STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ANTHONY M. BONANNO, Complainant, vs. STATE OF WISCONSIN HOWARD FULLER, Secretary of the State of Wisconsin Department of Employment Relations, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFSCME COUNCIL 24 and AFSCME LOCAL 171, Respondents.	Case 218 No. 34929 PP(S)-118 Decision No. 22733-A

Appearances:

Mr. Bruce K. Kaufmann, Jenswold, Studt, Hanson, Clark, & Kaufmann, Attorneys at Law, Suite 900, 16 North Carroll Street, Madison, Wisconsin 53703, with Mr. Allen A. Arntsen, appearing on behalf of Anthony M. Bonanno, referred to below as the Complainant.

Mr. Richard V. Graylow, Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin 53703-3354, appearing on behalf of the American Federation of State, County and Municipal Employees, AFSCME Council 24, and AFSCME Local 171, referred to below as the Unions.

Ms. Barbara Buhai, Attorney, Division of Collective Bargaining, 137 East Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the State of Wisconsin, Howard Fuller, Secretary of the State of Wisconsin Department of Employment Relations, referred to below as the State.

ORDER DENYING MOTION TO DISMISS AND GRANTING MOTION TO COMPEL DISCOVERY

The Complainant filed a Complaint of Unfair Labor Practices and a Demand to Produce Documents with the Wisconsin Employment Relations Commission on April 30, 1985. The Complainant alleged the Unions and State had committed Unfair Labor Practices within the meaning of Sec. 111.84(1), and of Sec. 111.84 (2)(a), Stats. The Complainant, in a letter filed with the Commission on May 28, 1985, requested that hearing not be set on the matter until the Complainant had conducted discovery regarding the fair share deduction exacted from the Complainant's pay check. The Commission, on June 6, 1985, appointed Richard B. McLaughlin, a member of its staff, to act as Examiner in the matter. In documents filed with the Commission on July 3, 1985, the State established that it took no position regarding holding the scheduling of a hearing in abeyance or regarding the Complainant's demand on the Unions for certain documents. The Unions, in a letter filed with the Commission on July 12, 1985, stated they did not object to holding the scheduling of a hearing in abeyance, but did object to discovery proceedings. On July 23, 1985 the Unions filed a Motion to Dismiss the complaint with the Commission. In a letter dated August 5, 1985, the Examiner requested that the parties file written argument on the disputed request for discovery. The parties filed written briefs or waived the filing of a written brief by September 19, 1985.

ORDER

1. The Motion to Dismiss filed by the Unions on July 23, 1985, does not afford a basis on which to preclude hearing on the complaint and is, accordingly, dismissed.

2. For the purpose of preparation for further hearing in this matter, the Unions shall produce for Complainant's inspection and reproduction, the following evidence:

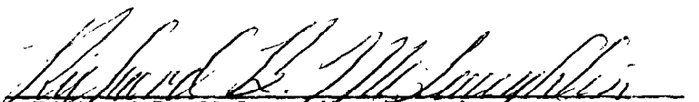
> all of the Unions' accounting and other records with regard to their disbursements and activities for the one year period preceding April 30, 1985.

3. The timetable, location and other details concerning the production of evidence ordered above shall be in accordance with such arrangements as the parties can agree upon between themselves or arrangements established by the Examiner at the request of either party if they are unable to reach such an agreement on or before January 17, 1986.

4. Any expenses incurred in connection with such discovery shall be paid by the Complainant. 1/

Dated at Madison, Wisconsin this 22nd day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

1/ This order is one "issued by the commission at the request of a party" within the meaning of Sec. 111.07(2)(d), Stats.

DEPARTMENT OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS
AND GRANTING MOTION TO COMPEL DISCOVERY

BACKGROUND

The Complainant filed a "Complaint of Unfair Labor Practices" together with a "Demand to Produce Documents" with the Commission on April 30, 1985. The complaint consists of three separately identified claims. The first claim is headed "Interference with Statutory Rights". The final paragraph under that claim states:

> The action of AFSCME, AFSCME Council 24 and AFSCME Local 171 in expelling Complainant from AFSCME and barring him from all further union activity because of his involvement in activities protected by Sec. 111.82, Wis. Stats., constitute Unfair Labor Practices under Sec. 111.84(2)(a), Wis. Stats.

The second claim is headed "Illegal Deduction of "Fair Share" Payments". The final paragraph under that claim states:

> The denial of Complainant's December 7, 1982, and August 21, 1984 requests and the State of Wisconsin's refusal to cease deducting the Fair Share contribution from Complainant's paycheck constitute Unfair Labor Practices under Sec. 111.84(1), Wis. Stats.

The third claim is headed "Illegal Use of "Fair Share" Monies by Respondent AFSCME". The final two paragraphs of that claim state:

> The monies collected by the State of Wisconsin and paid over to AFSCME Council 24 pursuant to the "Fair Share Agreement" exceed the proportionate share of the AFSCME Council 24 costs of its representational interest in the collective bargaining process and contract administration, as a portion of said monies are used for political and other nonpermitted activities.
>
> The collection of fair share monies by the State of Wisconsin from Complainant and other similarly situated employees who are not members of AFSCME Council 24 constitutes an Unfair Labor Practice under Sec. 111.84(1), Wis. Stats., to the extent that the sum collected exceeds the proportionate share of the costs of the representational interest of AFSCME Council 24 in the collective bargaining process and contract administration.

The "Demand to Produce Documents" is directed to "AFSCME Council 24" and states:

> Complainant, Anthony M. Bonanno, demands that you produce at the offices of Jenswold, Studt, Hanson, Clark & Kaufmann, Suite 900, 16 North Carroll Street, Madison, Wisconsin, within thirty (30) days of service of this demand, all documents or other materials which relate to the computation and determination of the Fair Share contribution for technical employees employed in the classified service of the State of Wisconsin as provided for in a referendum held April 30, 1973.

In a letter filed with the Commission on May 28, 1985, counsel for the Complainant made the following request: "By this letter I am hereby requesting that the above matter not be set for hearing until complainants (sic) have had an opportunity to conduct discovery with regard to the fair share agreement which forms the basis for the complaint . . . "

In a letter to the parties dated June 6, 1985, I made the following request:

> To clarify the status of this matter I ask that counsel for Respondents:
>
> (1) File an answer to the complaint by July 5, 1985.
>
> (2) Include in, or with, the answer a written statement of position regarding Complainant's demand for discovery and request that no hearing be set until discovery has been conducted.

The State filed an answer and a "Response to Demand to Provide Documents and Request to Delay Hearing" on July 3, 1985. The Response states: "Respondent, Howard Fuller, Secretary of the State of Wisconsin Department of Employment Relations, takes no position in regard to Complainant's discovery demant upon Respondent, AFSCME Council 24, nor to the requested delay of hearing herein."

In a letter filed with the Commission on July 12, 1985, the Unions' counsel stated:

> Please note the appearance of the Law Firm for and in behalf of the Union Respondents.
>
> The Union has no objection to holding this matter in abeyance.
>
> It does, however, object to discovery proceedings.
>
> This matter undoubtedly will be controlled by Browne vs. Board, WERC Case No. 18408 (3/81) and Johnson, et al. vs. County of Milwaukee, et al., WERC Case No. 19545-B (2/83), both of which are now pending.

Counsel for "the Respondent Unions", on July 23, 1985, filed a motion to dismiss. The motion asserted three separately stated grounds:

> 1. The International Union Constitution contains a rebate procedure designed for use in situations similar/identical to that at bar, assuming that all of the allegations in the Complaint are correct. The Complaint fails to allege use of or attempted use of said rebate procedure.
>
> . . .
>
> 2. The Complainant has failed to allege exhaustion or attempted exhaustion of the grievance arbitration procedure contained in the Labor Agreement now in full force and effect between the Respondent State and Respondent Union.
>
> Said grievance arbitration procedure requires dispute resolution by final, binding arbitration.
>
> . . .
>
> 3. The Complaint is barred by the Statute of Limitations. See Section 111.07(14), Wis. Stats. (1983-84).
>
> . . .

In a letter to the parties dated August 5, 1985, I stated:

> In a letter dated July 10, 1985, and in a letter dated July 22, 1985, Mr. Graylow has asserted the Union Respondents' position on discovery, and has asserted a motion to dismiss the complaint. The July 10, 1985 letter also states the Union Respondents have no objection "to holding this matter in abeyance."

> The motion to dismiss raises factual questions requiring hearing, and can be held in abeyance pending that hearing. The objection to discovery raises a point requiring ruling prior to hearing.
>
> To assist me in that ruling, I ask that any of you interested in filing written arguments on the legal propriety of Complainant's request for discovery file a brief with me . . .

The parties filed written argument, or waived written argument by September 19, 1985.

THE PARTIES' POSITIONS

The Complainant asserts that: "For the purposes of the discovery request, this case is virtually on all fours with the case of Browne vs. Milwaukee Board of School Directors, Case XCIX; No. 23535, MP 892 . . . ", and, thus, that Browne "controls the present action." According to the Complainant, the complaint challenges the "amount and propriety of (the) fair share deductions . . ." and this challenge "can only be resolved by referring to the records as to how said monies are calculated and used . . . " Since, according to the Complainant, the necessary records are soley controlled by the Unions, it follows that the "only way to get the information before the Examiner is to order the Union to make available the requested information." Although the Complainant focuses on the discovery request, the Complainant also asserts that "procedural defenses similar to those raised herein were given short shift by the Wisconsin Supreme Court in its first Browne decision . . . ", are factually unsupported in the present matter, and have no relation to a decision on Complainant's request for discovery. Characterizing the Unions' motion to dismiss as "a transparent delay tactic", the Complainant concludes his discovery request must be granted.

Counsel for the Unions, "in behalf of Council 24, and only 24" initially urges that a favorable ruling on the motion to dismiss would make "the request for discovery academic; moot" and requests a ruling granting the motion. In the event the motion to dismiss is not granted, the Unions argue that the request for discovery is improper since "there is no administrative or statutory authorization for a "DEMAND TO PRODUCE DOCUMENTS", especially in its present conclusory form." If the request is considered a request for deposition, the Unions argue that the request must be denied since:

. . .

> the Commission presently has before it at least two (2) cases which will sooner or later determine the parameters of legal expenditures by Unions in the public sector under fair share agreements. 1/ As such no present definitive Commission Decision has yet been entered on the subject. As such no discovery has been allowed by the Commission and (sic) either of the two (2) cited cases to date. The case at bar is no different.

1/ See Browne vs. Board, WERC Case No. 18408 (3/81) and Johnson, et al. vs. County of Milwaukee, et al., WERC Case No. 19545-B (2/83) (both of which are now pending.)

In addition, "the general administrative practice is", according to the Unions, "to deny discovery requests." The Unions conclude by asserting that the allegations of the complaint are conclusory, and fail to set forth "what . . . expenditures . . . exceed the proportionate share of the Unions' cost of collective bargaining. . . " The Unions request that the motion to dismiss be granted or the request for discovery be denied.

As noted above, the State has taken no position regarding the Complainant's request for discovery on the Unions.

Discussion

Both the Complainant and the Unions acknowledge that Browne 2/ and Gerleman 3/ will govern the present matter. This acknowledgement is appropriate since the relevant statutory authority regarding procedural issues is common to all three matters. 4/

The Union and the Complainant agreed that hearing on the present matter could be postponed and the State took no position on this point. My letter of August 5, 1985, assumed the Unions' motion to dismiss did not present threshold issues regarding the propriety of conducting a hearing. The Unions' brief establishes the Unions regard the motion to dismiss as a threshold issue, and the Complainant's brief addresses the motion to dismiss in passing. Against this background, it is necessary to rule on the motion to dismiss as the motion is directed at precluding a hearing.

The first asserted ground for dismissal concerns an internal rebate procedure of the International Union, and cannot, under any view of the present matter, be accepted as a basis to preclude a hearing on the merits of the complaint. Under the liberal pleading rules of the Commission, it is difficult to assume a failure to allege exhaustion of the rebate procedure could constitute a basis for dismissal. The motion seeks a clarification of the pleadings which, if made, would result, at most, in a deferral of the present matter to the rebate procedure. Even if dismissal could constitute an appropriate sanction, there is no reason to dismiss the present matter, since the Commission rejected a similar motion in Milwaukee Board of School Directors (Browne). 5/ Their rationale, though not entirely applicable here is, nevertheless, persuasive. The Commission indicated it "may very well address the question of the appropriateness of requiring resort to and exhaustion of the Unions' internal rebate procedure as part of the question of the appropriate remedial order in this case." 6/ What guidance will emerge regarding the use of internal rebate procedures hinges on the Commission's ultimate ruling. To dismiss or defer the present matter to the internal rebate procedure in the absence of further Commission ruling on the point would be a waste of the parties' time and resources. In sum, the Unions' motion to dismiss or to defer the present matter to the internal rebate procedure is not persuasive and does not afford any basis to preclude further processing of the complaint.

The second asserted basis for dismissal concerns the existence of a provision for final and binding arbitration in the labor agreement between the Unions and the State, and does not afford any ground to delay or to preclude further processing of the complaint. Here too, it is difficult to consider the absence of this allegation as a basis to dismiss the complaint. At most, the allegation states a motion to defer the complaint to grievance arbitration. The Commission has stated the basis upon which it will defer matters to grievance arbitration thus:

> The decision to abstain from discharging the commission's statutory responsibility to adjudicate complaints in favor of the arbitral process will not be made lightly. The commission will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and

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2/ Case XCIX, No. 23535, MP-892

3/ Case C, No. 23558, MP-897

4/ Cf. Sec. 111.84(4), Stats., to Sec. 111.70(4)(a), Stats. By the operation of the provisions of Sec. 111.07, certain provisions of Chapter 227 are also implicated, as will be discussed below.

5/ Dec. No. 18408-A (WERC, 10/81).

6/ Ibid. at 6.

> renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. . . Second, the collective bargaining agreement must clearly address itself to the dispute. . . Third, the dispute must not involve important issues of law. 7/

Although not specifically alleged by the Union, it will be assumed, for the purpose of addressing the motion, that the Unions and the State would renounce technical objections to the processing of a grievance. Even assuming the agreement contains provisions applying to the issue presented by the Complainant's second and third claims regarding the specific deduction and use of fair share monies, it is inconceivable that the agreement could clearly address the first claim asserted regarding a dispute between the Unions and the Complainant. Thus, the second criterion necessary for deferral is not present. Finally, even a cursory review of the litigation surrounding Browne and Gerleman establishes that a challenge to a fair share deduction presents an important issue of law. The issue of discovery alone in the present matter presents a point ill-suited for resolution in the grievance arbitration forum. In sum, no less than two of the three criteria for deferral are not present in this case. Thus, the second asserted basis for dismissal does not present any reason to preclude further processing of the complaint.

The final asserted ground concerns the operation of Sec. 111.07(14), Stats., made applicable by Sec. 111.84(4), Stats. The Unions have yet to file an answer and there is, at present, no reason to question the allegations of the complaint. Even if an answer had been filed, the Unions' motion requires that the allegations of the complaint be treated as fact for the purpose of addressing the motion. 8/ The first claim of the complaint alleges the Unions have barred the Complainant "from all further union activity" and thus, on its face, alleges a continuing pattern of conduct. The second claim challenges a denial of Complainant's requests of December 7, 1982, and of August 21, 1984, to terminate the fair share deduction. The complaint was filed on April 30, 1985, and without regard to the 1982 request, does challenge conduct on August 12, 1984, which does fall within the one year period preceding April 30, 1985. The final claim of the complaint alleges a continuing violation of the SELRA regarding the on-going deduction of fair share amounts. Thus, each of the three claims assert matters which, in the absence of rebuttal evidence, fall within the one year limitations period. The third asserted basis for dismissal is, thus, unpersuasive. The motion may be reasserted depending on the evidence ultimately presented at hearing. However, what may ultimately occur is irrelevant to the present motion which does not present any reason to preclude the further processing of the complaint.

It is now necessary to address the Complaint's request for discovery. Although the original demand does not so specify, the Complainant's argument establishes the "discovery request seeks information as to how the "fair share" contribution is calculated and utilized." Thus, the discovery request concerns only the second and third claims of the complaint.

In Milwaukee Board of School Directors (Browne), the Commission granted a request for discovery based on the Commission's conclusion that ". . . absent pre-hearing discovery, the hearing in this case would be unnecessarily protracted and the record would be unduly burdened." 9/ This conclusion is applicable here, and the Complainant's request for discovery has been granted.

The Unions have posed significant questions regarding the conclusory nature of the request and the basis for granting the request, and thus some discussion of the issues is necessary.

7/ State of Wisconsin, Dec. No. 15261 (WERC, 1/78) at 8.

8/ See Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra, 12/77)

9/ Dec. No. 18408-B (WERC, 5/84) at 3.

I have treated the April 30, 1985, demand as a request for deposition 10/ and for the production of documents. Before addressing the ultimate basis for granting Complainant's request, it is worthy of some note that the Commission is, in any case arising under the SELRA, authorized to issue subpoenas and to order the taking of depositions. This authority is granted under Sec. 111.07(2)(b), Stats., which is made applicable to the SELRA by Sec. 111.84(4), Stats. This authority is further elaborated in the Commission's rules through Sec. 111.94(1), Stats., at ERB 20.14 and ERB 20.15. ERB 20.15 demands "good cause" for the taking of a deposition "upon application." As noted above, the Commission has already addressed the need for discovery in general, and, for the present, it is enough to note the availability of a deposition if, upon specific application, "good cause" exists.

The ultimate source of the Commission's authority to order pre-hearing discovery lies in Chapter 227. The present matter does present a contested case within the meaning of Sec. 227.01(2), Stats. The Commission is an "agency" within the meaning of Sec. 227.01(1), Stats.; a hearing is required by law under Sec. 111.84(4), and Sec. 111.07(2)(a), Stats.; substantial interests of the Complainant as an individual as well as of the Unions' and of the State as institutions, turn on any decision regarding the amount and the validity of the fair share deduction; and, although no answer has been filed, the Unions have, through the motion to dismiss, denied or controverted the interest asserted by the Complainant in his complaint.

The Commission has in Milwaukee Board of School Directors (Browne), established that fair share litigation of the type posed here constitutes a "class 2 proceeding" within the meaning of Sec. 227.01(2)(b), Stats. 11/ That reasoning applies to this case. The Complainant has requested that the Commission impose the sanction of terminating the fair share deduction. This request does constitute a sanction since the SELRA authorizes such a deduction, and since the deduction has been ongoing. That the Complainant alleges his situation is the same as "other similarly situated employees" underscores the significance of the requested sanction which, if granted, may have precedential value. Section 227.08(7) governs discovery requests in contended cases and provides:

> In any class 2 proceeding, each party shall have the right, prior to the date set for hearing, to take and preserve evidence as provided in ch. 804.

In sum, the Complainant's request for discovery has a statutory basis.

The Unions have challenged the Complainant's failure to allege "what expenditures exceed the proportionate share of the Unions' cost . . . ", but this challenge presumes knowledge the Complainant cannot be presumed to have absent discovery.

The Union has more persuasively challenged the breadth of Complainant's request. Given the present state of the pleadings, which do not yet include an answer from the Unions, some overbreadth is tolerable. In any event, the Commission has already established that the cost of discovery will fall on the Complainant and this will, in all probability, narrow the breadth of discovery more effectively than will further discussion in this decision.

The order issued above is taken from a prior Commission decision, except for the dates. 12/ The Complainant has requested the documents be produced at his counsel's office. This request has not been specifically granted, and the order issued above encourages the parties to, if possible, agree on the most reasonable means of producing the evidence. The Complainant has not specified what period of

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10/ No specific request for deposition has been made, and the discussion of depositions will concern only the general validity of the request without assuming any specific objections which may arise from a specific request.

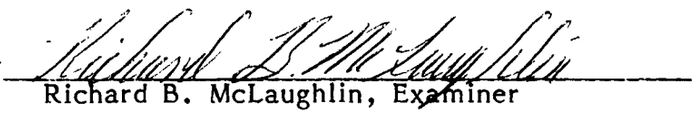
11/ Dec. No. 18408-A (WERC, 10/81).

12/ Dec. No. 18408-B at 2.

time the discovery request is directed to. I have limited the period to the one year period preceding the filing of the complaint. Any request for a different period of time will be addressed as, and if, necessary.

Dated at Madison, Wisconsin this 22nd day of November, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner