STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME LOCAL UNION NO. 360 and 3148, AFL-CIO, Complainants, vs. SAUK COUNTY, Respondent.	Case 67 No. 34706 MP-1686 Decision No. 22552-A

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of AFSCME Local Union Nos. 360 and 3148, AFL-CIO.

Hesslink Law Offices, S.C., Attorneys at Law, by Mr. Robert M. Hesslink, Jr., 6200 Gisholt Drive, Madison, Wisconsin 53713, appearing on behalf of Sauk County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AFSCME Local Union Nos. 360 and 3148, AFL-CIO, having filed a complaint with the Wisconsin Employment Relations Commission on March 5, 1985, wherein it alleged that Sauk County had committed prohibited practices within the meaning of Sec. 111.70, Stats.; and the Wisconsin Employment Relations Commission having appointed Andrew Roberts, 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 Sec. 111.70(5), Stats.; and hearing on said complaint having been held at Baraboo, Wisconsin, on May 31, 1985, before the Examiner; and both parties having filed initial and reply briefs by September 10, 1985; and the Examiner having considered all evidence 1/ and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That AFSCME, Local Nos. 360 and 3148, AFL-CIO, hereinafter referred to as Complainant Local 360 and Complainant Local 3148, are labor organizations having principal offices located at 5 Odana Court, Madison, Wisconsin.

2. That Sauk County, hereinafter referred to as the Respondent, is a municipal employer having its principal offices at Baraboo, Wisconsin; and that among other county services the Respondent maintains and operates a Health Care Center and a Highway Department.

3. That at all times material herein David Ahrens was the staff representative for Complainant Local 360 and Complainant Local 3148; and that Eugene Dumas was the Corporation Counsel for the Respondent.

1/ At hearing the parties stipulated the Examiner may take administrative notice of the following case files of the Commission: Sauk County (Highway Department), Case 61, No. 34183, MED/ARB-3055, Dec. No. 22311-B; Sauk County, Case 62, No. 34267, MED/ARB-3086, Dec. No. 22524-C; Sauk County, Case III, No. 31538, MP-1472, Dec. No. 21128-B.

4. That the Respondent had 1982 collective bargaining agreements with Complainant Local 3148 and Complainant Local 360; that on May 5, 1983 a complaint was filed with the Wisconsin Employment Relations Commission by said Complainants claiming that the Respondent had violated the Municipal Employment Relations Act by refusing to withhold fair share dues deductions beginning in April, 1983 for employes in said Locals; that Examiner Richard McLaughlin was appointed as the Examiner on October 28, 1983; that hearing was held on December 13, 1983; that on May 7, 1984, after record had been taken at hearing, said Complainants requested that the complaint be dismissed; that based upon the request of the Complainants, on June 6, 1984 Examiner McLaughlin ordered: "That the complaint filed in the instant matter be, and the same hereby, is dismissed"; that no decision based on the record at hearing had been reached by Examiner McLaughlin in said matter; that in January, 1984 a mediation-arbitration award was issued with respect to Complainant Local 3148 which resulted in a collective bargaining agreement for calendar years 1983-1984; and that Complainant Local 360 also entered into a collective bargaining agreement for calendar years 1983-1984.

5. That, except for a period between January and March, 1983 and except for when the parties had agreed otherwise, during all previous periods after expiration of collective bargaining agreements between the Respondent and Complainant Locals, the Respondent ceased withholding voluntary dues deductions and fair share deductions.

6. That the 1983-1984 collective bargaining agreement with Complainant Local 3148 had the following fair share provision:

ARTICLE VI

FAIR SHARE AGREEMENT

6.01 The Employer agrees to deduct the Union dues from the employees' checks once each month. Said dues shall be payable to the treasurer of the local union within ten (10) days of such deductions.

6.02 The Employer agreed that it will deduct from the earnings of all employees in the collective bargaining unit covered by this Agreement, the amount of money certified by the Union as being the monthly dues uniformly required of all members. Changes in the amount of dues to be deducted shall be certified by the Union thirty (30) days prior to the effective date of the change.

6.03 As to new employees, such deductions shall be made from the normal check for dues deductions following six (6) months of employment.

6.04 The Employer will provide the Union with a list of employees from whom such deductions are made with each monthly remittance to the Union.

6.05 The Union, as the exclusive representative of all employees in the bargaining unit, will represent all such employees, Union and non-union, fairly and equally, and all employees in the unit will be required to pay their proportionate share of the costs of representation by the Union. No employees shall be required to join the Union, but membership will be made available to all employees who apply. No employee shall be denied Union membership because of race, creed, color, age, or sex.

and that the 1983-1984 collective bargaining agreement with Complainant Local 360 contained a similar fair share provision.

7. That petitions for mediation-arbitration with respect to successor collective bargaining agreements were filed by Complainant Local 360 on

November 26, 1984 and by Complainant Local 3148 on December 13, 1984; that on January 14, 1985 Corporation Counsel Dumas sent Union Representative Ahrens the following correspondence:

> Please be advised that the Sauk County Negotiating Committee has determined to discontinue all deductions for Union dues checkoff or fair share, with regard to all bargaining units which are not covered by a valid collective bargaining agreement.
>
> Please contact me if you have any questions concerning this matter.

that the final offers of the Respondent and of Complainant Local 360 were certified for mediation-arbitration on January 29, 1985 after investigation by a member of the Commission's staff; that on January 31, 1985 Ahrens responded to Dumas' January 14, 1985 letter as follows:

> Local 360 and Local 3148, AFSCME, AFL-CIO, take strong objection to the County's action in regard to cessation of dues deduction. Such action by the County is unwarranted and is reflective of a basic animus against the Union.
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> Continuation of such action by the County will cause the Union to take legal action against the County immediately. We believe that in the past year, the legal framework has been sufficiently transformed that our possible action against the County will prove successful. Hopefully, your ideological animosity will be overcome for the goodwill of the County's citizens.
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> Please notify me immediately that you have reinstated our dues and fair share deductions.

that the final offers of the Respondent and of Complainant Local 3148 were certified for mediation-arbitration on April 8, 1985; that neither the Respondent nor either Complainant Local proposed any amendment to the fair share provisions in their final offers; that on March 27, 1985 agreement was reached on a successor collective bargaining agreement between the Respondent and Complainant Local 360 before Mediator-Arbitrator Sherwood Malamud; and that as part of that settlement the Respondent agreed to retroactively withhold the fair share deductions for the employes in that Complainant Local when the Respondent receives notification from that Complainant as to which employes would have a retroactive deduction.

8. That certain employes in the Complainant Local 3148 bargaining unit who chose to join the Union signed voluntary dues deduction cards which were then submitted to the Respondent; and that certain of such employes have authorized voluntary dues deduction cards which have not been revoked.

9. That when the Respondent unilaterally ceased the voluntary dues deductions and the fair share deductions as above described, it did not individually or in concert with others interfere with, restrain or coerce municipal employes from the exercise of their rights; initiate, create, dominate or interfere with the formation or administration of said labor organizations; encourage or discourage membership in said labor organizations by discrimination in regard to hiring, tenure, or other terms or conditions of employment; or refuse to bargain collectively with a representative of a majority of its employes.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That when the Respondent ceased voluntary dues deductions and fair share deductions on January 14, 1985 for employes in Complainant Local 360's bargaining unit and Complainant Local 3148's bargaining unit, it did not violate Sec. 111.70(3)(a)1, 2, 3, or 4, Stats.

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

ORDER 2/

It is ordered that the complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew Roberts
Andrew Roberts, Examiner

2/ 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 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.

SAUK COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSION OF LAW AND ORDER

Complainants' Position

The Complainants submit that the Respondent has unilaterally repudiated tentative agreements and has repudiated and changed its last final offers when it terminated the fair share and voluntary dues deductions in January, 1985. Yet, the Complainants maintain that all or most of the employes in the two bargaining units have effective voluntary dues deduction card authorizations which were not revoked by those employes. The Complainants further argue the Respondent's action violates the fair share and mediation-arbitration provisions of MERA. The legislature has recognized the importance and unique standing of fair share as a union security provision by its identification and description of it in various sections of MERA. It is the union security provision allowed in Wisconsin which serves the State's public policy. In that regard, the Complainants note that fair share dues are needed most during the mediation-arbitration process. If the Respondent is allowed to repudiate that stipulation, it would thwart the policy behind mediation-arbitration to resolve disputes expeditiously. With respect to mediation-arbitration the union cites various cases, including City of Brookfield, Dec. No. 19822-C (WERC, 11/84) and State of Wisconsin (Dept. of Health and Social Services), Dec. No. 17901-B (WERC, 10/82), and cites pertinent sections of 111.70, Stats., which, the Complainants argue, require the Respondent to continue with the fair share deductions. This is so, the Complainants maintain, because the Respondent's proposed final offers continued the fair share provisions that were in the previous collective bargaining agreements.

Berns v. WERC, 99 Wis.2d 252 (1980), which the Respondent cites, actually supports the Complainants' position, for the parties in Berns agreed, as here, to extend the fair share during the hiatus. The Complainants further contend that, while fair share benefits the union, it also affects the employer-employe relationship, and that it must be treated as other mandatory subjects of bargaining during the hiatus so as to be part of the dynamic status quo.

Respondent's Position

The Respondent asserts that fair share and dues deductions expire at the termination of a collective bargaining agreement. Citing Commission and federal court decisions, the Respondent argues that those provisions which inure to labor organizations cease at the termination of a contract, though other provisions continue. The Respondent maintains that the recent Commission decisions of City of Brookfield, supra, and Green County, Dec. No. 20308-B (WERC, 11/84), do not alter the result. In fact, the Respondent would violate the law if it did not cease withholding fair share payments when there is not an effective collective bargaining agreement. Here, no fair share agreement, as required under the law, was in effect after termination of the labor contract. The 1983-1984 collective bargaining agreements were of two years duration which, the Respondent claims, is the maximum duration of a labor contract between a county and employes under Sec. 59.15(2)(d), Stats.

Moreover, identical complaints were brought by the same Complainants herein, and such complaints were dismissed by an examiner of the Commission. The dismissal order did not indicate it was without prejudice, and res judicata and collateral estoppel therefore bar the Complainants' claims herein, notwithstanding that this is an administrative tribunal. In addition, the Respondent notes it prevailed in a similar action by another union in 1982. Accordingly, the Respondent had a right to rely on the earlier actions of these Complainants and the examiner's decision with respect to the other union. Furthermore, there has been a consistent past practice in which the Respondent has terminated the union security provisions upon the expiration of the labor contracts, and such provisions must then be interpreted to cease at such contract expiration. In addition, the Respondent notes the Complainants have waived their prohibited practice claims because they failed to grieve or arbitrate the matters, and the contractual time limits have long since expired. Finally, the Respondent argues that the issue with respect to Local 360 is moot because on March 27, 1985 the parties agreed to withhold fair share assessments retroactive to January 1, 1985.

In response to the Complainants' argument that the Respondent agreed the successor collective bargaining agreement would include a fair share provision, the Respondent maintains it never agreed to extend the fair share and dues deductions provisions, or other provisions in collective bargaining agreements beyond their expirations. Nor did the Respondent agree to make fair share deductions during the hiatus. The Respondent's suspension of fair share deductions did not violate a tentative agreement. In that regard Respondent's final offer only required it to make fair share deductions when a new contract became effective. Moreover, when a collective bargaining agreement has expired a subsequent collective bargaining agreement does not necessarily bring intervening acts within its scope. Even if the Respondent has violated a collective bargaining agreement by not enforcing the 1985 tentatiave agreement, the Complainants failed to allege the appropriate statute, i.e., Sec. 111.70(3)(a)5. Furthermore, the Respondent's suspension of fair share dues deduction did not interfere with the employes' right to support a labor organization. State of Wisconsin, supra, which is cited by the Union, does not apply because: (1) the relevant provisions of the state statute differ from the municipal statute; and (2) that case dealt with the state as an employer interfering in a dispute between the union and certain employes, which is not the case here. Accordingly, the complaint should be dismissed.

PROCEDURAL ISSUES RAISED BY RESPONDENT

Failure to Exhaust Contractual Remedy

The Respondent argues the Complainants waived their prohibited practice claims because they failed to exhaust their contractual rights. At the outset it is noted that Sec. 111.70(3)(a)5, which prohibits the violation of a collective bargaining agreement, has not been alleged; rather, Secs. 111.70(3)(a)1, 2, 3 and 4, have been claimed. In addition, as discussed more fully below, there was not a collective bargaining agreement in effect when the Respondent ceased the fair share deduction and voluntary dues deduction. Because the terms of the contracts here were not extended and because the issues raised by the complaint are questions of statutory obligations, then the Complainants were not obligated to first exhaust a contractual claim. 3/

Mootness

The Respondent claims the complaint is moot as to Complainant Local 360 because the parties reached tentative agreement before Mediator-Arbitrator Malamud on March 27, 1985, which included the retroactive withholding of fair share assessments back to January 1, 1985. The Wisconsin Supreme Court has stated the following definition of a moot case:

> A moot case has been defined as one which seeks to determine an abstract question which does not rest upon existing facts or rights, or which seeks a judgment in a pretended controversy when in reality there is none, or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy. 4/

The Commission has applied this definition in finding that a prohibited practice complaint is not moot when the parties have subsequently reached agreement, stating:

> The activity in question violated the public policy of Wisconsin as expressed in MERA and the Complainant has a legal right to ask that the Respondent be directed to cease engaging in that activity and take such affirmative action as might be

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3/ Cf., School District of the Tomorrow River, Dec. No. 21329-A (Crowley, 6/84).

4/ WERB v. Allis Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436, 32 N.W. 2d 190 (1948).

> appropriate to insure its non-recurrence. The controversy is certainly not "pretended" and the Complainant is not merely seeking a "decision in advance", since the complaint in this case was not filed until after the conduct had actually taken place. The only possible basis on which the controversy could be found to be moot would be on the claim that a judgment in the matter would not have any "practical legal effect".
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> Even though the activity complained of has ceased, the terms of the current collective bargaining agreement is subject to renegotiation beginning in January, 1974 and the agreement can be terminated by either party as early as August 25, 1974. If the Commission were to dismiss the case as moot at this point in time, the Respondent could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy expressed in MERA and would have the "practical legal effect" of leaving the Complainant without an effective remedy. 5/

Here, too, if it is determined that the Respondent violated MERA, the Complainants then have the right to such relief as would prevent future repetition of that conduct. Therefore, the complaint with respect to Complainant Local 360 is not moot.

Res Judicata, Collateral Estoppel and Repose

The Respondent contends that because of Examiner McLaughlin's order in Sauk County, Dec. No. 21128-B (6/84), which dismissed a complaint filed on May 5, 1983 by the same Complainant Locals regarding similar previous actions by the Respondent, then the instant claims are barred because of res judicata and collateral estoppel. The Respondent's contention is misplaced. At most such order of the Examiner would bar the refiling of a similar complaint by the same Locals as to that Respondent action of 1983. The Respondent's conduct here, however, is a separate and distinct later cause of action; thus: "new violations will support new proceedings dealing with different periods of time." Exposition Press, Inc. v. FTC, 295 F.2d 869 (2nd Cir.), certiorari denied 370 U.S. 917 (1961).

The Respondent's theory of repose also does not apply. That an order of dismissal was issued as to these Complainant Locals at their request on a different cause of action and that a Commission decision was reached between the Respondent and a different union relating to earlier generally similar conduct by the Respondent does not bar the complaint herein, for it alleges a distinct, later cause of action. Pick Mfg. Co. v. General Motors, 80 F.2d 639 (7th Cir. 1935), relied upon by the Respondent, is inapposite for there the court barred the plantiff's claim after the parties had earlier entered a consent decree on the same cause, which is not the case herein.

MERITS

Voluntary Dues Deductions

Turning now to the merits of the dispute, the Complainants contend that MERA was violated by the Respondent's unilateral cessation of employes' voluntary dues deductions. With respect to such claim, the Commission stated in Gateway Vocational, Technical and Adult Education District, Dec. No. 20209-B (WERC, 8/84), that:

> We are cognizant that Sec. 111.70(3)(a)6, Stats., 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 (footnotes omitted).

5/ Unified School District No. 1 Racine County, Dec. No. 11315-D (WERC, 4/74). See also, Green County, Dec. No. 20308-B (WERC, 11/84).

Here, there was no provision in either contract which addressed voluntary dues deductions, 6/ nor was there any other contractual obligation after termination of the previous collective bargaining agreements. In the absence of any such contractual requirement, there is no obligation on the part of the Respondent here to honor certain voluntary dues deduction authorizations.

Fair Share

The Complainants further argue that because the parties had tentatively agreed not to alter the fair share provision in either collective bargaining agreement, then the parties had reached an enforceable tentative agreement or stipulation. The undersigned disagrees. First, it is noted that at the time the Respondent gave notice that it would cease voluntary dues deductions and fair share deductions the 1984-1984 collective bargaining agreements had ceased. There were no agreements to extend the bargaining agreements or, more specifically, the union security provisions. Thus, there was no tentative agreement at the time of the cessation of such union security provisions. Final offers were then certified. Neither the Complainant Locals nor the Respondent in their final offers proposed to change the fair share provisions in either collective bargaining agreement. However, identical provisions in proposed collective bargaining agreements, as submitted in certified final offer form, do not, without more, result in an enforcable bargaining agreement. Thus, it has been held:

> Items, on which tentative agreement has been reached by the parties during their negotiations, do not become enforceable provisions of a labor agreement until the parties have reached an accord on a total agreement incorporating the tentatively agreed-to items. 7/

The Complainants also contend that the Respondent violated MERA by unilaterally discontinuing fair share during the hiatus period. As to the hiatus period generally, the Commission has recently held:

> It is well settled that, absent a valid defense, a unilateral change in the status quo wages, hours or conditions of employment--either during negotiations of a first agreement or during a hiatus after a previous agreement has expired--is a per se violation of the MERA duty to bargain. Unilateral changes are tantamount to an outright refusal to bargain about a mandatory subject of bargaining because each of those actions undercuts the integrity of the collective bargaining process in a manner inherently inconsistent with the statutory mandate to bargain in good faith. 8/

It must then be determined whether fair share falls within that holding. Examiner McGilligan has stated in Sauk County, Dec. No. 17657-C (3/81):

> The Complainant argues in the alternative that since a fair share clause is a mandatory subject of bargaining it must be continued during a contract hiatus relying on City of Greenfield (14027-B) 11/77. However, the Greenfield case does not stand for the proposition for which it is cited. Specifically, the Commission in Greenfield found that the Respondent (School District) violated Sections 111.70(3)(a)1 and 4 of MERA by establishing a new grievance procedure without first negotiating same with the Association either until an agreement thereon or until the parties reached impasse. The only subject of bargaining identified by the

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6/ With respect to Complainant Local 3148 the collective bargaining agreement contains only a fair share provision, Article VI, not a voluntary dues deduction clause. Complainant Local 360's collective bargaining agreement is similar in that respect. Tr. p. 14.

7/ Ozaukee County, Dec. No. 18384-A (Knudson, 7/81).

8/ School District of Wisconsin Rapids, Dec. No. 19084-C (WERC, 3/85).

Commission in said case was the grievance procedure. Nowhere in the decision were dues checkoff or union security provisions mentioned. The Commission held narrowly that "the violation consists in the District's unilateral rejection of the previous procedure and institution of a new procedure respecting grievances over mandatory subject of bargaining, and it is on this basis that we affirm the Examiner."

Contrary to the Complainant's position, Gateway Vocational, Technical and Adult Education District (14142-A,B) 2/78 is controlling herein. In Gateway the Commission did not find any violation of MERA where the contract had expired and the School District refused to deduct dues from Association members' paychecks. The Commission noted that the question of dues deduction inures to the benefit of the Association as a labor organization and does not deal primarily with the employer-employe relationship. Citing the National Labor Relations Board's ruling that such a contractual provision does not survive a contract's expiration, irrespective of whether the parties have reached an impass on the issue, 2/ the Commission found that such a provision lapses when the contract expires and the employer is not thereafter required to honor such a term of an expired contract.

2/ Bethlehem Steel Co. (Shipbuilding Division) 133 NLRB 1347 (1961).

While the Commission did not specifically address that issue on petition for review, it is noted that the Commission did not modify Examiner McGilligan's holding that fair share ceases during the hiatus period.

However, the Commission has directly addressed whether a voluntary dues deduction provision survives during a hiatus when it reviewed a decision of Examiner Greco. Examiner Greco held in Gateway Vocational, Technical and Adult Education District, Dec. No. 14142-A (1/77):

> The Association also alleges that the District committed a prohibited practice when it refused to adhere to Article III of the expired 1973-1975 contract which provided for the voluntary check-off of union dues. While it is true that individual employes may be interested in this issue, the fact remains that the question of dues deduction inures to the Association qua a labor organization and it does not deal primarily with the employer-employe relationship. Indeed, if the employes herein were not represented for collective bargaining purposes, it would be impossible for such an issue to have arisen.
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> Because of that fact, the National Labor Relations Board, hereinafter the NLRB, has held that such a contractual provision does not survive a contract's expiration, irrespective of whether the parties have reached an impasse on such an issue. Accordingly, such a provision lapses when the contract expires and an employer is not thereafter required to honor such a term of an expired contract. If that same principle is applied here, the District would therefore be relieved from honoring the due deduction provision following the expiration of the 1973-1975 contract.
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> While decisions of the NLRB are not generally binding on the Commission, the Examiner concludes that the same principle of law should apply under MERA. In so finding, the Examiner is well aware, as noted in Greenfield, supra, that there are fundamental policy differences between private and public employment, the most noticable of which is the strike prohibition in the public sector. Since the right to strike is the single most important weapon in a union's arsenal, this

strike prohibition makes difficult any meaningful comparison between public and private employment. Nonetheless, the fact remains that a dues deduction procedure does inure to the Association's benefit and it does not directly affect the employer-employe relationship. Lacking that direct relationship, there is less reason to find that such a contractual provision survives a contract's expiration, as employes are not as affected by this item as they would be by those contractual provisions which directly bear on their wages, hours and conditions of employment. Additionally such an "institutional" type provision also inures to an employer's benefit in some circumstances. Accordingly, any rule which holds that the Union's "institutional" contract provisions expire at the end of a contract would likewise apply to those contractual provisions which relate directly to a union, qua union, and which benefit an employer, e.g. provisions relating to work stoppages and strikes. As noted in Greenfield, supra, a contractual no strike clause is important to an employer since it enables an employer to arbitrate "whether a union can be held liable for damages if it violates a no strike prohibition" and under certain circumstances it enables an employer "to come before either the Commission or courts in an attempt to secure the enforcement of such a contractual requirement." Viewed in that light, the application of such a rule is an even handed one which governs both unions and employers alike.

That issue was raised in the petition for review filed with Commission, and the Commission sustained Examiner Greco's holding. 9/ Thus, the Commission has held that a voluntary dues deduction provision does not survive during the hiatus period because it inures to the benefit of the Union.

While the Commission has not had the opportunity to decide, head on, whether fair share survives during the hiatus period, it has recently commented:

> For that same reason, we find WEAC's reliance on the Supreme Court's Berns 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. 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.
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> 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, 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

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9/ Gateway Vocational, Technical and Adult Education District, Dec. No. 14142-B (WERC, 2/78).

> 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 (emphasis added). 10/

From that holding it is apparent fair share is viewed in the same light as voluntary dues deduction. Because fair share inures to the benefit of the Union then it, too, must cease during the hiatus period.

Accordingly, absent an agreement that a fair share provision survives a collective bargaining agreement's expiration, then such a provision lapses pending a mediator-arbitrator's award or a successor collective bargaining agreement negotiated between the parties. 11/ Therefore, the fair share provisions herein did not survive the expiration of the 1983-1984 collective bargaining agreements.

Such a finding is also supported by Sec. 111.70(3)(a)6, Stats., which 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 . . . earnings, . . . except where there is a fair share agreement in effect." Since the fair share provisions expired upon termination of the two collective bargaining agreements, then there were not fair share agreements in effect, and pursuant to Sec. 111.70(3)(a)6, Stats., the Respondent could not deduct fair share dues without such an agreement.

Because there were no voluntary dues deduction provisions in the previous collective bargaining agreements, because there were not effective collective bargaining agreements during the hiatus period, and because the fair share provisions did not survive during the hiatus periods, then there was not a violation of Secs. 111.70(3)(a)1, 2, 3 or 4, Stats., and the complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 26th day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Andrew Roberts
Andrew Roberts, Examiner

10/ Gateway Vocational, Technical and Adult Education District, Dec. No. 20209-B (WERC, 8/84).

11/ As noted previously, Complainant Local 3148 and the Respondent included the 1983-1984 fair share provisions in their final offers for a successor bargaining agreement, while Complainant Local 360 and the Respondent reached a tentative agreement on March 27, 1985 on their successor collective bargaining agreement, which included fair share and its retroactivity.