STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of Complainants.

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

Mr. Bruce Meredith, Staff Counsel, appearing amicus curiae on behalf of Wisconsin Education Association Council.

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

Examiner Andrew Roberts having, on November 26, 1985, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled matter, wherein he concluded that the Respondent, Sauk County, had not committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, 3, or 4, Stats., by ceasing to deduct voluntary dues and fair share payments from employe paychecks on January 14, 1985 for employes in bargaining units represented for purposes of collective bargaining by Complainants, AFSCME Local 360 and 3148; and the Complainants having, on December 12, 1985, filed a petition for Commission review of said decision; and the parties having filed briefs in support of and in opposition to the Petition for Review, the last of which was received on January 27, 1986; and on December 12, 1986, Wisconsin Education Association Council having submitted a brief amicus curiae in support of the Complainants' position in the matter and having requested that the Commission consider that brief in its deliberations in the case; and Respondent County having opposed WEAC's request; and the Commission having granted WEAC's request; and Respondent County having submitted a brief in response to the Amicus' arguments on January 20, 1987; and since that time both the Complainants and Respondent having updated their positions by submitting to the Commission written references to recent developments in other jurisdictions; and each of the parties having responded at least once to the recent developments noted by the other, with the last communication in that regard having been received by the Commission on March 10, 1987; and the Commission having reviewed the record in the matter and having considered the arguments of the parties, and of the Amicus; and being satisfied that the Examiner's Findings of Fact should be modified, but that his Conclusion of Law and Order should be affirmed.

NOW, THEREFORE, it is

ORDERED 1/

A. That the Examiner's Findings of Fact 1-5 and 8 shall be, and hereby are, affirmed and adopted as the Commission's.

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

(Footnote 1 continued on Page 2)

(Footnote 1 continued)

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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. 227.57 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.

B. That the Examiner's Finding of Fact 6 is amended to add at the end of that Finding the following:

> ; and that the parties have, by their conduct, treated the above-noted contract language as constituting both an agreement to deduct voluntary dues checkoff and involuntary fair share payments from employe paychecks.

C. That the Examiner's Finding of Fact 7 is amended to add the underlined portion so that it reads in its entirety as follows:

> 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 at the time Respondent gave notice that it would cease voluntary dues deductions and fair share deductions, the 1983-84 agreements had expired without the parties agreeing to extend those collective bargaining agreements and more specifically without an agreement to extend Article VI thereof; 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. 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.
>
> 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 of the expired agreements 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 deduction for the employes in that Complainant Local when the Respondent receives notification from that Complainant as to which employes would have a retroactive deduction.

D. That the Examiner's Findings of Fact 9 is hereby affirmed and adopted as the Commission's.

E. That the Examiner's Conclusion of Law and Order are hereby affirmed and adopted by the Commission.

Given under our hands and seal at the City of Madison, Wisconsin this 3rd day of June, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Dahae Davis Gordon
Dahae Davis Gordon, Commissioner

SAUK COUNTY

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

BACKGROUND

In its complaint initiating this proceeding, the Complainants alleged that Respondent committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 2, 3, and 4, Stats., by ceasing to deduct fair share and voluntary dues payments from the paychecks of employes in the bargaining units represented by Complainants during the hiatus that followed the expiration of the two 1983-84 collective bargaining agreements.

DECISION OF THE EXAMINER

The Examiner held that various procedural objections, specifically the failure to exhaust a contractual claim, mootness, res judicata, collateral estoppel and repose, did not bar a determination of the instant dispute on the merits.

With respect to the merits of the dispute, he concluded that the Respondent was not obligated to honor certain voluntary dues deduction authorizations because there was no provision in either expired agreement which addressed voluntary dues deduction nor any other contractual obligation after the termination of said agreements.

He determined that no enforceable tentative agreement or stipulation existed at the time Respondent notified Complainants that it would cease the voluntary dues and fair share deductions because the agreements had expired without the parties agreeing to an extension of the union security provisions. He also found that identical provisions in proposed collective bargaining agreements as submitted in certified final offer form, do not, without more, result in an enforceable bargaining agreement.

In evaluating whether Respondents violated Sec. 111.70(3)(a)4 by unilaterally discontinuing fair share during the hiatus period, he decided that because fair share inures to the benefit of the Union, the Respondent may cease making this deduction during the hiatus period, absent an agreement to continue the fair share provision beyond the expiration of the collective bargaining agreement.

Having also found that Sec. 111.70(3)(a)6, Stats., did not permit Respondent to deduct fair share payments without a fair share agreement being in effect between the parties, he, therefore, dismissed the complaint in its entirety.

PETITION FOR REVIEW AND COMPLAINANTS' ARGUMENTS IN SUPPORT OF SAME

In the Complainants' timely filed petition for review of the Examiner's decision, they appeal the Examiner's ultimate Finding of Fact 9, the Examiner's Conclusion of Law and Order. The Complainants' acknowledge that the Examiner's analysis was correct insofar as the case law is concerned prior to 1984.

They argue, however, that Sec. 111.70(4)(cm), Stats.; Wis. Adm. Code ERB 31, specifically 31.10; City of Brookfield, Dec. No. 19822-C (WERC, 11/84); and Sheboygan County, Dec. No. 15380-B (WERC, 4/78) warrant a different conclusion.

Complainants assert that Respondent has repudiated a tentative agreement, repudiated part of its ultimate final offer and has implemented a change in its final offer without authority from Complainants and in violation of Sec. 111.70(4)(cm). Citing, Sheboygan County, supra; Whitehall Teachers Association, Dec. No. 10812-A, (WERC, 12/73); Florence County, Dec. No. 13896-A (WERC, 4/76); Teamsters Local 249, 67 LRRM 1015, 1016 (1967); and Plumbers, Local 638, 67 LRRM 1615 (1968). They argue that tentative agreements are generally enforceable, especially where, as here, the tentative agreement was not in dispute. According to Complainants, at least two tentative agreements are significant. First, the parties agreed that the effective date of the successor agreement was/would be January 1, 1985. Secondly, the parties agreed that the fair share and voluntary dues deduction provisions would continue unchanged.

The Complainants argue that the Respondent's implementation of its threat to cease making the deductions violated the standard set forth in City of Brookfield, supra, because the Respondent acted prior to receiving the arbitration award. The Complainants point out that the Respondent's final offers required a continuation of both fair share and dues deductions, which final offers were identical to the Complainants' in this respect.

At a minimum, the Complainants claim that the unilateral revocation of the voluntary dues deduction contributions constitutes restraint, interference or coercion within the meaning of Sec. 111.70(3)(a)1, Stats., based on the holdings in State of Wisconsin (Department of Health and Social Services), Dec. No. 17901-B (WERC, 10/82), and State of Wisconsin (Department of Industry, Labor and Human Relations), Dec. No. 11979-B (WERC, 11/75).

In reply to Respondent's assertions, the Complainants do not argue that Respondent's failure to make dues deductions and fair share withholdings after the expiration of the agreement is per se violative of Sec. 111.70, Stats. Rather, they argue that it is violative of Sec. 111.70 to repudiate a tentative agreement and act in a manner contrary to its terms prior to receipt of the mediation-arbitration award.

With respect to the fair share aspects, Complainants argue that stipulations to carry over a fair-share provision to the succeeding agreement must be enforceable during the hiatus period providing that such a stipulation is made pursuant to Sec. 111.70(4)(cm)6.a. Stats. They cite Forest Home Dodge, Inc. v. Karns, 29 Wis.2d 138, (1965) and Berns v. WERC, 99 Wis.2d 252, 258, (1980), affirming 94 Wis.2d 214 (1979). The legislative intent would be thwarted if such stipulations are not treated as binding. Moreover, there is a potential for abuse should such stipulations be found not to bind Respondent.

Complainants aver that Respondent by its action has violated the dynamic status quo doctrine recently adopted in School District of Wisconsin Rapids, Dec. No. 19084-C, (WERC, 3/85) because a fair share agreement is a mandatory subject of bargaining.

Finally, Complainants dispute the claim that a fair-share provision inures solely to the Union's benefit. They argue that such provisions help to secure the benefits of collective bargaining for all bargaining unit members once again relying upon Berns v. WERC, supra. A fair share provision contains elements that benefit both the employer-employe relationship as well as the Union. Given that such agreements are mandatory subjects of bargaining, it is erroneous to conclude that the disposition of fair share issues does not primarily affect employer-employe relations.

In conclusion, Complainants stress that Respondent has claimed in the past to have made no tentative agreements. On these facts, it has done so now and should now be held to its tentative agreements.

REPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION

The Respondent maintains that a tentative agreement is not enforceable and that provisions in a tentative agreement only take effect upon the creation of a fully agreed-to successor agreement or a complete successor agreement resulting from an arbitrator's award. It contends that the Commission should dismiss the petition for review on the grounds that it is inadequately supported and on the basis that the Examiner correctly applied all relevant law to the complaint.

According to Respondent, the evidence disclosed, and the Examiner held that the parties never agreed to honor dues deduction authorizations of fair share withholding during the contractual hiatus. Complainants, it stresses, incorrectly equate the parties' tentative agreement to honor deduction authorizations and fair share when and if the new agreement goes into effect with an agreement to honor dues deduction authorizations and fair share withholding during the contractual hiatus. Respondent, contrary to the Complainants' contentions, maintains that it never agreed to "continue" or "carry-over" dues deductions or fair share in the sense of making dues deductions of fair share enforceable during the contractual hiatus.

Respondent claims that its final offer and tentative agreements were silent on the question of hiatus enforceability of union security deductions. To the extent that Complainants intended that such arrangements continue during a contractual hiatus, this intent would have had to have been stated and accepted in order to constitute an "agreement" between the parties.

Respondent reasserts an argument which it claims the Examiner failed to address, i.e. the claim that the agreements contained no voluntary dues deduction provision and that the voluntary dues deduction authorizations introduced into evidence at hearing failed to meet statutory requirements.

Respondent stresses that it was not bound by the tentative agreement until the parties reached a complete agreement incorporating the tentatively agreed-to provisions. While acknowledging that it could not refuse to enforce the fair share provision after reaching agreement on the entire contract, it suggests that it cannot be inferred that the parties agreed to "continue" dues deductions after expiration of the 1983-84 contracts just because neither suggested that fair share be deleted from the successor agreements.

Respondent asserts that City of Brookfield, supra, and Sheboygan County, supra, are distinguishable from the instant case in that here the Respondent did not repudiate or change the terms of a tentative agreement or refuse to incorporate prior agreed-to provisions in the final written agreement.

Respondent distinguishes Wisconsin Rapids School District, supra, by arguing that unrebutted evidence in the instant case demonstrates a consistent practice by Respondents of not withholding dues or fair share contributions during hiatus periods.

In sum, Respondent opposes the Petition for Review and urges the Commission to affirm the Examiner's decision.

ARGUMENTS OF WEAC, AMICUS CURIAE

This decision should be limited to its particular facts: Unlike the typical private sector situation, the parties have not mutually chosen to resolve their dispute through exercise of the right to strike; the instant contract negotiation dispute will therefore inevitably be peacefully resolved through final offer interest arbitration; the parties' positions do not differ regarding the contractual union security provisions; there is no question concerning the identity of the exclusive representative; and the parties' union security provisions will operate the same before and after the hiatus.

In these particular circumstances, there is no rational basis in public policy on which to allow the employer to unilaterally deviate from the status quo union security arrangements. The "inures to the benefit of the exclusive representative" analysis used by the NLRB in Bethlehem Steel and by the Commission in Gateway is without foundation in logic or policy. In the private sector it may make sense to prevent the union from insisting on employer support in the context of the economic warfare common in private sector contract hiatuses. In the Wisconsin public sector, however, disputes such as this one are subject to peaceful final and binding final offer interest arbitration. Therefore, imposing the private sector outcome herein merely unfairly delays the agreed-upon retroactive application of the deductions until after completion of the statutory dispute resolution process. Such delays serve no useful or legitimate purpose in terms of increased settlement pressure in most instances, but they are harmful to the purposes served by fair share agreements generally, and they are likely to produce significant hostility and antagonism.

understanding. Any of these traditional accords frequently operate as 'an agreement,' even though they are not expressly part of the actual collective bargaining agreement." Brief of Amicus at 7.

Policy and logic dictate that a tentative agreement reached upon union security arrangements which is manifested in identical proposals incorporated into both parties' respective final offers constitutes an "agreement" authorizing fair share and dues deductions. While identical final offers providing for continuation of previously-existing union security arrangements must wait until final resolution of the dispute to be incorporated formally into the parties' new collective bargaining agreement, the delay does not change the agreed-upon status of these items. The Commission's Brookfield decision holds that, as a general rule, neither party may unilaterally change a mandatory subject of bargaining during the hiatus period. The certified final offers in this case, being amendable without mutual consent, were therefore effectively matters of agreement between the parties, and they provide the necessary legal predicate upon which to base union security deductions.

WEAC Amicus concludes:

> Since there is no legal impediment to continuation of union security provisions during the hiatus period and strong policy arguments favoring continuation, the Commission should reject the Examiner's conclusions under these particular facts. In doing so, the Commission need not resolve whether the Brookfield princple is completely applicable to union security provisions. That decision should await a different set of facts.

Brief of Amicus at 9.

COUNTY RESPONSE TO ARGUMENTS OF THE AMICUS

The County responds to the Amicus by arguing that the advent of final and binding interest arbitration did not overturn all existing case law on contractual hiatuses. The Commission's City of Brookfield decision does not serve as a basis for concluding that the Commission's case law dealing with the parties' obligations upon contract termination has been overruled, sub silentio, by the passage of the med/arb law. The employer's duty to deduct fair share monies, like the employer's duty to arbitrate grievances arising during a contract hiatus, is purely contractual. Citing Greenfield Schools, 14026-B (WERC, 11/77) and Racine Schools, Dec. No. 19830-C (WERC, 1/85). Absent a contractual commitment in effect, those obligations do not continue in effect. The Legislature chose to expressly include fair share among the contractual provisions that are solely dependent for their existence upon a current agreement incorporating them by adopting the language of Sec. 111.70(3)(a)6, Stats., which prohibits an employer from withholding fair share funds unless there is a fair share agreement "in effect", and of Sec. 111.70(1)(h), Stats., which specifically defines a fair share agreement as an "agreement" between the parties. The advent of final offer interest arbitration simply doe snot overrule those contract expiration precedents and those MERA requirements of an agreement in effect.

The Amicus' contention that a side-bar agreement, grievance resolution or memorandum of understanding could suffice as an "agreement" is of no significance herein because there is no evidence of such an arrangement regarding hiatus fair share herein. There has not been mutual consent to an agreement in effect at the times in issue herein. The County did not consent to the withholding of fair-share payments during the contractual hiatus. It only agreed to enforce a fair share arrangement under a new collective bargaining agreement when it took effect. Individual items on which tentative agreement has been reached during negotiations do not become an enforceable agreement until the parties reach a complete agreement. Citing, Ozaukee County, Dec. No. 18384-A (Knudson, 7/81) aff'd. by operation of law -B (WERC, 8/81). Even if there were deemed to be expired contract language ambiguity regarding hiatus fair share, the parties' past practice has uniformly been not to enforce fair share during contract hiatuses.

The County further argues that policy considerations do not warrant overturning the Commission case law on contract termination, especially where, as here, they contravene the language of the statute itself. While Berns v. WERC, 99 Wis.2d 252 (1980) makes retroactive withholding of fair share permissible, it does not require it unless the parties have agreed to it. Therefore, retroactive

withholding of fair share would not inevitably follow from final offer arbitration in this case. Mediation-arbitration is not the major union expenditure item the Amicus would make it out to be. And AFSCME is not so financially vulnerable to pressure as the Amicus implicity asserts. The Amicus' analysis also fails to consider the fair share payors' rights by presuming that fair share disputes are purely betwen the exclusive representatives and the municipal employer. For those reasons, WEAC's policy contentions should be rejected, as well.

The County discontinued fair share deductions upon expiration solely to comply with its obligations under the law, and not out of anti-union or any other motivations.

ADDITIONAL ARGUMENTS OF THE PARTIES

On February 24, 1987, AFSCME submitted a copy of Trans World Airlines v. Independent Federation of Flight Attendants ____ F.2d ____, Dec. No. 86-1998 (CA 8, 1-14-87). AFSCME noted the Court's reliance on the fact that neither party was proposing a change in the union security clause in holding that the employer's unilateral discontinuation of union security after the nominal contract expiration date was unlawful. AFSCME notes the factual parallellism with the instant case and argues that TWA therefore supports the Complainants' position in this matter.

On February 27, 1987, the County replied, arguing that TWA is inapposite since it rests on the specific and rather unique language of the Railway Labor Act. Whereas the RLA provisions have been interpreted to mean that all provisions of an expired contract are automatically renewed unless all of the procedural requirements of the dispute resolution process have been complied with, the County argues that MERA contains no corresponding requirement. Citing, Railway Employees v. Flordia East Coast Railway Co., 384 U.S. 283 (1966).

On March 10, 1987, the County submitted a copy of a February 23, 1987, GERR report regarding City of Dearborn and Technical, Professional and Office Workers Association of Michigan, Mich. ERC No. C85 B-39 (MERC, 1-16-87). The County notes that according to the report, MERC held that checkoff and union security are well-established exceptions to the rule that an employer cannot alter a mandatory subject of bargaining when a contract expires.

On March 11, 1987, AFSCME responded that the MERC decision cited does not appear to deal with a provision parallel to the language of the particular provisions of the Wisconsin Statutes involved herein.

PERTINENT STATUTORY PROVISIONS, Wis. Stats., 1983-84

> Section 111.70 . . .
>
> (1) DEFINITIONS
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> . . .
>
> (f) "Fair-share agreement" means an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization.
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> . . .
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> (3) PROHIBITED PRACTICES AND THEIR PREVENTION (a) It is a prohibited practice for a municipal employer individually or in concert with others:
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> . . .

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

. . .

6. 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.

DISCUSSION

Clarification of Factual Background and Modification of Findings

The Petition for Review focuses soley upon the Examiner's ultimate Finding of Fact 9 and Conclusion of Law to the effect that the County did not violate Sec. 111.70(3)(a)1, 2, 3 or 4, Stats., when, circa January 14, 1985, the County ceased taking dues and fair share deductions from employe paychecks for payment over to the Complainant Locals.

Before those central questions in the case are reached, however, two preliminary questions need to be addressed, to wit: Did the 1983-84 agreements contain a dues checkoff requirement in addition to a fair share agreement? and did the fact that certain parts of authorization cards on file with the County were not filled in invalidate those cards so as to justify the County in refusing to withhold dues based upon them if there was an obligation to maintain a dues checkoff arrangement during the hiatus?

There is no mention made in the Petition for Review or in the briefs in support of it filed by Complainants or Amicus concerning the Examiner's statement in his Memorandum (at p. 8) that "there was no provision in either contract which addressed voluntary dues deduction" because they contained "only a fair share provision, Article VI, not a voluntary dues deduction clause." Rather, Complainants and Amicus argue the case as if the expired agreements and the successor agreements ultimately reached contain provisions for both dues checkoff deductions pursuant to voluntary individual authorizations and for involuntary fair share deductions.

Our reading of the record persuades us that the parties had a mutual understanding that the Article VI language noted in the Examiner's Finding of Fact 6 was understood by both parties to provide for both a voluntary dues checkoff deductions and for involuntary fair share deductions.

Although Article VI is entitled "Fair Share Agreement", it contains in Sec. 6.01 a sentence that is ambiguous enough to support a dues checkoff arrangement and that arguably would be rendered superfluous if it were not given such effect. That sentence reads: "The Employer agrees to deduct the Union dues from the employees' checks once each month." The balance of the Article would fully constitute a fair share agreement without that opening sentence. The record also contains unrebutted testimony that a dues checkoff arrangement was unquestionably a part of the relationship at one point in time, in that the initial Local 3148 contract with the County effective January 1, 1981 contained a modified fair share agreement applicable to employes hired after a certain date and a dues checkoff arrangement applicable to employes hired prior to that date. (Tr. 32-33)

The record also reveals that since it was certified as exclusive representative in 1980, Health Center Local 3148's treasurers have been transmitting signed dues authorization cards to the County (tr. 25) and that those cards have not been returned to the Local or otherwise rejected by the County at any time during that period. (Tr. 29)

Resolving the above-noted contract ambiguity in accord with the evidence that the parties have conducted themselves as if their agreements contained a dues checkoff agreement, we conclude that the Article VI language provided for both voluntary dues checkoff deductions and for involuntary fair share deductions.

It can also be noted in that regard that the County's January 14, 1985 letter to AFSCME advised that it was discontinuing all deductions for Union dues checkoff as well as for fair share. In addition, the County's Answer to the Complaint admitted Complaint allegation 9 which alleged, "Both of the aforementioned labor Agreements required that the County deduct and forward to these Unions both dues and fair share assessments."

The Examiner made no formal finding of fact regarding existence or nonexistence of a dues checkoff agreement. However, in Finding of Fact 5 he found that the County "had ceased withholding voluntary dues deductions and fair share deductions during every previous hiatus except for a period between January and March, 1983; and in Finding 9 and again in his Conclusion of Law, the Examiner indirectly found that the County had previously been honoring dues deduction authorizations by stating that the Respondent County did not violate MERA "when Respondent ceased voluntary dues deductions and fair share deductions on January 14, 1985." Hence, there was technically no Finding of Fact as to which the Complainants could take issue on the point.

For those reasons, we disagree with the Examiner's memorandum statement that Article VI does not include both a dues checkoff as well as a fair share agreement. For the same reasons, we agree with the implicit findings in Finding 9 and elsewhere that the County's January 14, 1985 communication to the AFSCME locals effectuated a decision to discontinue both dues checkoff and fair share deductions that the County had been taking during the terms of the 1983-84 agreements.

We turn now to the issue of the validity of the authorization cards on file with the County. The County presented evidence to the effect that the cards turned over to the County typically contained uncompleted blanks, inter alia, in the sentence identifying the two week time period each year during which a revocation of the card could be effected. (Tr. 28-29) Section 111.70(3)(a)2, Stats., requires that cards to be valid must be personally signed and "terminable by at least the end of any year of its life or earlier by the municipal employee giving . . . notice of such termination to the municipal employer and to the representative organization." In our view, however, the foregoing evidence would be pertinent only to the extent that a remedy were appropriately to be fashioned as regards a failure to honor particular cards with particular deficiencies. For, the County witness Eugene Dumas testified that the County terminated the dues checkoff and fair share arrangements with all of the unions the County was dealing with solely because the collective bargaining agreements containing those union security provisions had expired. (Tr. 45-46) The County had never before challenged the validity of any of the cards on file with it and did not terminate the dues checkoff arrangement with the Complainant Locals because of it. The County's action was taken in reliance upon a claimed right to unilaterally discontinue union security provisions during contract hiatuses, and we find it appropriate to address the action in the context of that broader issue, especially where, as here, the County has not shown that all of the cards on file, without exception, suffered from the same deficiencies.

We have therefore added to the Examiner's Finding of Fact 6 a statement that the parties, by their conduct, have treated the Article VI language as both a dues checkoff agreement and fair share agreement. We have also added to the Examiner's Finding 7 a clarification to the undisputed effect that, apart from the disputed

the parties as providing for dues checkoff and fair share effective retroactive to January 1, 1985. 2/

Legal Issues Presented and Summary of Decision

When this case is reduced to its essentials, Complainants and the Amicus urge us to reconsider the previously settled questions of whether fair share and/or dues checkoff can be a part of the status quo which the Sec. 111.70(3)(a)4 duty to bargain ordinarily requires to be maintained during a contract hiatus. They also call upon us to determine whether matching certified interest arbitration final offers proposing inclusion of unmodified and fully retroactive fair share and/or dues checkoff language in a successor agreement constitute agreements that are in effect and enforceable during the contract hiatus, and whether cessation of dues checkoff was an independent interference violation. We have addressed those issues in that order below. Upon consideration of the evidence and arguments--including the recent case law developments cited and the policy arguments advanced by the Complainants and Amicus--we have concluded that the answers to those questions should remain "no" and that the Examiner's ultimate Finding of Fact 9 and Conclusion of Law and Order are appropriately affirmed.

Fair Share and Dues Checkoff as Part of the Status Quo

The Commission has held that in disputes subject to final and binding interest arbitration, the MERA duty to bargain ordinarily requires that the parties maintain the status quo as regards mandatory subjects of bargaining until a settlement or arbitration award is reached in the matter. E.g. City of Brookfield, supra. However, neither City of Brookfield nor any of the other status quo cases relied upon by the Complainants and Amicus had any bearing on the question of whether fair share or dues checkoff can be a part of the status quo to be maintained.

It is not disputed herein that both fair share and dues checkoff are mandatory subjects of bargaining. 3/

However, prior decisions of the Commission have universally excluded both fair share and dues checkoff from the status quo that is ordinarily to be maintained during a contract hiatus as a part of the Sec. 111.70(3)(a)4 duty to bargain. Gateway VTAE, Dec. No. 14142-A (1/77), aff'd. in pertinent part -B (WERC, 2/78); and Sauk County, Dec. No. 17657-C (3/81), aff'd. -D (WERC, 2/82).

While those decisions preceded the status quo decisions cited by the Complainants and Amicus, their holdings are not affected by the case law developments as regards maintenance of the status quo in relation to interest arbitration. Nor are those earlier holdings affected by the case law developments concerning the dynamic status quo. Rather, the prior cases held that fair share and dues checkoff, by their nature, were peculiarly dependent upon the existence of an agreement, such that the Sec. 111.70(3)(a)4 duty to bargain did not require the parties to continue those arrangements in effect during a contract hiatus.

2/ There is a dispute between the parties as to whether the Local 3148 final offer, as awarded by Mediator-Arbitrator Rice, is retroactive to January 1, 1985 as to union security. Sauk County, MP-1813. No such dispute exists as to Local 360 and the parties agreed to a 1985-86 contract with union security provisions retroactive to January 1, 1985.

3/ As to fair share, see, e.g., Town of Allouez, Dec. No. 15022-B (WERC, 1/77) (fair share); and School District No. 8 v. WERC, 69 Wis.2d 200, 215 (1975), reversed on other grounds, 429 U.S. 167, 93 LRRM 2970 (1976). As to dues checkoff, see, Milwaukee Schools v. WERC, 42 Wis.2d 637, 649-50 (1969) (". . . although the majority has the right to negotiate for a checkoff, the right is negotiated for all employes who collectively may or may not decide to exercise the right."); and to the same effect, Milwaukee Federation of Teachers v. WERC, 83 Wis.2d 588, 600-601 (1977).

Those cases drew a distinction between mandatory subjects which inured to the benefit of the exclusive representative and those which bore a direct relationship to the employer-employe relationship. Fair share and dues checkoff were both found to be in the former category and were excluded for those reasons from the status quo to be maintained during a hiatus.

In our view, MERA's fair share language makes it clear beyond question that no party can be required to involuntarily maintain fair share during a contract hiatus. The statutory definition and nature of fair share requires that it be the product of a bilateral "agreement" that is "in effect." Section 111.70(1)(f), Stats. See also, Sec. 111.70(3)(a)6, Stats., prohibiting municipal employer deductions from employe paychecks in favor of a labor organization "except where there is a fair-share agreement in effect" and Sec. 111.70(3)(a)3, Stats., excepting fair share agreements from the general prohibition against unlawful discrimination.

While there is no parallel "agreement in effect" requirement in MERA for a dues checkoff arrangement, we nonetheless conclude that dues checkoff, like fair share, is also peculiarly dependent upon the existence of an agreement, such that it too is not properly to be considered a part of the status quo to be maintained under the MERA duty to bargain. In the cases cited to us in this proceeding (see citations in summaries of arguments presented above), such has been the longstanding conclusion not only of this Commission, but also of both the National Labor Relations Board and the Michigan Employment Relations Commission. 4/ The only cases cited to us reaching a contrary conclusion were cases arising under the Railway Labor Act and under our own State Employment Labor Relations Act; but in each instance those decisions were based upon specific statutory provisions not paralleled in MERA. The RLA has been held to require that all provisions of an expired agreement are automatically renewed unless specified procedural requirements of the Act are met; and Sec. 20.921, Stats., requires that the State of Wisconsin honor paycheck deduction authorizations without regard to an enabling agreement of any kind with the recipient organization.

As noted, our prior decisions in this area--and the instant Examiner's decision herein as well as the NLRB's lead decision in Bethlehem Steel--also rely at least in part on the notion that although union security provisions are mandatory subjects of bargaining, such provisions are not part of the status quo because they inure to the benefit of the exclusive representative rather than to the bargaining unit employes directly. After reviewing the arguments of the Amicus, we remain persuaded that such a distinction is viable.

Since fair share and dues checkoff, although mandatory subjects of bargaining, are nonetheless not a part of the status quo, it follows that the Sec. 111.70(3)(a)4, Stat., duty to bargain did not require the County to continue fair share or dues deduction during the contract hiatus. 5/

Matching Final Offers to Include Unmodified Fair Share and Dues Checkoff Language in Successor Agreement as an Agreement in Effect and Enforceable During Contract Hiatus

Given the foregoing, the lawfulness of the County's discontinuation of fair share and dues checkoff deductions in January of 1985 depends on whether there was a fair share and dues checkoff agreement in effect that was enforceable during the hiatus.

4/ E.g., Bethlehem Steel Co., 136 NLRB 1500, 1501-1502, 50 LRRM 1013 (1962) aff'd Marine & Shipbuilding Workers v. NLRB, 320 F2d 615, 63 LRRM 2878 (CA 3/1963); and City of Dearborn, Case No. C85 B-39 (Mich. ERC, 11/85).

5/ Complainants also rely on the ERB 31.10, Wis. Adm. Code provision that, absent a timely objection, matters contained in final offers shall be deemed mandatory subjects of bargaining. As noted above, however, although the fair share and dues checkoff language involved is mandatory in nature, it is not a part of the status quo that must be maintained during a contract hiatus.

As the Examiner properly noted, when the discontinuations occurred in January of 1985, the parties' 1983-84 agreements had expired. The parties had not agreed to implement an extension of those agreements or of the fair share and/or dues deduction components of them beyond the expiration date. While, in our view, even the willingness of both parties to continue a fair share and/or a dues checkoff arrangement in effect after expiration of an overall labor agreement would suffice to constitute the requisite bilateral "agreement" that is "in effect" even in the absence of any specific oral or written agreement to that effect, no such implicit continuation agreement can be found in the instant facts in light of the County's unequivocal unwillingness to continue fair share or dues deduction in effect after expiration of the overall written 1983-84 collective bargaining agreement.

Complainants and the Amicus would nonetheless have the Commission conclude, contrary to the Examiner, that the status of the parties' bargaining and final offers was sufficient to establish an agreement to continue fair share and dues checkoff that was enforceable during the hiatus. On the contrary, we agree with the Examiner that there was no such agreement enforceable during the hiatus herein.

The record indicates that the 1983-84 agreements expired on December 31, 1984. By the time of that expiration, the Complainant Locals had each filed petitions for mediation-arbitration. The Local 360 investigation was closed on January 8, 1985, and the Local 3148 investigation was closed on March 28, 1985, and the matters were thereafter certified to mediation-arbitration on January 29 and April 8, 1985, respectively. Throughout the bargains, neither party was proposing a change in the union security provisions of the 1983-84 agreements. The resultant final offers each contained a proposal that the successor agreement contain the same provisions as were contained in the 1983-84 agreements except as otherwise proposed in that final offer; neither offer contained a proposed change in the union security language; and both offers provided for a contract term beginning on January 1, 1985. 6/

Thus, although there was no stipulation of agreed upon items executed by the parties in either interest arbitration proceeding, Complainants and the Amicus are correct when they contend that once the investigations were closed, the parties' final offers reflected that they were in agreement that the successor agreement would contain the same fair share and dues checkoff provision as did the 1983-84 agreements. The dispute is over whether fair share and dues checkoff were enforceable prior to the time a total agreement was reached, whether through settlement or an arbitration award.

Complainants and Amicus argue that the union in such a situation ought not be required to wait for consumption of a total agreement in such circumstances before enjoying the fair share and dues checkoff arrangements that the parties agree shall ultimately be given effect as regards the entire period of the hiatus.

Whether one views matching final offers in interest arbitration proceedings as "tentative agreements" or not, we agree with the Examiner that matching final offers, without more, are not enforceable as agreements during the pendency of the interest arbitration proceeding. Rather, they become enforceable only upon the parties' reaching a total agreement either through voluntary settlement of all outstanding issues or through receipt of an arbitration award which resolves disputed issues and incorporates prior tentative agreements into the overall agreement.

In the instant case, the County does not take issue with its obligation to incorporate the fair share and dues deduction provisions in the agreement ultimately arrived at either through voluntary settlement or the receipt of an arbitration award. It does, however, take the position that it need not continue the deductions until an ultimate accord is reached which may or may not provide for retroactivity with respect to these provisions.

6/ See footnote 2, supra.

The Complainants have cited two Commission cases 7/ and two National Labor Relations Board cases 8/ as authority for the proposition that tentative agreements are generally enforceable.

All four cases involve situations where negotiating teams arrived at an entire tentative agreement subject to ratification by the union membership or the municipal employer's entire board. In these cases, the negotiating team either refused to recommend ratification or ratified but refused to execute a collective bargaining agreement or delayed submission of the entire tentative agreement to the appropriate lawfully authorized body for ratification or acceptance. They are distinguishable from the instant case because here it is only part of a total agreement that the Complainants seek to enforce during the contract hiatus and the pendency of the interest arbitration proceeding. The term "tentative agreement" as it was used in these four cases refers to an entire agreement tentatively approved by the bargaining teams of both parties subject to ratification or voted approval by the principals involved.

Complainants also rely upon Sheboygan County, Dec. No. 15380-B (WERC, 4/78) for the proposition that tentative agreements reached in interest arbitration proceedings are enforceable. In that case, the parties reached agreement on a number of items to be included in an initial agreement but were unable to reach agreement on other issues and resorted to the final and binding arbitration procedure. The Commission ordered the parties to submit the issues in dispute to binding arbitration and in so doing found that items previously agreed to need not be submitted to the arbitrator as part of the parties' final offers. The arbitrator issued an award adopting the union's final offer and directing that it be incorporated into the agreement. The municipal employer implemented the union's final offer and all of the items which had been agreed upon by the parties' bargaining representatives before the issuance of the award, but it refused to formally adopt or sign a written agreement which accurately set forth all the previously agreed-upon items as well as the union's final offer.

The Commission rejected the municipal employer's contention "that where the parties fail to reach agreement on all of the terms to be included in a collective bargaining agreement and an arbitrator is called upon to issue a final and binding award under Sec. 111.77, Stats., there is no 'agreement' reached within the meaning of Sec. 111.70(1)(d), Stats." The Commission stated:

> Sec. 111.77, Stats., further defines the duty to bargain in good faith in disputes involving county law enforcement personnel to include a requirement that the parties comply with the procedures contained therein. Those procedures culiminate in final and binding arbitration over the "issues in dispute" if the parties reach an impasse in their bargaining. The Commission believes that the intent of the legislation is that the award of the arbitrator on the issues in dispute be incorporated 6/ into a collective bargaining agreement consisting of the terms of the old agreement, if any, which neither party has proposed to change, and any changes or new provisions which the parties have agreed upon during their negotiations for inclusion in the collective bargaining agreement.

Dec. No. 15380-B at 4. The Commission then went on to find a violation of Sec. 111.70(3)(a)4, Stats., for failure to sign and execute "an agreement reached." 9/

7/ Whitnall Teachers Association, Dec. No. 10812-A (Torosian, 9/73) aff'd Dec. No. 10812-B (WERC, 12/73); Florence County, Dec. No. 13896-A (McGilligan 4/76).

8/ Teamsters Local 249, 67 LRRM 1015, 1016 (1967); and Plumbers Local 638, 67 LRRM 1615 (1968).

9/ State of Wisconsin (Department of Health and Social Services), Dec. No. 17901-B (WERC, 10/82); and State of Wisconsin (Department of Industry, Labor and Human Relations, Dec. No. 11979-B (WERC 11/75).

Thus, in Sheboygan, it was the failure to incorporate tentatively agreed-to items into the ultimate agreement which was violative of Sec. 111.70(3)(f), Stats. In the instant case, Sauk County did not refuse to executive the ultimate agreement, and it has been willing to implement fully retroactive union security deductions. Hence, we cannot find that the County has contravened the general principles set forth in Sheboygan. Furthermore, the Complainants have not produced any precedents in which an individual item has been held enforceable without the concurrence of the other party prior to the parties' having reached an entire agreement on all outstanding items. To the contrary, we generally share the view of the Examiner in Ozaukee County, Dec. No. 18384-A (Knudson, 7/81), aff'd by operation of law, -B (WERC, 8/81) that absent an agreement to the contrary, individual "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." Id. at 7.

Even a formal stipulation of agreed items, standing alone, would represent no more than an agreement that the terms it contains shall become a part of the overall agreement consisting of the final offer selected by the arbitrator plus the terms of the stipulation of agreed items, with whatever retroactive effect the resultant agreement reflects. In our experience, parties to an interest arbitration include agreed-upon modifications of existing terms and conditions of employment in stipulatons of agreed-upon items and implement those changes only when an overall agreement is concluded by an interest arbitration award. Occasionally, parties agree to an interim implementation of agreed-upon modifications, but a specific agreement to that effect is necessary to deviate from the well-understood norm.

While the parties' matching offers herein do not modify the fair share and dues checkoff arrangements that were in effect prior to expiration of the predecessor agreements, our treatment of those matching offers as enforceable (retroactively or otherwise) only after the conclusion of the interest arbitration proceeding is the same treatment as would be given a stipulation to retain the same grievance arbitration provision in the new collective bargaining agreement where the employer was unwilling to continue that provision in effect after expiration of the predecessor agreement. See, Racine Schools, Dec. No. 19830-C (WERC, 1/85).

In sum, the parties' matching final offers did not constitute an agreement that was enforceable during the period prior to resolution of the ultimate total agreements.

If and to the extent that the Amicus is suggesting that the Commission should make an exception to the general rule concerning enforceability of items not in dispute for fair share arrangements, we find no persuasive basis in the arguments presented or in MERA for doing so. While it is true tht the Supreme Court recognized the special status and purpose of fair share agreements in its Berns decision, it also made it clear in that same decision that fair share agreements are to be enforced in accordance with their terms and retroactively where appropriate. 99 Wis.2d 252 at 263. We find it entirely consistent with Berns that in the absence of an agreement that fair share shall be implemented and enforceable prior to resolution of a total agreement, that there is no enforceable fair share agreement in effect or enforceable during the overall contract hiatus.

Since there was no fair share agreement and no dues checkoff agreement in effect and enforceable during the instant contract hiatus, the County's failure and refusal to implement fair share and dues checkoff throughout that period did not violate Sec. 111.70(3)(a)1, 2, 3, or 4, Stats.

As noted earlier, the County could have chosen to implement fair share and dues checkoff during the hiatus without violating MERA because its conduct in doing so would have established fair share and dues checkoff agreement in effect that would have been terminable at the County's option at any point during the hiatus. The County chose not to agree to implement fair share and dues checkoff during the hiatus, and was within its rights in so choosing. See, Sec. 111.70(1)(a), Stats., "The duty to bargain does not compel either party to agree to a proposal or require the making of a concession."

Discontinuation of Dues Checkoff as Independent Interference Violation

At a minimum, the Complainants urge us to find that the unilateral revocation of the voluntary dues deduction constitutes restraint, interference, or coercion within the meaning of Sec. 111.70(3)(a)1, Stats., based upon two cases decided by the Commission under SELRA. 10/ However, the conclusion in those cases that the state employer "must" comply with valid dues deduction authorizations even in the absence of a collective bargaining agreement in force to that effect is predicated on provisions of Sec. 20.921, Stats., affirmatively obligating the state employer to honor voluntary dues deduction authorization. No such affirmative obligation applies to Respondent County herein, so those cases are inapposite.

The employes in the instant bargaining units with authorization cards on file did not have a Sec. 111.70(2), Stats., right to the implementation of dues checkoff prior to resolution of the ultimate total agreement. Hence, we conclude there has been no County interference, restraint or coercion of said employes as regards their Sec. 111.70(2), Stats., rights, and no independent violation of Sec. 111.70(3)(a)1, Stats., herein.

For all of the foregoing reasons, we have affirmed the Examiner's ultimate finding and conclusion and his order dismissing the complaint in its entirety.

Dated at Madison, Wisconsin this 3rd day of June, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

Danae Davis Gordon
Danae Davis Gordon, Commissioner

10/ Accord, Gateway VTAE, Dec. No. 20209-B (WERC, 8/84) at 8.