Cullen, appearing on behalf of the Complainants.

Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Mark L. Olson, appearing on behalf of the Respondents.

Mr. Steve Kowalsky, Representative, Wisconsin Federation of Teachers, appearing on behalf of the Intervenor.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wisconsin Education Association Council and Gateway Technical Education Association having, on November 15, 1982, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter, the Commission, alleging that the Gateway Vocational, Technical and Adult Education District and Gateway Vocational, Technical and Adult Education District Board had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3, 4, and 5 of the Municipal Employment Relations Act, hereinafter referred to as MERA; and the Commission having, on December 30, 1982, appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and the Gateway Federation of Teachers, Local 1924, WFT, AFT, AFL-CIO having, on February 4, 1983 filed a written motion to intervene in said proceeding; and the Examiner having granted said motion at the hearing held in Racine, Wisconsin on February 9, 1983; and the parties having filed briefs with the Examiner which were exchanged by June 10, 1983; and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. That Wisconsin Education Association Council, hereinafter referred to as WEAC, is a labor organization existing for the purpose of representing employes through collective bargaining; that Gateway Technical Education Association, hereinafter referred to as GTEA, is a labor organization and the local affiliate of WEAC; and that their principal offices are located at 101 West Beltline, Madison, Wisconsin 53708.

2. That Gateway Vocational, Technical and Adult Education District, hereinafter referred to as the District, and Gateway Vocational, Technical and Adult Education District Board, hereinafter referred to as the Board, are municipal employers which operate an adult vocational and technical education program in southeastern Wisconsin, and their principal offices are located at 3520 30th Avenue, Kenosha, Wisconsin 53141.

3. That Gateway Federation of Teachers, Local 1924, WFT, AFT, AFL-CIO, hereinafter referred to as GFT, is a labor organization existing for the purposes of representing employes through collective bargaining and its address is: President, GFT Local 1924, c/o Gateway Technical Institute, 3520 30th Avenue, Kenosha, Wisconsin 53141.

4. That following an election conducted by it, the Commission, on June 29, 1976, certified the GFT as the exclusive collective bargaining representative of certain employes of the District in a bargaining unit described as follows:

> All full-time and regular part-time instructional personnel, including teachers, counselors, librarians, program chairmen, developers, Opportunity Center teachers, certified teaching assistants, and aviation teaching assistants, but excluding the ABE teachers and the ABE Counselor, the Recruiters, the Women's Bureau Counselors, the Consumer Consultant, Community Services division instructional personnel, supervisory, managerial and confidential employes, custodial employes and clerical employes, and all other employes. 1/

5. That the District and the GFT, on or about March 19, 1981, entered into a collective bargaining agreement covering the wages, hours and working conditions of employes in the above-described bargaining unit which, by its terms, expired on June 30, 1982, and that said agreement contained the following provisions:

ARTICLE III

DUES DEDUCTION AND SENIORITY

SECTION 1 - DUES DEDUCTION AND FAIR SHARE

A. MEMBERSHIP NOT REQUIRED; Membership in any employee organization is not compulsory. Employees have the right to join, not join, maintain or drop their membership in an employee organization as they see fit.

B. EFFECTIVE DATE AND EMPLOYMENT COVERED; As of the date of the first pay check following the results of the referendum as provided in C., the District shall, once each month, deduct from the regular earnings of all employees specified herein an amount equal to such employees' proportionate share of the cost of the collective bargaining process and contract administration as certified annually by September 1 by the Union. The District shall pay such amount to the treasurer of the bargaining representative of such employees on or before the end of the month following the month in which such deduction is made. Changes in the amount of dues to be deducted shall be certified by the Union thirty (30) days before the effective date of the change. No more than one change request per year will be honored by the employer. Employees on layoff or leave of absence or other status in which they receive no pay are excluded.

C. REFERENDUM; The agreement herein set forth shall become effective and binding on both parties when such agreement has been ratified by a referendum conducted among all full-time (50% or more) employees in the bargaining unit. Unless 60% of the eligible voters vote in favor of the Fair Share Agreement, this Fair Share Agreement shall be null and void and a Fair Share Agreement is not to be

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1/ Decision No. 14381-B.

implemented during the term of this contract. This referendum shall be conducted by the Wisconsin Employment Relations Commission on the joint petition of the parties hereto.

D. INDEMNIFICATION AND HOLD HARMLESS PROVISION; The collective bargaining representative shall indemnify and save the District harmless against any and all claims, demands, suits, orders, judgements, or other forms of liability that shall arise out of, or by reason of, actions taken or not taken by the District under this section.

E. APPLICATION; The provisions of this Fair Share Agreement shall apply to full-time (50% or more) employees only. All other bargaining unit members shall be excluded from its provisions.

F. Upon receipt of written authorization by the teacher, the Board shall deduct an amount to provide monthly payments of dues for membership in the Gateway Federation of Teachers, Local 1924, from the regular salary check of such teacher and the amounts so deducted pursuant to the Gateway Federation of Teachers on the second pay period of each month.

G. Changes in the amount of dues to be deducted shall be certified by the Union thirty (30) days before the effective date of the change. No more than one change request per year will be honored by the Employer.

6. That as of February, 1981, certain bargaining unit employes had signed dues deduction cards which authorized the District to deduct dues from the individuals' salary and to remit such sums to GFT; and that said cards included the following language:

> "This authorization may be revoked by me effective as of September 1 of any school year by written notice to the treasurer of Local 1924 and the District Business Manager given on or before September 1 of that year. Without such notice, it is deemed renewed from year to year until revoked by me or upon termination of my employment."

7. That on May 14, 1981, the Commission certified the results of a referendum conducted by it on April 29, 1981, that the required number of employes, pursuant to Article III, Section C of the parties' agreement, voted in favor of the implementation of a fair share agreement between the District and GFT; 2/ and that thereafter the District deducted fair share amounts and paid them to GFT.

8. That on December 21, 1981, WEAC filed a petition with the Commission requesting that it conduct an election in the unit described in Finding of Fact 4 to determine whether said employes desired to be represented by WEAC; that an election was held on March 3, 1982 in said unit; and that on March 16, 1982, the Commission certified WEAC as the exclusive collective bargaining representative of employes in said unit. 3/

9. That by a letter to the District dated March 19, 1982, WEAC requested that all fair share monies collected by the District pursuant to Article III of the agreement since March 16, 1982 be forwarded to GTEA; that by a letter dated March 24, 1982, to the District, GFT requested that the dues withheld by the

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2/ Decision No. 18596.

3/ Decision No. 19362.

District be paid to the GFT; and that the District continued to make fair share deductions between March 16, 1982 and June 30, 1982, but refused to forward these to either the GTEA or the GFT and instead placed said amounts in escrow.

10. That from March 16, 1982 and thereafter, WEAC and GTEA, pursuant to the contractual grievance procedure, processed a number of grievances which alleged that the District violated the terms and conditions of the agreement which by its terms expired on June 30, 1982.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

## CONCLUSIONS OF LAW

1. That on March 16, 1982, the Gateway Federation of Teachers, Local 1924, WFT, AFT, AFL-CIO ceased to be the exclusive collective bargaining representative of employes in the bargaining unit and the provisions of the agreement related to fair share became inoperative and unenforceable, and therefore, the District was not obligated to transmit any fair share amounts to the Gateway Federation of Teachers, Local 1924.

2. That on March 16, 1982, the Wisconsin Education Association Council became the exclusive bargaining representative of employes in the bargaining unit and was thereafter obligated to enforce and administer the substantive provisions of the agreement; that the provisions related to the fair share agreement were extinquished and not enforceable by the Wisconsin Education Association Council; and that the District, by its refusal to transmit fair share amounts after March 16, 1982, pursuant to the terms of the collective bargaining agreement then in effect, did not violate the terms of said agreement, and hence the District and Board did not violate Section 111.70(3)a(5) of MERA.

3. That the District and Board, by their refusal to submit fair share amounts to the Wisconsin Education Association Council, did not interfere with, restrain or coerce employes in the exercise of rights guaranteed them in Section 111.70(2) and hence did not violate Section 111.70(3)(a)1 of MERA; that by said action, the District and Board did not discriminate in regard to terms and conditions of employment and hence did not violate Section 111.70(3)(a)3 of MERA; and that by said action, the District and Board did not refuse to recognize and bargain with WEAC or GTEA, and hence did not violate Section 111.70(3)(a)4 of MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

## ORDER 4/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 14th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

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4/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the
(Continued on Page five)

4/ (Continued)

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. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. 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 or order it may extend the time another 20 days for filing a petition with the commission.

## MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The issue raised by the complaint is who, if anyone, is entitled to the fair share monies deducted by the District pursuant to Article III of the GFT-District agreement during the period from the date of WEAC's certification as the bargaining unit's exclusive bargaining representative on March 16, 1982 to the expiration of the agreement on June 30, 1982. 5/

### WEAC'S POSITION

WEAC contends that where a new bargaining representative is certified during the term of a collective bargaining agreement, the new representative is obligated to enforce and administer the substantive provisions of the agreement which inure to the benefit of employes covered by the agreement. It asserts that it has fulfilled this obligation by filing and processing numerous grievances. WEAC argues that a fair share agreement is meant to spread the costs of contract administration among all members of the bargaining unit, and as GFT is no longer certified, it has no costs of negotiation and representation, and is not entitled to fair shaire monies. WEAC points out that it has incurred such costs in administering the agreement, and has become something akin to a successor representative who succeeds to all the rights and duties of its predecessor including fair share. WEAC contends that the fair share agreement is not between the District and GFT only. It points out that the ballot used in the referendum does not indicate a particular bargaining representative. It argues that a fair share agreement during the term of a contract can only be rescinded by a referendum, otherwise it remains in full force and effect. It notes that nothing in the agreement provides that this fair share agreement will cease if the GFT is replaced, and it therefore requests a finding that the District committed prohibited practices by its refusal to promptly pay it the fair share monies collected from March 16, 1982 through June 30, 1982.

### GFT'S POSITION

The GFT contends that it is entitled to all fair share monies collected through June 30, 1982, because it certified the fair share amounts as $180.00 per year on September 1, for the cost of collective bargaining and contract administration for the school year, and it incurred obligations based on the school year, and therefore, it is entitled to the yearly amounts of fair share. The GFT maintains that the referendum vote required by the contract was not a generic vote but was specifically to authorize payment to the GFT. In support of this argument, it points out that the Commission specifically named the GFT in the certification of the referendum results. It further argues that if WEAC desired to utilize the contractual language, it would obtain a fair share only by winning a 60% referendum vote. The GFT rejects WEAC's argument that it succeeded to the fair share agreement specifically noting that WEAC does not have the same affliation as its predecessor. It contends that succession to a fair share agreement requires a merger with a predecessor, a circumstance not present in this case. GFT argues in the alternative that if it is not entitled to any fair share monies, then it is entitled to voluntary dues deductions from employes who had authorized such deductions. It notes that a majority union cannot gain exclusivity of dues checkoff and that the GFT is entitled to receive dues deductions pursuant to valid authorizations continuously from March 1982.

### DISTRICT'S POSITION

The District contends that its refusal to remit fair share monies to either GFT or WEAC is premised on a good faith doubt as to whom the funds are to be paid. It submits that it withheld the funds pending a legal determination as to

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5/ There is no dispute as to fair share monies after June 30, 1982. The record indicates that in negotiations for a successor agreement, the District and the GTEA have reached a tentative agreement that a fair share agreement will be implemented within 30 days after a referendum in which a majority of the employes favor a fair share.

the rights and responsibilities of the respective parties. It asserts that under these circumstances, it has not interfered with, restrained or coerced its employes in the exercise of any rights guaranteed them by Section 111.70(2), Stats. The District contends that it has, at all material times, maintained the position that a second fair share referendum is a condition precedent to the implementation of any fair share provision between the District and GTEA, and as no such referendum has taken place, a legal question exists as to the GTEA's eligibility for fair share amounts. The District argues that it has sought to comply with all legal and contractual obligations, and has not committed any prohibited practice.

DISCUSSION

Where the Commission conducts an election during the term of a collective bargaining agreement and the employes select a bargaining representative other than the one previously recognized in the agreement, the Commission's policy is that the new representative

> "will be obligated to enforce and administer the substantive provisions therein inuring to the benefit of the employes covered by the . . . agreement. Any provision which runs to the benefit of the former bargaining agent will be considered extinguished and unenforceable." 6/

On March 16, 1982, WEAC became the certified exclusive bargaining representative of the employes formerly represented by the GFT and thereafter the District was obligated to bargain with WEAC. In accordance with the Commission's policy, WEAC was obligated to enforce the substantive portions of the agreement inuring to the benefit of employes and the GFT had no rights under the collective bargaining agreement. Inasmuch as the GFT was no longer the representative of the employes and no longer administered the agreement, it follows that it could no longer insist that all employes pay fair share amounts for the cost of bargaining and contract administration.

While the employes elected a new bargaining representative, such election does not indicate a repudiation of the substantive terms for the collective bargaining agreement. However, the Examiner concludes that such an election terminates a fair share provision. A fair share agreement is a union security provision which runs to the benefit of the bargaining representative. Section 111.70(2) provides that upon a 30% showing of interest by employes in a unit to terminate a fair share agreement, the Commission will conduct a referendum, and unless a majority vote in favor of retention of a fair share agreement, it will be deemed terminated. 7/ In such a referendum, the bargaining representative continues to represent the unit although the fair share provision becomes null and void. In an election where this bargaining representative ceases to be the exclusive bargaining agent, it is implicit that the employes no longer support a fair share agreement to the former bargaining representative and it follows that the fair share agreement is terminated. Therefore, the GFT was not entitled to any fair share amounts after March 16, 1982. The GFT's arguments that fair share amounts were certified for the year and that it budgeted sums based on yearly amounts are not persuasive. Once it lost its status as the exclusive bargaining representative, it lost its right to fair share deductions under the contract, and the type of accounting system it utilizes does not affect such loss.

WEAC contends that it is entitled to all fair share monies under the contract after it was certified on March 16, 1982 as the employes' exclusive bargaining representative. The Examiner concludes that it is not entitled to such monies. As noted above, once WEAC was certified, the fair share agreement was extinguished and was unenforceable, not only by the GFT but also by WEAC. The fair share agreement is a union security provision rather than a substantive provision which runs to the benefit of bargaining unit employes and WEAC was not obligated to

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6/ City of Green Bay, (6558) 11/63; Merton Joint School District No. 9, (12828) 6/74.

7/ 111.707(1)(n), Stats.

enforce it and was not entitled to benefit from it, even though it was obligated to enforce the remaining provisions of the contract. Additionally, the GFT contract's fair share provision provided for a referendum and a 60% vote in favor of a fair share agreement before it would be implemented. The Commission's certification of the results of the referendum specifically indicates such fair share agreement would be between GFT and the District. 8/ While WEAC was elected to replace GFT, it was not entitled to replace GFT under the fair share agreement.

WEAC cites Hamilton Jt. School District 9/ as supporting its position that a successor is entitled to enforce a fair share agreement. WEAC's analogy to a successor union's rights to enforce union security provisions is misplaced. In Hamilton, four local associations merged to form a new joint labor organization while retaining their state and national affiliations. In that case the Commission determined that the new organization enjoyed successorship status on the basis of continuity between the predessor's organizations and the successor organization and the retention of the same affiliation and leadership. 10/ These factual patterns of successorship are not present in the instant case. Here, WEAC has ousted a rival labor organization. There is no continuity between the predecessor and successor and their affiliations at the state and national level are entirely different. The Hamilton scenario is essentially an internal union affair, whereas the instant case involves a Commission election between competing labor organizations for the same bargaining unit. Under these circumstances, WEAC did not succeed to GFT's rights to the fair share under the contract. Therefore, WEAC is not entitled to the fair share monies collected during the period March 16, 1982 through June 30, 1982, and the District's refusal to transmit such amounts to WEAC did not violate the agreement or any provision of MERA and the complaint has been dismissed in its entirety.

Inasmuch as neither WEAC nor GFT are entitled to the fair share amounts deducted after March 16, 1982, the remaining question is what is the District to do with the amounts held in escrow. Section 111.70(3)(a)6 provides that it is a prohibited practice to deduct labor organization dues from an employe's earnings unless the employer has been presented with a personally signed dues deduction authorization, except where a fair share agreement is in effect. In light of the above discussion, the fair share agreement was no longer in effect on and after March 16, 1982. Any deductions after that date could be made only pursuant to dues deduction authorizations on file with the District. Where a fair share agreement is no longer applicable to an employe, his or her dues deduction authorization on file with the employer, that has not been revoked according to the terms of the authorization, must be honored by the employer. 11/ Although GFT was the minority union after March 16, 1982, voluntary dues deductions to it is proper. In Milwaukee Federation of Teachers, Local No. 252 v. WERC, 12/ the Wisconsin Supreme Court held that a municipal employer does not commit a prohibited practice when it arranges to deduct dues for a minority union member. The record indicates that there were a number of valid dues deduction authorizations on file with the District which authorized dues to the GFT. Therefore, the District shall refund the escrowed fair share monies to employes, except that the District may deduct from these, amounts of dues pursuant to valid dues deduction authorization on file with it as of March 16, 1982.

Dated at Madison, Wisconsin this 14th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

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8/ Decision No. 18596.

9/ Decision Nos. 15765 and 15768 (8/77).

10/ Id.

11/ State of Wisconsin, (19701-A) 8/81.

12/ 83 Wis. 2d 588, 266 N.W. 2d 314 (1978).