STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN EDUCATION ASSOCIATION COUNCIL and GATEWAY TECHNICAL EDUCATION ASSOCIATION, Complainants, vs. GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, and GATEWAY VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT BOARD, Respondents, and GATEWAY FEDERATION OF TEACHERS, LOCAL 1924, WFT, AFT, AFL-CIO, Intervenor.	Case XXVI No. 30635 MP-1408 Decision No. 20209-B

Appearances:

Cullen & Weston, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Lee Cullen, appearing on behalf of the Complainants.

Mulcahy & Wherry, S.C., Attorneys at Law, 815 East Mason Street, Suite 1600, Milwaukee, Wisconsin 53202-4080, by Mr. Mark L. Olson, appearing on behalf of the Respondents.

Mr. Steve Kowalsky, Representative, Wisconsin Federation of Teachers, 6525 West Bluemound Road, Milwaukee, Wisconsin 53213, appearing on behalf of the Intervenor.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, MODIFYING EXAMINER'S CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Lionel Crowley having issued his Findings, Conclusions and Order in the above matter on July 14, 1983, wherein he dismissed the complaint based on his conclusions that the Respondents' refusal to pay certain fair share monies to the above named Complainant did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.; and Complainants having filed a timely petition for review on August 2, 1983; and the period for filing of briefs having been closed on November 2, 1983, with WEAC being the only party that chose to file a brief; and the Commission having considered the Examiner's decision, the record, and the written arguments, and being fully advised in the premises, and being satisfied that the Examiner's Findings and Order should be affirmed and that the Examiner's Conclusions of Law should be modified,

NOW THEREFORE, it is hereby

ORDERED 1/

1. That the Findings and Order issued by Examiner Lionel L. Crowley on July 14, 1983, shall be and hereby are affirmed and adopted as the Commission's Findings and Order in the above matter.

1/ See Page two.

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

2. That the Examiner's Conclusions of Law in the above matter shall be and hereby are modified to read as follows and, as modified, are adopted as the Commission's Conclusions of Law in the above matter:

MODIFIED CONCLUSIONS OF LAW

1. That the dues deduction and fair share provisions of the agreement between GFT and the District were extinguished and rendered unenforceable by reason of the March 16, 1982, Commission certification of WEAC as representative of the bargaining unit in question.

2. That because there was and is no fair share agreement in effect for the bargaining unit in question as regards the period March 16 through June 30, 1982, the District was and is prohibited by Sec. 111.70(3)(a)6, Stats., from deducting fair share monies in favor of any labor organization from employe earnings as regards that period, and the District's (and Board's) continuing refusal to transmit fair share monies to WEAC or to GFT did not and does not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.

3. That because there was and is no dues deduction agreement and no dues deduction arrangement in effect between WEAC and the District as regards the period March 16 through June 30, 1982, the District was and is prohibited by MERA from deducting labor organization dues in favor of GFT or any other minority labor organization as regards that period notwithstanding the existence of otherwise valid dues deduction authorization cards on file in favor of GFT or such other organization.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

GATEWAY TECHNICAL INSTITUTE, XXVI, Decision No. 20209-B

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

Complainants (herein WEAC) have petitioned the Commission for review of Examiner Crowley's dismissal of their complaint that Respondents (herein District) violated Secs. 111.70(3)(a)1, 3, 4 and/or 5, Stats., by failing to pay fair share monies to WEAC between March 16, 1982 and June 30, 1982. WEAC was certified by the Commission as the exclusive representative of the bargaining unit involved on March 16, 1982, following an election in which it ousted the above noted Intervenor (herein GFT) from its pre-existing representative status during the term of a collective bargaining agreement expiring on June 30, 1982. GFT argued before the Examiner in its motion to intervene and in its post-hearing brief that GFT was entitled either to payment of all of the monies in question pursuant to the fair share agreement it had negotiated with the District, or to that portion of the monies payable under the dues deduction provision GFT had negotiated with the District and individual employe dues deduction authorizations in favor of GFT on file with the District and in effect by their terms.

No party has objected to the Examiner's Findings of Fact, and we have adopted them. The central facts can be summarized as follows: when WEAC petitioned for an election involving the teacher bargaining unit at the District, GFT's collective bargaining agreement was in effect. The agreement provided for fair share and dues deduction from employe paychecks and that such monies were to be forwarded by the District to GFT. The fair share provision went into effect during the term of the agreement after GFT underwent a contractually-required referendum vote in which it received more than the required sixty percent majority. After WEAC was certified by WERC on March 16, 1982, as representative pursuant to the representation election proceeding, it demanded that the District immediately commence payments of fair share amounts to WEAC, and GFT demanded that the District continue to pay the amounts deducted from employe paychecks to GFT. The District refused to forward any of the monies deducted to either of the organizations on the ground that it was in doubt as to which, if either, was entitled to the money. Instead, the District placed the monies deducted from each employe's paycheck into escrow.

WEAC filed the instant complaint, and GFT intervened as noted above. All three parties expressed the view that it would be desirable for the Commission to provide guidance to the District as to what disposition is to be made of the monies in escrow.

THE EXAMINER'S DECISION

The Examiner relied upon prior Commission decisions in Green Bay 2/ and Merton Schools 3/ in which the following principles were enunciated as regards situations in which an existing representative is ousted by a rival organization in a representation election and the new representative is certified during the term of an existing agreement:

> the representative so selected normally 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 normally will be considered extinguished and unenforceable. 4/

The Examiner herein concluded that fair share was a provision running to the benefit of the former bargaining agent as opposed to the employes. Primarily on

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2/ City of Green Bay, Dec. No. 6558 (WERC, 11/63)

3/ Merton Joint School District No. 9, Dec. No. 12828 (WERC, 6/74)

4/ City of Green Bay, supra, at 6.

that basis he concluded that the fair share provision in the existing agreement was extinguished and unenforceable by either WEAC or GFT.

The Examiner noted that Sec. 111.70(3)(a)6., Stats., prohibits the District from deducting labor organization dues from an employe's earnings unless the District has been presented with a personally signed dues deduction authorization or a fair share agreement is in effect. He concluded that since no fair share agreement survived WEAC's March 16, 1982 certification as representative, the District was required to "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."

Although the Examiner used the term "may" in the concluding portion of his memorandum quoted above, the discussion preceding the quoted portion suggests that he may have concluded that the District is obligated to comply with such valid dues deduction authorizations in disposing of the escrowed monies. 5/

THE PETITION FOR REVIEW AND ARGUMENTS ADVANCED IN SUPPORT THEREOF

The only party to file a petition for review was WEAC, and the other parties did not reply to WEAC's brief. WEAC's contentions can be summarized as follows: WEAC argues that this is a case of first impression, since Green Bay was decided prior to the 1971 enactment of fair share. Green Bay was therefore not intended to cover fair share situations.

WEAC contends that the Commission's "window" period for pre-contract expiration filing of petitions provides a substantial contract overlap time when the challenging union is successful. The new union must enforce the old contract, pursuant to Green Bay, and the union's statutory duty of fair representation requires that the Commission attempt to further the adequate performance of the union's duties. Precluding the new union from receiving fair share monies works to the detriment of that duty.

WEAC also contends that its local, the GTEA, incurred expenses for grievances and other representational duties, and that the policy set by the Supreme Court in Berns v. WERC, 6/ which supported WEAC's general rationale that fair share is the "preferred" method of payment for the expenses of collective bargaining and contract administration, supports its claim to the money on grounds of equity and the underlying purpose of fair share.

WEAC argues that although the certification issued by the Commission after GFT prevailed in its referendum election named GFT as the union entitled to receive fair share, the ballot used in that referendum did not name a union. WEAC argues that the choice of the employes to agree to fair share was thus generic rather than being tied to GFT. In subsequently selecting representation by WEAC, the employes impliedly intended that the new representative would step into GFT's shoes.

WEAC further contends that in Hamilton Joint School District 7/ the Commission transferred fair share along with other rights and duties under a collective bargaining agreement to a successor union. WEAC asserts that although the successor in that case had the same state and national affiliation as the predecessor, the Examiner herein erred in finding that to be a basis for distinguishing that case from the instant situation.

5/ For example, the Examiner, citing State of Wisconsin, Dec. No. 17901-A (Pieroni, 8/81), stated:

> 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.

Examiner Crowley's decision at 8.

6/ 99 Wis.2d 252 (1980).

7/ Dec. Nos. 15765-15768 (WERC, 8/77).

WEAC argues that Sec. 111.70(1)(n) and (2) provide a specified and therefore exclusive means of terminating fair share, by filing a referendum petition with the Commission. Presumptions of invalidity on other grounds are therefore inconsistent with the Legislative intent and unwarranted.

Finally, WEAC contends that the Examiner misapplied Green Bay because fair share inures to the benefit of employes by financing adequate representation. Hence, the fair share agreement ought not be deemed extinguished.

DISCUSSION:

We have affirmed the Examiner's Findings of Fact and Order. However, we have modified his Conclusions of Law to make clear our view that in paying out the escrowed monies, the District is neither obligated by contract nor permitted by MERA to give effect to valid dues deduction authorizations which were on file with the District and (by their terms) in effect during the period in question, whether those authorizations are in favor of GFT or any other labor organization. 8/

The Examiner properly applied controlling and viable Commission precedents to reach the conclusion that the fair share agreement was extinguished by operation of law as a consequence of the election and certification of a rival organization.

While the Green Bay case was decided in 1963, before the 1971 statutory amendments authorizing fair share, the same principles were cited with approval by the Commission in the Merton Schools case decided in 1974 and hence after fair share became a part of the law.

The principles developed in Green Bay (i.e., the quotation in the text accompanying Note 4, supra) continue to represent the Commission's views of the appropriate approach to questions of enforceability of an existing collective bargaining agreement where a rival organization is certified as exclusive representative. In our view those principles properly:

> - maintain a measure of predictability--of labor costs for the municipal employer and of rights and benefits for the employes--through the previously established expiration date of the existing agreement;
>
> - free the employes and the municipal employer from labor contract obligations to the previous representative which were established under circumstances that have been materially changed by the ouster of that organization;
>
> - remove any incentive for changing representatives that might derive from a desire to "get out from under" what may be viewed as an unfavorable contract, before it has run its course; and
>
> - neither reestablish the relatively few labor contract provisions inuring to the benefit of the ousted organization nor transfer same to the benefit of the insurgent organization without an agreement being reached to those effects between the new representative and the municipal employer.

The Commission's Hamilton case does not represent a departure from the Green Bay rule. For Hamilton is materially distinguishable in that it involved a merger of locals that retained the previous state and national affiliations, rather than ouster of an incumbent by a rival organization.

WEAC contends that its proposed outcome is only fair and is supported implicitly by the election outcome; whereas GFT argued to the Examiner concerning certain equities and logic favoring its position. In our view, neither of their proposed outcomes would fulfill the underlying purposes of MERA as well as that which we have reached herein.

8/ See Note 16, infra.

We do not share WEAC's view that the statutory provisions related to termination of fair share were intended to be the exclusive means of extinguishing such an agreement. Such an agreement could terminate by operation of law in a variety of situations in addition to the statutory deauthorization referendum process, e.g., as a WERC remedy for certain violations of MERA on the part of the signatory labor organization; or as a consequence of the signatory organization's loss in a decertification election in which no representation was the employes' expressed preference but an existing agreement had not reached its expiration date. In our view, the termination of provisions inuring to the benefit of the previous representative that normally occurs by operation of law (as previously established in Green Bay and Merton Schools) similarly extinguished and rendered unenforceable the previous fair share agreement such that there was no such agreement to be terminated by deauthorization or otherwise once WEAC was certified as the exclusive bargaining representative, ousting GFT.

For that same reason, we find WEAC's reliance on the Supreme Court's Berns 9/ decision misplaced. While that decision and others may characterize fair share agreements as the union security device most favored in the legislative scheme, the Berns decision also emphasizes the Sec. 111.70(3)(a)6, Stats., requirement that an agreement to fair share must, by its terms, be in effect, retroactively or otherwise, before such an arrangement can be lawfully implemented or enforced. 10/ For the reasons noted above, we have concluded that once WEAC was certified as the new representative, the fair share agreement between GFT and the District was extinguished. Unless and until a fair share agreement is thereafter entered into between WEAC and the District, retroactively or otherwise, there is no fair share agreement in effect between those parties and there is none that can lawfully be continued in effect or enforced.

Thus, we share the Examiner's conclusion that the instant fair share agreement was extinguished by operation of law on March 16, 1982, and that neither GFT nor WEAC has any claim to the escrowed monies deriving from that extinguished provision.

The dues deduction clause in the instant agreement, on it face, obligates the District to honor voluntary individual employe dues deduction authorizations in favor of GFT. No reference is made therein to an obligation to honor such authorizations in favor of any other organization. However, when GFT negotiated the dues deduction provision in the instant agreement, it thereby negotiated the right to have the District honor every employe's dues deduction authorizations whether they are in favor of GFT or WEAC or any other labor organization making the appropriate arrangements with the District. 11/

9/ Berns v. WERC, 99 Wis.2d 252 (1980)

10/ As the Supreme Court noted in that case,

> Section 111.70(a)6 . . . makes it a prohibited practice for an employer to deduct dues from an employe's earnings 'except where there is a fair share agreement in effect.'"

Id. at 263.

11/ Because an exclusive checkoff provision is per se unlawful, the Supreme Court has stated that

> . . . although the majority has the right to negotiate for a checkoff, the right is negotiated for all employees who collectively may or may not decide to exercise the right.

Milwaukee Schools v. WERC, 42 Wis.2d 637, 649-50 (1969), and that

> While a majority representative may negotiate for checkoff, he is negotiating for all the employes, and, if checkoff is granted for any, it must be granted for all."

Milwaukee Federation of Teachers v. WERC, 83 Wis.2d 588, 600-601 (1978).

Although the resultant right to have dues deductions taken from one's earnings is not, as a matter of law, specific to any one organization, and although it is one which each employe is free to exercise or not at his or her individual discretion, 12/ we nonetheless conclude that the dues deduction provision, like the fair share agreement, is a provision that inures to the benefit of the former bargaining agent rather than to the benefit of the employes, under the Green Bay dichotomy. Accordingly, the dues deduction provision, like the fair share agreement, was extinguished by WEAC's certification, and neither that agreement nor any statutory duty to maintain the status quo binds the District to comply with the terms of that provision or to honor the otherwise valid individual dues deduction authorizations on file.

The Commission has held that the State of Wisconsin "must" comply with valid dues deduction authorizations even in the absence of a collective bargaining agreement in force to that effect. In that regard, the Examiner cited State of Wisconsin, supra, Note 5, which, in turn, was predicated on State of Wisconsin, Dec. No. 11979-B (WERC, 11/75). However, in each of those cases, that conclusion was based on provisions of Sec. 20.921, Stats., which affirmatively obligated the State Employer to honor employe dues deduction authorizations. Since no similar affirmative statutory obligation has been shown to exist as regards municipal employers in general or the District in particular, those cases do not control herein.

We are cognizant that Sec. 111.70(3)(a)6, Stats., 13/ implies that municipal employers may lawfully honor certain dues deduction authorizations. However, that provision does not, in and of itself, require the municipal employer to do so in the absence of a contractual obligation. 14/ Nor, in our view, does that provision render lawful what would be a minority checkoff in favor of GFT after March 16, 1982, in the absence of a contractual dues deduction arrangement negotiated by WEAC as the new majority representative. 15/

12/ Of course, once the employe has executed and delivered an authorization to the employer, the employe's right to revoke that authorization is subject to the limitations on revocation contained in the authorization, provided those limitations are consistent with Sec. 111.70(3)(a)6. In this case, for example, the GFT authorizations in evidence prevented the employe from making a revocation effective until September 1 of each year.

13/ That provision states:

> (It is a prohibited practice for a municipal employer individually or in concert with others:)
>
> To deduct labor organization dues from an employe's or supervisor's earnings, unless the municipal employer has been presented with an individual order therefor, signed by the municipal employe personally, and terminable by at least the end of any year of its life or earlier by the municipal employe giving at least 30 days' written notice of such termination to the municipal employer and to the representative organization, except where there is a fair-share agreement in effect.

14/ The Commission has expressly stated that Sec. 111.84(1)(f), which parallels 111.70(3)(a)6, ". . . declares it an unfair labor practice for the employer to deduct dues unless certain time periods for revocation are provided. Said section does not make it an unfair labor practice to not deduct dues . . .." State of Wisconsin, Dec. No. 11979-B supra, at 11.

15/ See, Milwaukee Federation, supra, Note 11 at 598 (the 1971 fair share amendments "do not expressly grant to the certified union a right to an exclusive checkoff nor expressly deny, under all circumstances, minority union members the opportunity of arranging a checkoff of their dues") (emphasis added) and Milwaukee Schools, supra, Note 11 at 649-650 ("While a majority representative may negotiate for checkoff, if checkoff is granted for any, it must be granted for all.")

We therefore conclude, in the circumstances of this case, that the District would be violating MERA were it to choose to honor otherwise valid dues deduction authorizations which were on file with the District and (by their terms) in effect during the period in question, whether those authorizations are in favor of GFT or any other labor organization. This outcome is also most consistent with the purposes of the Green Bay principles noted above, in that it relieves the employes and the municipal employer of collective bargaining agreement obligations to the former bargaining agent that were entered into under circumstances that have been materially changed by the ouster of that organization as majority representative.

Thus, in an attempt to provide the District with the sort of guidance that all parties have agreed should be provided in this proceeding, we conclude that the escrowed monies are properly to be refunded to the employes from whose earnings they were taken, and that in doing so the District is neither obligated nor permitted by contract or law to give effect to dues deduction authorizations on file with the District during the period March 16-June 30, 1982, whether those authorizations are in favor of GFT or any other labor organization. 16/

Dated at Madison, Wisconsin this 31st day of August, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

16/ This guidance is based on our understanding that the District has at no time established a dues deduction arrangement with WEAC as regards the period March 16-June 30, 1982. If, contrary to our understanding, the District has granted such an arrangement to WEAC as regards that period or any portion thereof, then the District (in disbursing the escrowed monies) must honor GFT's request that the otherwise valid authorizations on file during that period or portion thereof in favor of GFT be honored, as well.