COURT OF APPEALS
DECISION
DATED AND RELEASED

DEC 22 1988

No. 88-1048

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

AFSCME, LOCAL UNION NO. 360
and 3148, AFL-CIO,

Petitioner-Appellant,

v.

WISCONSIN EMPLOYMENT RELATIONS
COMMISSION,

Respondent.

Decision No. 22552-B

APPEAL from an order of the circuit court for Sauk county: JAMES EVENSON, Judge. Affirmed.

Before Dykman, J., Eich, J., and Sundby, J.

EICH, J. AFSCME, Local Union No. 360 and 3148, AFL-CIO appeals from an order affirming the decision of the Wisconsin Employment Relations Commission (WERC). The issue is whether WERC properly concluded that Sauk County did not commit a "prohibited labor practice" under the Municipal

Employment Relations Act, sec. 111.70(3)(a), Stats.,[1] when it discontinued withholding labor union dues under "fair-share"[2] and voluntary checkoff provisions during a contract hiatus. We agree with the commission's conclusion and affirm the order.

The facts are not in dispute. Sauk County and the union had a collective bargaining agreement for 1983-84 which required the county to deduct union dues from all employees electing such a deduction ("checkoff" deductions)

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[1] Section 111.70(3)(a)4, Stats., is construed to mean that the employer has a "duty to bargain" mandatory subjects of collective bargaining. Fair-share and voluntary checkoff provisions are such mandatory subjects.

Section 111.70(3)(a)6, Stats., provides that it is a prohibited practice for Sauk County to "deduct labor organization dues from an employe's ... earnings, unless the ... employer has been presented with an individual order therefor, signed by the ... employe personally, and terminable by at least the end of any year of its life or earlier by the ... employe giving at least 30 days' written notice of such termination to the ... employer and to the representative organization, except where there is a fair-share agreement in effect."

[2] "'Fair-share agreement' means an agreement between a municipal employer and a labor organization under which ... 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." Sec. 111.70(1)(f), Stats.

and to deduct equivalent "fair-share" amounts from all other employees.

The contract expired on December 31, 1984, without a successor contract in place for the following year. The expired contract did not contain any provisions extending the dues deduction plans beyond its expiration. On January 14, 1985, the county notified the union that, in the absence of a current collective bargaining agreement, it would no longer continue the dues deductions. The union filed a complaint with WERC alleging that stopping the deductions would constitute a prohibited practice under the Act. The commission, while agreeing that there was no contract in effect during the contract hiatus (a successor contract for 1985-86 was signed while the case was pending before WERC), concluded that cessation of the deductions was not a prohibited practice, and the circuit court affirmed.

While the interpretation of statutes is usually a question of law which courts will review de novo, where we undertake to review the decision of an administrative agency, we give deference to the agency's interpretation and application of the statutes it is charged to administer. And this is especially true where the question involved,

though one of law, is "intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is of long standing." West Bend Education Ass'n v. WERC, 121 Wis.2d 1, 12, 357 N.W.2d 534, 539-40 (1984) (footnote omitted). In this case the question involved -- whether the dues checkoff and fair-share provisions must be maintained by the employer during a contract hiatus -- is one with which WERC has dealt in the past, and it is an area in which the agency has special competence and expertise. As a result, we will give "great weight" to WERC's rulings and will affirm its conclusions if its view of the law is reasonable, even though an alternative view may be equally reasonable. Id. at 13-14, 357 N.W.2d at 540.

The commission's decision in this case recognized that the statutory duty to bargain generally requires that the parties maintain the status quo with respect to mandatory subjects of bargaining during a contract hiatus, and that fair-share and dues checkoff provisions are mandatory subjects of bargaining. It ruled, however, that because such provisions, by their nature, benefit the union itself rather than the individual employees, they do not

bear any direct relation to the employer-employee relationship and are thus distinguishable from other mandatory bargaining subjects. With respect to the fair-share contributions, the commission also noted the provisions of sec. 111.70(3)(a)6, Stats., which prohibit employers from making fair-share deductions "except where there is a[n] ... agreement in effect."

Taking the fair-share agreements first, we are satisfied that, other reasons aside, the statute controls. The commission ruled that no agreement was in effect at the time the county ceased making the deductions, and the union has not challenged that ruling. It is, therefore, the law of the case. And the statute is plain on its face: the county is barred from making the deductions where there is no agreement in effect. See Berns v. Wisconsin Employment Relations Comm., 94 Wis.2d 214, 223, 287 N.W.2d 829, 833 (Ct. App. 1979), aff'd, 99 Wis.2d 252, 299 N.W.2d 248 (1980) ("fair-share agreements become effective, and continue in effect by their own terms according to the parties' agreements").

As for the dues checkoff, the commission has ruled in several cases over the past decade that the Act does not

require the employer to continue making dues checkoff (and fair-share) deductions during a contract hiatus. In Gateway VTAE, WERC Dec. No. 14142-A (1/77), the commission held that checkoffs were, in effect, "union security provisions," which benefit the union as a union, rather than the individual employees, and thus do not directly affect the employer-employee relationship. The commission distinguished such provisions from those affecting wages or fringe benefits, which inure to the benefit of the employees, and which, as mandatory subjects of bargaining, could not be abridged or halted during a contract hiatus (except under certain limited conditions not applicable here). In County of Sauk, WERC Dec. No. 17657-D (2/82), the commission applied the same rationale to fair-share deductions. In a second Gateway case, Gateway VTAE, WERC Dec. No. 20209-A (7/83), the commission, holding that a fair-share deduction also ceases when a new union replaces a former bargaining representative, again characterized the agreement as "a union security provision rather than a substantive provision which runs to the benefit of bargaining union employes ...." Id. at 7. And union security provisions have been held to be "wholly dependent" upon the existence of a valid collective bargaining

agreement and thus the employer may unilaterally stop honoring them once the agreement has expired. Industrial Union of Marine & Shipbuilding Wkrs. v. N.L.R.B., 320 F.2d 615, 619-20 (3rd Cir. 1963), cert. denied, 375 U.S. 984 (1964).

The union argues, however, that a more recent commission case, City of Brookfield, WERC Dec. No. 19822-C (11/84), compels the opposite result. We disagree. In that case the employer, during a hiatus period in which no collective bargaining agreement was in force, unilaterally changed the working hours for certain employees. The commission ruled that such action violated the requirement that the employer, after expiration of an agreement, maintain the status quo with respect to mandatory subjects of bargaining until a new agreement is concluded through negotiation or a mediation-arbitration award. Unlike the union, we see no fatal inconsistency between Brookfield and the earlier Gateway and County of Sauk cases. Brookfield involved contract provisions setting employees' working hours -- provisions of utmost interest and benefit to employees. In the Gateway and County of Sauk cases, on the other hand, the commission, while recognizing that dues

deductions are mandatory bargaining subjects, took care to distinguish the checkoff and fair-share terms as provisions benefiting the union as an organization rather than its members, and that, as a result, they were not employee benefits but provisions relating to the security of the union itself.

The commission adopted that rationale in this case, and we cannot say it is an unreasonable interpretation of the law. The union disagrees, claiming that the decision represents a poor policy choice by the commission because it increases the "self-help powers" of the employer during contract hiatuses, and may lead to loss of funds to the union and diversion of its members' attention from other endeavors to dues collection and contract renegotiation during such periods.

We note first that "public policy questions concerning [the] scope and fairness [of legislation] are for the legislature rather than the courts." Jaeger Baking Co. v. Kretschmann, 96 Wis.2d 590, 597, 292 N.W.2d 622, 625 (1980). And we feel the same is true with respect to policy choices and determinations made by agencies created by the legislature to administer statutory programs under the

authority delegated to them. Beyond that, we agree with the commission that the union's policy arguments simply fail to overcome the reasoning of the agency's decision in this case. As we noted at the outset, the deference we owe to decisions of the commission in the area of its expertise requires us to give "great weight" to those decisions, affirming them if they have a rational basis, even though an alternative view is also reasonable. West Bend, 121 Wis.2d at 13-14, 357 N.W.2d at 540. The commission's ruling that the county's cessation of dues deductions during the contract hiatus was based on established agency precedent applying sec. 111.70(3), Stats., to similar fact situations, and we cannot say that it represents an unreasonable interpretation of the statute.

Finally, the union suggests that the commission's decision is flawed insofar as it relies on "private sector precedent" in a "public sector" case. The only private sector precedent to which we have referred in our determination that the commission's resolution of the issues was reasonable, however, is Marine & Shipbuilding Wkrs., supra, which we cited solely for its reference to fair-share agreements as union security provisions, rather than

employee-benefit provisions -- a view the commission itself has long held. And the union has not shown how or why the proposition should be disregarded simply because the case arose in the private rather than the public sector.

By the Court.--Order affirmed.

Publication in the official reports is recommended.