STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AFSCME, LOCAL UNION NO. 3148, AFL-CIO, Complainant, vs. SAUK COUNTY, Respondent.	:	Case 74 No. 36408 MP-1813 Decision No. 23489-A

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 W. Mifflin Street, Madison, WI 53703, by Mr. Richard V. Graylow, on behalf of Complainant.

Hesslink Law Offices, S.C., 6200 Gisholt Drive, Madison, WI 53713, by Mr. Robert M. Hesslink, Jr., and Mr. Eugene Dumas, Corporation Counsel, Sauk County, Sauk County Courthouse, Baraboo, WI 53913, on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant, AFSCME, Local No. 3148, AFL-CIO, hereinafter Complainant, having, on January 17, 1986, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter Commission, wherein Complainant alleged that Respondent, Sauk County, hereinafter Respondent, had committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, 3, 4 and 7 of the Municipal Employment Relations Act (MERA); and the Respondent having, on May 23, 1986, filed an answer, wherein it denied that it committed any prohibited practices; and the Commission having appointed David E. Shaw, a member of its staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held at Baraboo, Wisconsin on June 19, 1986; and the parties having filed post-hearing briefs herein by September 18, 1986; and the Examiner, having considered the evidence and arguments of the parties and being fully advised of the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Complainant is a labor organization and is the certified exclusive bargaining representative of all employes of the Sauk County Health Care Center, but excluding supervisory, managerial, professional, confidential, craft and seasonal employes and residents; that Complainant's principal office is located at 5 Odana Court, Madison, Wisconsin, 53719; and that at all times material herein the Staff Representative representing Complainant has been Mr. David Ahrens.

2. That Respondent is a municipal employer having its principal offices located at 515 Oak Street, Baraboo, Wisconsin, 53913; and that among the services Respondent provides at all times material herein, Respondent has maintained and operated the Sauk County Health Care Center located at Reedsburg, Wisconsin.

3. That Complainant and Respondent have been parties to a collective bargaining agreement covering the bargaining unit involved for the years since 1981; that the parties' 1981 Agreement contained a "modified" fair-share provision whereby only those employes of the Health Care Center who became employed there after the Agreement was ratified were required to pay fair-share fees and said provision also covered voluntary dues payors; that agreement on and ratification of said Agreement was not reached until late 1981; that Respondent did not make any retroactive deductions of fair-share fees or dues for the period prior to ratification of the parties' 1981 Agreement; and that Complainant did not file a grievance or otherwise make any objection known to Respondent regarding Respondent's failure to make any retroactive deductions of fair-share fees or dues under the parties' 1981 Agreement.

4. That upon expiration of the parties' 1982 Agreement the Respondent continued to make deductions for voluntary dues deductions and fair-share fees for a period from January of 1983 through March of 1983, but thereafter discontinued making such deductions; that in 1983, subsequent to the Respondent's ceasing to deduct dues and fair-share fees in the bargaining unit represented by Complainant, Complainant filed a complaint of prohibited practices with the Commission alleging Respondent's actions violated Secs. 111.70(3)(a) 1, 4 and 5 of MERA; that during 1983, Complainant collected dues by hand from its members; that a 1983-1984 Agreement between the parties was reached as a result of mediation-arbitration through an award issued on or about January 18, 1984; that the parties' 1983-1984 Agreement, in relevant part, contained the following provisions:

ARTICLE VI

FAIR SHARE AGREEMENT

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

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

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

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

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

. . .

ARTICLE XXXII

DURATION

32.01 THIS AGREEMENT shall be effective as of the first day of January, 1983, and shall remain in full force and effect through the 31st day of December, 1984, except that either party may request to reopen with respect to wages, only, as hereinafter set forth. It shall be automatically renewed from year to year thereafter, unless either party shall notify the other in writing on or before the 1st day of August of any year in which the Agreement is in force of the desires to modify this Agreement. However, nothing shall prevent the parties from altering or amending, at any time, any part of this Agreement by mutual consent in writing, in accordance with the Entire Memorandum of Agreement clause.;

that the "Fair-Share Agreement" language in the parties' 1983-1984 Agreement was a modification from the language in that provision in their 1982 Agreement in that it was no longer a "modified" fair-share agreement; that fair-share was not an issue in dispute in the mediation-arbitration on the 1983-1984 Agreement; and that Complainant collected dues by hand during 1983, except as to January through March as previously noted in this Finding.

5. That Complainant's Treasurer, Pearl Lenz, sent the following letter dated January 23, 1984 to Respondent:

Local Union Name Union of Sauk County Health Care Center Employees No. 3148

Secretary Pearl Lenz, Treasurer

Address: Box 123A, R. R. 2
(Street)

Cazenovia, Wi 53924
(City, Zone and State)

Date: January 23, 1984

To: Payroll Department
Sauk County Courthouse
515 Oak Street
Baraboo, WI 53913

Attached are current listings of bargaining unit members with an obligation to pay monthly union dues in accordance with Sections 6.01, 6.02, 6.03, and 6.04 of Article VI - Union Security of the labor agreement between Sauk County and the Union of Sauk County Health Care Center Employees. The monetary amount after each individual's name indicates the amount of dues to be collected for the year 1983 to fulfill this individual's financial obligation. The monetary amounts stated represent any and all months not paid and being due between Jan. 01, 1983 and December 31, 1983. We request that these amounts be deducted from the payroll checks issued to cover the retroactive wages for 1983 for each individual as stated.

Respectfully yours,

Pearl Lenz, Treasurer
AFSCME Local 3148;

and that Complainant received no response to its request from Respondent.

6. That Complainant's representative, Ahrens, sent the following letter to Respondent's Corporation Counsel, Dumas, on March 8, 1984:

March 8, 1984

Eugene Dumas
Sauk County Corporation Counsel
Sauk County Courthouse
Baraboo, WI 53913

Dear Mr. Dumas:

Local 3148, AFSCME, AFL-CIO, has directed me to request that the County not deduct Fair Share payments retroactive to January 1, 1983, for those persons newly covered by union

security provisions of the 1983 Labor Agreement. The union requests that Fair Share payments should begin with the first paycheck following issuance of Arbitrator Kerkman's award.

The union's request to defer deduction to the date of the award, should be viewed without prejudice in regard to the pending prohibited practice complaint against the county. By this requested deferral, the union makes no inference or admission that the county's failure to deduct dues following certification of impasse was lawful. Thus, the union will continue to press its case against the county.

If you have any question as to whom this deferral affects, please contact Pearl Lenz, treasurer of Local 3148. If you have any objections to implementing this proposal, I would appreciate notice to that effect.

Sincerely,

DAVID AHRENS
Council 40 Staff Representative;

and that in March of 1984 Complainant sent the following letter to the employes in the bargaining unit it represents:

Dear Health Care Center Employee:

Now that the arbitration and 1984 contract negotiations are behind us, it is time for the members of the local and employees of the Health Care Center to look forward and to begin work together.

It is within this spirit that Local 3148 voted to forego Fair Share payments for employees prior to union certification retroactive to January 1, 1983. The union notified the county of its decision a number of weeks ago. It directed the county not to deduct these monies from the checks of affected employees. We also asked the county to respond to this request. Have we heard from the county? Not a word. In negotiations, again we asked the county not to deduct the dues. Again they refused to respond.

If the county insists on deducting the dues, the union will forward the money to the employees. We believe the county may attempt this to drive a wedge between union members and Fair Share payors.

It is our hope that those employes who are now under Fair Share will sign a union card and become members. Only through active membership can you gain a say in the direction of the union and, thus, the conditions of your employment.

We hope that you join us and make the Health Care Center a better place to work for employees and a better place to live for our residents.

Sincerely,

Executive Board, Local 3148, AFSCME
Sauk County Health Care Center Employees Union

7. That by a notice dated March 21, 1984 Complainant notified Respondent that it would move to amend its complaint of prohibited practices in the then pending complaint case it had filed in 1983 to add the following allegations:

100. On or about January 18, 1984, Arbitrator-Mediator Jospeh B. Kerkman entered the following Award with respect to an earlier Med-Arb Petition filed by Local 3148.

AWARD

> The final offer of the Union, along with the stipulations of the parties, as well as the terms of the predecessor Collective Bargaining Agreement, which remains unchanged through the course of bargaining, are to be incorporated into the written Collective Bargaining Agreement of the parties.

101. The period covered by said Arbitration Award is essentially the 1982-1983 (sic) calendar years (CYs).

102. On or about April 1, 1983, the County of Sauk acting unilaterally and without agreement from either of the complaining Unions, interrupted and ceased dues deductions.

103. In short, the County no longer withheld or remitted dues or fair share monies.

104. The actions of the County as described herein is in violation of Section 111.70(3)(a)1, 111.70(3)(a)4 and 111.70(3)(a)7.

that on or about May 4, 1984 Complainant's attorney sent the following letter to the examiner in the pending complaint case:

May 4, 1984

Mr. Richard McLaughlin
Examiner
Wisconsin Employment Relations Commission
14 West Mifflin Street, Suite 200
Madison, WI 53707

Re: Sauk County
Case No. LIII No. 31538 MP-1472

Dear Examiner McLaughlin:

I am informed and believe that the two (2) Interest Arbitration Awards recently entered in this Union's favor, have resolved all outstanding issues.

Accordingly, on behalf of the Complaining Union(s) I respectfully request that the Complaint(s) of Prohibited Practice be dismissed.

If you have any questions, please call.

Very truly yours,

RICHARD V. GRAYLOW

that pursuant to the foregoing letter the examiner dismissed the complaint on June 6, 1984; and that Respondent did not make any retroactive deductions of dues or fair-share fees in the bargaining unit represented by Complainant before or after the parties' 1983-1984 Agreement was signed by them.

8. That prior to the expiration of the parties' 1983-1984 Agreement they entered into negotiations on a successor agreement; and that on December 13, 1984 Complainant filed a petition with the Commission requesting that the Commission initiate Mediation-Arbitration pursuant to Sec. 111.70(4)(cm)6 of MERA.

9. That following the expiration of the parties' 1983-1984 Agreement Respondent's Corporation Counsel sent the following letter to Ahrens:

January 14, 1985

Mr. David Ahrens
Staff Representative
Local 3148, AFSCME, AFL-CIO
5 Odana Court
Madison, Wisconsin 53719

Dear Mr. Ahrens:

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.

Sincerely,

Eugene R. Dumas
Sauk County Corporation Counsel

ERD/cak

To: Local Officers: 360
3148

that Respondent sent identical letters to the representatives of all its bargaining units; that Respondent ceased making deductions for dues and fair-share fees in all of its bargaining units following expiration of the labor agreements covering 1984, including the bargaining unit represented by Complainant; and that Ahrens sent the following letter dated January 31, 1985 to Respondent:

Melvin Rose, Chairman
Sauk County Board
Sauk County Courthouse
Baraboo, WI 53913

Re: Elimination of Dues/Fair Share

Dear Mr. Rose:

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.

Sincerely,

DAVID AHRENS
Council 40 Staff Representative

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

11. That on March 5, 1985 Complainant and another AFSCME local, representing Respondent's Highway Department employes, filed a complaint of prohibited practices with the Commission alleging that by ceasing to deduct dues and fair-share fees the Respondent had violated Secs. 111.70(3)(a), 1, 2, 3 and 4 of MERA; 1/ that on March 28, 1985 the mediation-arbitration investigation involving Complainant and Respondent was closed; that neither the parties' tentative agreements, nor Complainant's and Respondent's final offers, proposed any changes in Article VI, Fair Share Agreement, in the parties' expired agreement; that the Complainant's final offer contained the following proposal: "IX. All provisions of the Labor Agreement of 1983-84 except as modified above"; that on April 8, 1985 the Commission issued its Findings of Fact, Conclusions of Law, Certification of Results of Investigation and Order Requiring Mediation-Arbitration involving these parties 2/; and that the parties proceeded with the complaint and on November 26, 1985 the examiner issued his Findings of Fact, Conclusion of Law and Order dismissing the complaint in its entirety. 3/

12. That on October 15, 1985 the Mediator-Arbitrator issued his Award which reads in relevant part:

> DISCUSSION
>
> The Employer contends that the Union's final offer is a two year proposal and urges the Arbitrator to consider it as such in determining the most appropriate final offer. . . . Apparently, the Union assumed that both parties clearly understood that they were both proposing one year agreements and its written final offer does not specifically spell that out. The Arbitrator is satisfied that the Employer, the Union and the Commission's investigator understood that the proposal of the Union was for a one year period and it will be considered as such.
>
> . . .
>
> AWARD
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> After full consideration of the criteria listed in the statute and after careful and extensive examination of the exhibits and briefs of the parties the Arbitrator finds that the Union's final offer more closely adheres to the statutory criteria than that of the Employer and directs that the Union's proposal contained in Exhibit "A" be incorporated into an agreement containing the other items to which the parties have agreed.

13. That Article VI, FAIR SHARE AGREEMENT, contained in the parties' 1985 Agreement is identical to the fair-share provision contained in the parties' 1983-1984 Agreement; and that the duration provision in the parties' 1985 Agreement reads as follows:

1/ Sauk County, Case 67, No. 34706, MP-1686.

2/ Sauk County, Dec. No. 22524 (WERC, 4/85).

3/ Sauk County, Dec. No. 22552-A, (Roberts, 11/85), affirmed, Dec. No. 22552-B (WERC, 6/82). The record in that proceeding has been entered into evidence in the instant case as Exhibit No. 2 and the Examiner's decision as Exhibit No. 3.

ARTICLE XXXII

DURATION

32.01 THIS AGREEMENT shall be effective as of the first day of January, 1985, and shall remain in full force and effect through the 31st day of December, 1985, except that either party may request to reopen with respect to wages, only, as hereinafter set forth. It shall be automatically renewed from year to year thereafter, unless either party shall notify the other in writing on or before the 1st day of August of any year in which the Agreement is in force of the desires to modify this Agreement. However, nothing shall prevent the parties from altering or amending, at any time, any part of this Agreement by mutual consent in writing, in accordance with the Entire Memorandum of Agreement clause.

14. That Respondent's County Clerk's office sent the following letter dated October 30, 1985 to Complainant:

October 30, 1985

Ms. Pearl Lenz
Rt. 2, Box 123
Cazenovia, WI 53924

RE: Local 3148 Union Dues

Pearl:

We would appreciate your assistance in preparing an up-to-date list of Local 3148 members having union dues deducted starting with the month of November 1985.

We would need a list of the current members and whether they are part-time or full-time.

According to your last letter dated 11-27-84:

Full Time employees $13.10
Part Time employees $ 9.80

We will be taking November union dues on Health Care Center's payroll dated 11-15-85. We would appreciate it if you could have a list to us no later than Monday, November 11. This will give us enough time to get the computer ready for processing their payroll.

Thank you.

Becky DeMars
Dep. Co. Clk-Bookkeeper

15. That Complainant's Treasurer, Lenz, sent the following memo dated November 13, 1985 to Respondent's County Clerk's office:

Local Union Name Union of Sauk County Health Care Center Employees No. 3148

Secretary Pearl Lenz, Treasurer

Address: R. R. 2 Box 123A (Street)

Cazenovia, Wisconsin 53924 (City, Zone and State)

Date: November 13, 1985

TO: Ms. Rebecca DeMars
Dep. Co. Clk-Bookkeeper
Sauk County Courthouse
515 Oak Street
Baraboo, WI 53913

RE: Local 3148's Bargaining Unit Membership Listing
Local 3148's 1985 Retro-active Dues Listing

Becky:

Per your request, enclosed is an updated listing of Local 3148's bargaining unit membership. The enclosed list indicates each individuals work status and the monetary amount of retro-active dues to be deducted.

Local 3148 expects these amounts to be deducted and forwarded to the Treasurer within a reasonable period of time. A list of the employees from whom such deductions were made should accompany your remittance, in accordance with the labor agreement.

Prompt expedition of this matter is expected . . . any delay or non-compliance is a violation of the labor agreement and the law and will be dealt with judiciously.

Pearl Lenz
Treasurer
AFSCME Local 3148

16. That Complainant's Treasurer, Lenz, sent the following memo dated December 19, 1985 to Respondent's County Clerk's office:

Local Union Name Union of Sauk County Health Care Center Employees No. 3148

Secretary Pearl Lenz, Treasurer

Address: R. R. 2 Box 123A
(Street)

Cazenovia, Wi. 53924
(City, Zone and State)

Date: December 19, 1985

TO: Ms. Rebecca DeMars
Dep. Co. Clk-Bookkeeper
Sauk County Courthouse
515 Oak Street
Baraboo, WI 53913

RE: Local 3148's 1985 Retro-active Dues Listing

The enclosed list reflects the current amount of retro-active dues to be deducted from each individual's paycheck the second payperiod of December 1985. The enclosed list supercedes the one dated 11/13/85.

Pearl Lenz
Treasurer
AFSCME Local 3148

17. That Respondent did not make retroactive voluntary dues deductions and fair-share deductions from the pay of employes in the bargaining unit represented by Complainant for the period running from January 1, 1985 to the issuance of

Arbitrator Rice's mediation-arbitration award dated October 15, 1985; that the parties, by their conduct, have treated Article VI of their agreeement as constituting both an agreement to deduct voluntary dues check off and involuntary fair-share payments from employes' paychecks; that voluntary dues deductions and fair-share fees are deducted in the identical manner by the Respondent County; that employes in the affected bargaining unit authorize voluntary dues deductions by signing dues payroll deduction cards; and that at no time material herein did any employe in the bargaining unit represented by Complainant revoke his/her authorization for voluntary dues deductions.

18. That by directing that Complainant's proposal contained in its final offer be incorporated into the parties' 1985 agreement, the Rice Award provided for fair-share/voluntary dues deductions for the period running from January 1, 1985 through December 31, 1985; and that by refusing to implement said deductions retroactive to January 1, 1985, Respondent refused to fully implement the Rice Award of October 15, 1985 and interfered with the rights of the employes represented by Complainant under MERA.

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

CONCLUSIONS OF LAW

1. That the issue of whether Article VI, Fair Share, of the parties' 1985 Agreement, was to be implemented retroactive to January 1, 1985 is covered by Arbitrator Rice's award dated October 15, 1985.

2. That Respondent Sauk County, its officers and agents, by refusing to implement Article VI, Fair Share Agreement, of the parties' 1985 Agreement, retroactively to January 1, 1985, refused to fully implement the parties' Mediation-Arbitration Award for 1985 and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a) 7 and derivatively 1, Stats., but did not commit prohibited practices within the meaning of Sec. 111.70(3)(a) 2, 3 or 4, Stats.

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

ORDER 4/

1. That the complaint of Complainant AFSCME Local 3148 is hereby dismissed as to the alleged violations of Secs. 111.70(3)(a) 2, 3 and 4, Stats.

4/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

2. That Respondent Sauk County, its officers and agents, shall immediately:

a. Cease and desist from refusing to make retroactive fair-share and voluntary deductions in accordance with Arbitrator Rice's Award dated October 15, 1985.

b. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

1. Comply with the terms of Arbitrator Rice's Award dated October 15, 1985 by making a deduction for fair-share fees and voluntary dues, owed and not otherwise already received by Complainant, retroactive to January 1, 1985 to the date such deductions were started in 1985, from the pay of those individual employes in the bargaining unit covered by Article VI of the parties' 1985 Agreement. 5/ As to those employes who left the Respondent's employ after the receipt of the Award, but were otherwise covered by the parties' resulting 1985 Agreement, Respondent Sauk County shall be liable for the fees/dues that would have been deducted but for the Respondent's failure to comply with the Award.

2. Pay interest at the rate of twelve percent (12%) per annum 6/ on said amount from the date the deductions would have been made had Respondent Sauk County complied with Arbitrator Rice's Award to the date(s) said monies are delivered to Complainant AFSCME Local 3148.

3. Notify its employes in the bargaining unit represented by AFSCME Local 3148 by posting in conspicuous places on its premises, where notices to such employes are usually posted, a copy of the notice attached hereto and marked "Appendix A". Such copy shall be signed by an authorized representative of Sauk County and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notice is not altered, defaced or covered by other material.

4. Notify the Commission within twenty (20) days of the date of this decision as to the steps taken to comply herewith.

Dated at Madison, Wisconsin this 7th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

5/ Such deductions may otherwise be in the amount(s) and at such intervals as the parties may agree to in order to reduce any hardship on the affected employes.

6/ The rate set forth in Sec. 814.04(4), Stats., at the time the instant complaint was filed.

APPENDIX A

NOTICE TO EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. Sauk County will comply with the terms of Arbitrator Rice's Mediation-Arbitration Award dated October 15, 1985 by deducting fair-share fees/voluntary dues, owed and not otherwise already received by AFSCME Local 3148, retroactive to January 1, 1985 to the date said deductions began in 1985, from the pay of those individual employes in the bargaining unit represented by AFSCME Local 3148 and covered by the terms of Article VI, Fair Share Agreement, of the 1985 Agreement between Sauk County and AFSCME Local 3148, AFL-CIO.

2. Sauk County will pay interest to AFSCME Local 3148 at the rate of twelve percent (12%) per annum on said amount from the date the retroactive deduction should have been made to the date said monies are delivered to AFSCME Local 3148, AFL-CIO.

Dated at _____, Wisconsin this _____ day of _____, 1987.

By_____
For Sauk County

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that by refusing to implement the fair-share provision, as well as voluntary dues deductions, retroactively to January 1, 1985, Respondent has violated Secs. 111.70(3)(a) 1, 2, 3, 4 and 7 of MERA. Complainant requests as relief that Respondent be ordered to cease and desist from such conduct in the future, to reinstate and restore said provisions, to make all employes and Complainant whole, to pay Complainant's attorneys fees, costs and disbursements, to pay damages plus interest to Complainant and that such other relief as may be appropriate be granted. In its Answer Respondent alleges the complaint does not state a claim upon which relief can be granted, that the claims are barred by the doctrines of res judicata, merger and bar, and collateral estoppel, that Respondent has no duty to retroactively implement the fair-share provisions and voluntary dues deductions as there was no agreement in effect during the period in question and no current, signed authorization cards for dues deductions on file and that Sec. 111.70(3)(a) 6, Stats., prohibits withholding fair-share assessments in such circumstances, so that Respondent was prohibited from withholding fair-share and dues from the time the parties' 1983-1984 Agreement expired until the mediation-arbitration award was issued. Respondent also alleges that a practice exists of not withholding fair-share and dues during the hiatus and of not retroactively implementing fair-share and dues deductions once an agreement is reached, and that practice has been incorporated into the Agreement. Respondent's last affirmative defense is that the dispute should be deferred to arbitration.

Complainant

Complainant asserts there are two issues to be decided: (1) Does a fair-share provision in a collective bargaining agreement apply retroactively to cover a hiatus period; and (2) Did Respondent refuse or fail to implement the parties' mediation-arbitration award for their 1985 Agreement. The Wisconsin Supreme Court's decision in Berns v. WERC, 99 Wis. 2d 252 (1980) is cited as holding that the retroactive application of a fair-share provision in a successor agreement was proper and that it is the public policy of this State to spread the cost of collective bargaining to all employes who receive the benefits of that process. Complainant asserts that Respondent ceased withholding fair-share fees upon expiration of the 1983-1984 Agreement and that the subsequent agreement reached through the mediation-arbitration award contained a fair-share provision and ran from January 1, 1985 to December 31, 1985. That is the identical situation as existed in Berns. Respondent refused to deduct fair-share fees retroactively to January 1, 1985, even though it paid wages retroactively to that date. Therefore, it committed a prohibited practice.

As to the Award, Complainant notes that the Award directed that its proposals "be incorporated into an agreement containing the other items to which the parties have agreed." (Emphasis Complainant's) Item "IX" in Complainant's proposal was "All provisions of the Labor Agreement of 1983-84 except as modified above", and neither side proposed any changes regarding fair-share or voluntary dues deduction.

In reply to Respondent's contentions, Complainant denies that past practice establishes that it has acquiesced in Respondent's failure to retroactively withhold fair-share. A complaint of prohibited practices was filed following Respondent's failure to withhold fair-share fees after the parties' 1982 Agreement expired, and Complainant requested that the complaint be dismissed following the receipt of the mediation-arbitration award because it decided not to seek retroactive fair-share due to the hard feelings it was causing among the fair-share payors. Ahrens' letter on March 8, 1984 to Respondent specifically stated that Complainant's action should not be viewed an admission that the Respondent's failure to withhold dues was lawful. Further, contrary to Respondent's assertions, Complainant has never agreed that fair-share did not have to be withheld retroactively, rather Complainant relinquishd its right to the retroactive fair-share because of the hardship it would work on the employes and the hard feelings it would cause. Complainant asserts that Respondent cannot rely on past practice, since as a matter of law no such practice existed. The Complainant never having acquiesced in the alleged practice.

Next, Complainant contends the instant case presents a novel fact situation which earlier Commission decisions do not address. Requiring the retroactive withholding of fair-share once an agreement has been reached covering the hiatus period would be consistent with the purpose of fair-share and with prior Commission decisions. Sauk County, Dec. No. 17657-D (WERC, 2/82) cannot be relied on by Respondent as the issue there was whether fair-share had to be deducted during the hiatus period following expiration of a labor agreement, whereas here the issue is whether fair-share must be withheld retroactively once a labor agreement is in effect covering the hiatus period "as required by Section 111.70(3)(a)7." Further, requiring retroactive withholding of fair-share in these circumstances would be a logical extension of the decision in Berns and would further the public policy of spreading the cost of collective bargaining to all who benefit from it during the hiatus.

Gateway V.T.A.E., Dec. No. 20209-B (WERC, 8/84) aff'd Kenosha County Cir. Court, also cannot be relied on by Respondent as it is inapplicable on its facts. Whereas in that case the exclusive bargaining representative that had negotiated the labor agreement containing a fair-share provision was ousted during the term of the agreement and another labor organization certified as the exclusive bargaining representative, here, the same union, Complainant, has represented the employes in the unit during the hiatus period. While Gateway requires that a fair-share agreement be in effect in order to deduct fair-share fees, here the new agreement covers the hiatus period and, therefore, there was a fair-share agreement in effect. Gateway also notes such an agreement may be retroactive by its terms.

Complainant concludes with the contention that the language submitted by it and adopted by the Mediator-Arbitrator requires that fair-share be deducted and forwarded to Complainant. Sec. 111.70(3)(a) 7, Stats., makes it a prohibited practice to refuse or fail to implement an arbitration decision lawfully made under Sec. 111.70(4)(cm), Stats.

Respondent

Respondent notes that Complainant has not alleged that Respondent's actions violated their agreement, and that the parties have litigated the issue in this case before. Respondent takes the position that in the absence of an express agreement to retroactively withhold dues or fair-share, the Respondent's practice of only withholding dues prospectively upon the ratification of the contract prevails. Hence, Respondent could legally decline to retroactively withhold dues or fair-share and was legally required to do so.

Respondent asserts the issue to be decided as being whether it has violated Secs. 111.70(3)(a) 1, 2, 3, 4 or 7, Stats., when it continues a practice the parties have followed of not deducting fair-share retroactively following either a voluntary settlement or an arbitrator's award determining the successor agreement.

Respondent alleges the following facts. There have been four collective bargaining agreements between the parties and that except for an error covering a brief period following the expiration of the parties' 1982 agreement, the Respondent has never deducted fair-share fees or dues retroactively even though some of those other agreements were reached under the same circumstances as in this case. It is also noted that Complainant filed a complaint over Respondent's actions similar to the instant complaint, but subsequently requested it be dismissed after the mediation-arbitration award was received. Further, Complainant has indicated in letters in the past that it also interpreted the agreement as not providing for the retroactive withholding of fair-share. The Respondent asserts that in January of 1985 it informed Complainant, as well as the bargaining representatives of the other units, that it was ceasing the deduction of dues and fair-share fees. Complainant and Respondent did not agree to extend their 1985 agreement and both their final offers and stipulations for the new agreement were silent as to fair-share, although Complainant's final offer expressly stated its wage proposal was retroactive to January 1, 1985. Following the receipt of the mediation-arbitration award the Respondent made fair-share deductions prospectively as it had in the past.

Respondent contends that Commission case law establishes there is no legal obligation to withhold fair-share fees or dues in the absence of an agreement in effect to do so. Gateway V.T.A.E., supra, and Sauk County, Dec. No. 22552-A are cited as affirming that the Commission continues to distinguish between

contract provisions that benefit employes or primarily affect the employer-employe relationship and those that "merely affect union security." The former continues beyond expiration of the contract by operation of law, while the latter remain "solely creatures of the contract" and cease upon its expiration. While Examiner Robert's decision (Dec. No. 22552-A) dealt with the hiatus period, and this case deals with the failure to retroactively deduct fair-share for that period, both cases involve the same period of time.

The Berns decision is not dispositive as it held only that it was permissible for a union and a municipal employer to agree to retroactive fair-share. Here Complainant is claiming the employer must make retroactive deductions regardless of whether or not the parties agreed to do it.

Respondent asserts there is no evidence its actions violated 111.70(3)(a) 2 or 3, Stats., as the evidence shows it took the same action with regard to all of its bargaining units, and there is no evidence its actions affected Complainant's operation or that it exercised control over Complainant so as to render it "mere tool" of Respondent.

Regarding the alleged refusal to bargain in violation of Sec. 111.70(3)(a) 4 (and derivatively (3)(a)1), Stats., the Commission repeatedly held that to determine whether there has been a change in the status quo the terms of the agreement, bargaining history, and the history of the administration of the applicable language must be considered. City of Waukesha 7/ is cited as holding that past practice is a factor to be examined in determining the status quo. The Agreement, as it applies to the question of retroactive application of fair-share, is ambiguous. While the duration clause in the Agreement states it shall be in effect from January 1, 1985 to December 31, 1985, it was not reached until October of 1985 when the mediation-arbitration award was issued. Comission case law and language in the fair-share provision favor a finding that the duration clause is not all inclusive. Usually only economic provisions are applied retroactively and the language of Article VI, Fair-Share Agreement, required Respondent to make the deductions prospectively "once each month". Citing Secs. 6.01 and 6.02. There is no mention of, nor provision for, making retroactive deductions. The specific langauge of the fair-share provision must control over general provisions such as the duration clause.

Cutler-Hammer, Inc. v. Industrial Commission, 13 Wis.2d 618 (1961) is cited as holding that where contract language is not clear, the practical construction given it by acts of the parties is of "great force" and "entitled to great weight." The past practice here is just as clear as in that case. Both parties agree fair-share has not been deducted during a hiatus or retroactively for at least five years, except for one temporary deviation. Other than going from "modified" to "full" fair-share in the 1983-84 Agreement, there has been no change in the language of the fair-share provision over those prior agreements. Thus, under School District of Webster 8/ and general principles of contract interpretation there is neither a status quo of retroactively withholding fair-share, nor a contractual obligation to do so. Respondent notes that there is no allegation of a violation of Sec. 111.70(3)(a)5, Stats., in this case. Complainant was notified in January of 1985 of the action the Respondent would take and if Complainant wanted to change the practice, it was required to propose such a change and bargain for it. Respondent has done in this case exactly as it has any other time it had to implement a contract retroactively.

Lastly, Respondent asserts it did not refuse to implement the Award issued on October 15, 1985. There is no allegation that it refused to incorporate a fair-share provision in the parties' 1985 Agreement, nor that it refused to withhold fair-share in any month following issuance of the Award. There is also no allegation that Respondent violated the Agreement. Respondent notes fair-share was not an issue in the mediation-arbitration on the parties' 1985 Agreement. Hence, the claim must be that since the Agreement was reached through mediation arbitration, any violation of the Agreement would constitute a refusal to implement the Award. This would exceed any existing case law. Section 111.70(3)(a) 7, Stats.,

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7/ Dec. No. 20585-C, 20586-C (Schoenfeld, 9/84).

8/ Dec. No. 21312-B (WERC, 9/85).

was created as part of the statutory revision creating mediation-arbitration and is also subject to the latter's sunset provisions. It was intended as a mechanism to compel acceptance of the award on the issues in dispute, and not as a separate enforcement mechanism for any agreement decided by mediation-arbitration. On that basis, and because Respondent's actions did not violate the agreement, there was no violation of Sec. 111.70(3)(a)7, Stats.

DISCUSSION

At hearing in this case Complainant requested that the Examiner take administrative notice of the entire file and record in Sauk County, Case 67, No. 34786, MP-1686, 9/ the case decided by Examiner Roberts and at the time on appeal to the Commission. Respondent did not object to the Examiner taking administrative notice as requested. Such administrative notice has been taken. It is noted, however, that the issue before Examiner Roberts was whether the Respondent was required to continue the deduction of voluntary dues deductions and fair-share deductions from the paychecks of employes represented by Complainant after the parties' 1983-84 agreement had expired. In other words, was the Respondent required to continue such deductions during the hiatus between agreements as part of the status quo. In this case, the issue is not a matter of whether deductions were to be continued during the hiatus period, rather it is whether Respondent was required to make retroactive deductions of voluntary dues checkoff and fair-share payments from those employes back to January 1, 1985 once the parties received their mediation-arbitration award and had a collective bargaining agreement in force covering 1985.

Among the defenses raised by the Respondent is the application of the doctrines of res judicata, merger and bar and collateral estoppel to bar the instant complaint. It is concluded that for the following reasons those doctrines do not apply as a bar to Complainant's proceeding on this complaint. First, regarding res judicata, the Wisconsin Supreme Court held in Leimert v. McCann 10/ that the doctrine:

> has the effect of making a final adjudication conclusive in a subsequent action between the same parties, or their privies, not only as to all matters which were litigated, but also as to all matters which might have been litigated in the former proceedings.
>
> In order for either doctrine to apply as a bar to a present action, there must be both an identity between the parties or their privies - . . . - and an identity between the causes of action or the issues sued on . . .
>
> The threshhold question presented is whether the issues here litigated were or could have been litigated in the earlier . . . action . . .
>
> . . .

79 Wis. 2d at 293-294. (Footnote omitted) While there was a dismissal of a prior complaint by this same Complainant in 1984, 11/ there was not a "final adjudication" of the issues as the Complainant withdrew its complaint in this case, apparently based on its belief that the interest arbitration awards it and its co-complainant received "resolved all outstanding issues."

9/ Dec. No. 22552-A (Roberts, 11/85), Order Modifying Examiner's Findings of Fact and Affirming Conclusion of Law and Order, Dec. No. 22552-B (WERC, 6/87). It is noted that in its decision the Commission amended the Examiner's Finding of Fact 6 to include a finding that Article VI constituted a voluntary dues deduction provision as well as being a fair-share provision.

10/ 79 Wis. 2d 289 (1976)

11/ Dec. No. 21128-B (McLaughlin, 6/84).

As noted previously, Examiner Robert's decision involved the issue of whether the Respondent was required to continue the deductions during the hiatus, while the issue in this case is whether the Respondent was required to make such deductions retroactively once there was an agreement pursuant to a mediation-arbitration award covering the year in question. Since the mediation-arbitration award was issued after the hearing was held and briefs were filed in Examiner Robert's case, the issue of retroactive deductions was not raised, and could not have been timely raised, in that case. Hence, neither Examiner Robert's decision, nor the Commission's affirmance of the decision, constitute res judicata as to the instant complaint.

As to collateral estoppel, the Wisconsin Supreme Court has held:

> Collateral estoppel precludes relitigation of an issue of ultimate fact previously determined by a valid final judgment in an action between the same parties. Ashe v. Swenson, supra, at 443. This doctrine applies:
>
> ". . . where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged . . ." (Emphasis added.) C.I.R. v. Sunnen, 333 (U.S. 591, 599, 600, 68 Sup. Ct. 715, 92 L. Ed. 898 (1948).
>
> The second proceeding "must involve . . . the same bundle of legal principles that contributed to the rendering of the first judgment." C.I.R. v. Sunnen, supra, at 602.

State ex. rel. Flowers v. H & SS Department, 81 Wis 2d 376, 387 (1977). The facts and the issue regarding whether retroactive deductions are required having not been present in the prior cases, the doctrine of collateral estoppel does not apply.

With regard to merger and bar, that defense is available where a party's claims are deemed to have been merged and the settlement of those claims bars further claims by that party against the party with whom the claims were settled. Raught v. Dentman, 69 Wis. 2d 130, 138-139 (1974). There is no evidence in the record indicating that the parties in this case have settled any claims regarding Complainant's right to retroactive deductions for 1985. Hence, the defense does not apply.

As noted initially, this is not a case involving the issue of what an employer must maintain as the status quo during a hiatus between agreements. Although the same period of time addressed in Examiner Robert's case is ultimately addressed here, the legal issues in the two cases are distinct from one another. There are a number of sub-issues involved in this case, including whether, by the terms of the Complainant's final offer and the Award and the fair-share and duration provisions of the parties' 1985 agreement, there was a fair-share agreement in effect covering the period in question. Deciding that issue requires a determination as to what the award provides. Respondent notes that fair-share was not at issue in the mediation-arbitration and asserts that, therefore, a charge of refusal to implement the award in violation of Sec. 111.70(3)(a) 7, Stats., would not apply. It is also noted by Respondent that Complainant does not allege a violation of Sec. 111.70(3)(a)5, Stats. However, it is asserted that a violation of contract is really what is being alleged and that the issue ought to be deferred to arbitration.

Section 111.70(3)(a) 7, Stats., provides that it is a prohibited practice for a municipal employer: "To refuse or otherwise fail to implement an arbitration decision lawfully made under sub. (4)(cm)." The Complainant's final offer included the following proposal: "IX. All provisions of the Labor Agreement of 1983-84 except as modified above." However, fair-share/voluntary dues deductions was not in issue in the arbitration on the parties' 1985 Agreement. The question of whether a violation of a provision not in issue in the interest arbitration can be a basis of a finding of a violation of Sec. 111.70(3)(a) 7, Stats., is one that has not been addressed before this by the Commission.

The Examiner is not convinced that it was intended that Sec. 111.70(3)(a) 7, Stats., generally provide an additional or alternative basis of finding a prohibited practice where it is alleged that a provision of an agreement has been breached. Rather, as Respondent argues, that prohibited practice provision was added at the same time as Sec. 111.70(4)(cm), Stats., and was intended to ensure that an award issued under that provision was implemented in compliance with the award. However, it is concluded that where, as here, the alleged violation arises in the context of implementing the new agreement pursuant to the award, as opposed to after the implementation of the award, and the issue goes to whether a provision of the agreement is to be given retroactive effect under the award, a (3)(a)7 charge will lie. This is true even if the provision in question was not directly in issue in the interest arbitration. In this case the issue is whether the Respondent complied with the award by implementing the fair-share/voluntary dues deduction provision prospective-only. Further, it is noted that the Complainant included in its final offer the rest of the agreement that had not been changed and that the Award directed that "the Union's proposal contained in Exhibit "A" (Complainant's final offer) be incorporated into an agreement containing the other items to which the parties have agreed." The Mediator-Arbitrator also concluded that the Complainant's final offer was for a one year period. Thus, to that extent it could be said that the provisions, while not directly in issue, were part of the Complainant's final offer and, hence, part of the award to be implemented. 12/

Having concluded that a Sec. 111.70(3)(a)7, Stats., violation may be found under the circumstances present in this case, it is necessary to determine whether there was a violation. For the following reaons it is concluded that the Respondent did violate Sec. 111.70(3)(a)7, Stats. by refusing to implement the fair-share/voluntary dues deduction provision retroctively to January 1, 1985. First, contrary to Respondent's contention, the language of Article VI, Fair-Share Agreement, does not require that the provision be implemented prospectively. The language referring to monthly deductions does not preclude making those deductions retroactively. At most the language is, as Respondent contends, ambiguous as to whether it is to be applied retroactively. The Respondent contends that in that case the general duration provision should not be applied to require that all provisions of the agreement be applied retroactively, rather, bargaining history and past practice as to the administration of the provision should be determinative. Article XXXII, Duration, states that "THIS AGREEMENT shall be effective as of the first day of January, 1985, and shall remain in full force and effect through the 31st day of December, 1985, . . ." Respondent cites Joint School District No. 15 and Prairie Farm Joint School District No. 5 in support of its position. In Joint School District No. 15 the Commission concluded:

> in the absence of a specific provision setting forth that all provisions of the collective bargaining agreement involved are to be retroactively applied from the initial date of the term of the agreement, provisions in the agreement affecting condition of employment, which, if retroactively applied, would negate any action by the employer, which action was otherwise proper prior to the date of the execution of the collective bargaining agremeent involved, will not be applied by the Commission in determining whether the Employer violated said agreement.

At 9. Citing, Prairie Farm. The Commission held that a nonrenewal occurring prior to the execution of the labor agreement, although falling within the term of the agreement, was not subject to the agreement's nonrenewal provisions. In Prairie Farm, cited above with approval, the Examiner held that:

> Generally speaking contracts are entered for the purpose of

At 11. The Examiner went on to hold that a "cause" standard for discharge was not to be applied retroactively.

This Examiner notes that a fair-share/voluntary dues deduction provision is most likely to be considered an "economic item," easily capable of being given retroactive effect, rather than a non-economic "condition of employment" that involves reversing a discretionary action that was proper at the time. Thus, the above-cited decisions would appear to support a conclusion that the provision should be given retroactive effect as Complainant contends. While the decision to cease the deductions during the hiatus was within Respondent's discretion at the time, that was so due to the unique status of the provision under the law of status quo, and that decision is not "reversed" by the retroactive implementation of fair-share/voluntary dues deduction in the same sense that a decision to nonrenew or discharge an employe in the absence of a "cause" standard is reversed by the retroactive application of such a standard subsequently agreed to by the parties. Complainant was awarded a one year agreement and under the foregoing reasoning it is concluded that the duration provision required by the award covers fair-share/ voluntary dues deductions. 13/

Having reached the above conclusion, the parties' alleged past practice is not relevant. However, even if past practice was deemed to be relevant, the evidence is not sufficient to establish that a binding past practice existed. For a practice to be given binding effect it "must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties. However, the mutual acceptance may be tacit." 14/ The alleged practice in this case consists of two occurrences. Upon attaining an agreement covering 1981 late in 1981 there were no fair-share fees or dues deducted retroactively to January of that year and Complainant did not object. However, the parties' 1981 agreement contained a "modified" fair-share provision whereby fair-share was to apply only to those persons employed following the agreement's ratification. The second occurrence was in 1984 following expiration of their 1982 agreement when the parties received a mediation-arbitration award covering 1983 and 1984. The Complainant initially sought fair-share fees retroactively for 1983, but subsequently directed Respondent not to make retroactive deductions in order to avoid hard feelings against Complainant among the fair-share fee payors in the unit. Voluntary dues had been hand collected by Complainant during the hiatus between the expiration of the 1982 agreement and the receipt of the award covering 1983 and 1984. Under the foregoing circumstances it does not appear that any of the elements necessary to find a binding past practice are present in this case.

It is concluded that by refusing to deduct fair-share fees/voluntary dues retroactive to January 1, 1985 Respondent refused to fully implement a lawful mediation-arbitration award in violation of Sec. 111.70(3)(a)7, Stats., and derivatively of Sec. 111.70(3)(a)1, Stats. Since the Award and resulting Agreement covered the issue of retroactivity there was no duty to bargain regarding the matter, and hence, no basis for finding a violation of Sec. 111.70(3)(a)4, Stats. There is also no evidence of coercion or discrimination within the meaning of Sec. 111.70(3)(a)3, Stats.

Complainant also alleges that Respondent's conduct violated Secs. 111.70(3)(a) 2, Stats. That provision provides, in relevant part, that it is a prohibited practice for a municipal employer:

> To initiate, create, dominate or interfere with the formation of administration of any labor or employee organization or contribute financial support to it,
>
> . . .

13/ This conclusion makes Sec. 111.70(3)(a)6, Stats., unavailable as a defense in this case, as parties may lawfully agree to the retroactive application of a fair-share provision. Berns, supra.

14/ Elkouri and Elkouri, How Arbitration Works (Washington D.C.: BNA, 1973) 3rd ed., p. 391.

In order to find a violation of this provision, the employer's conduct must rise to the level of "active involvement of a magnitude which threatens the independence of a labor organization as the representative of employe interest." 15/ While the nonretroactive implementation of the award as to fair-share can be presumed to have had a negative impact on Complainant's operation, the Respondent's action was based on its interpretation of the award and the resulting agreement and was not an attempt to dominate the Complainant, nor did it tend to have that effect. Therefore, Respondent's action does not fall within the conduct contemplated by Sec. 111.70(3)(a) 2, Stats.

Remedy

Complainant has requested as part of the relief that Respondent be ordered to pay costs and attorneys fees in addition to damages and interest. Pursuant to the conclusions reached in this decision "damages" in the form of the fair-share fees that were not deducted will be ordered by requiring the Respondent to make the retroactive deductions, 16/ plus interest to be paid by Respondent at the statutory rate from the date the retroactive deduction would have been made following receipt of Arbitrator Rice's award. Section 111.70(7m)(e), Stats., also provides the following regarding relief:

> (e) Civil Liability. Any party refusing to include an arbitration award or decision under sub. (4)(cm) in a written collective bargaining agreement or failing to implement the award or decision, unless good cause is shown, shall be liable for attorney fees, interest on delayed monetary benefits, and other costs incurred in any action by the nonoffending party to enforce the award or decision.

In a recent decision the Commission concluded the following regarding the relief available under that provision when a party refuses to implement an award issued under Sec. 111.70(4)(cm), Stats.,:

> Second, the County overstates the breadth of the New Berlin decision and of the Sec. 111.70(7m), Stats., mandate. In New Berlin, the municipal employer altogether refused to implement the fair share agreement contained in the interest arbitration award involved, arguing in part that the provision was facially unconstitutional. Since facial constitutionality could have been challenged through a pre-arbitral Sec. 111.70 scope of bargaining declaratory ruling proceeding, the Commission concluded that the City lacked good cause for its post-award refusal to implement on that ground. Where it is the legality of the implementation of a facially constitutional fair share provision that is questioned, the New Berlin rationale would not apply since the Commission has squarely held that that question cannot be challenged through a pre-arbitral scope of bargaining declaratory ruling. E.g., Richland County, Dec. No. 23103 (WERC, 12/85). It is true that if a municipal employer elects to refuse to pay over monies called for by the terms of a fair share agreement that is in effect, because of doubts as to whether the Union's administration of the provision meets the Hudson requirements, it would risk the full range of grievance arbitration or prohibited practice remedies if its concerns about legality of administration turn out to be unfounded. Nevertheless, as noted above, neither New Berlin nor the terms of Sec. 111.70(7m)e, Stats., would require that all of the remedial elements mandated in that statutory provision would automatically apply in each such instance.

15/ Turtle Lake School District, Dec. No. 22219-B (McLaughlin, 6/85), aff'd by operation of law, Dec. No. 22219-C (WERC, 7/85); Citing, Kewaunee County, Dec. No. 21624-B (WERC, 5/85) and Winnebago County (Social Services), Dec. No. 16930-A, (David, 8/79), aff'd by operation of law, Dec. No. 16930-B (WERC, 9/79).

16/ This would also include any voluntary dues that the Complainant was unable to collect by hand.

Grant County, Dec. No. 24128 (WERC, 12/86), at 5-6.

It is noted that in this case the dispute was not whether the Award was to be implemented at all regarding fair-share/voluntary dues deduction, but whether the Award and the resulting agreement required that it be implemented retroactively. The record establishes that the parties had an ongoing dispute as to whether the Respondent was required to continue the deductions during the hiatus between agreements, and the Respondent prevailed in that dispute both before an examiner and the Commission. Although the parties do not agree on the reasons why, the record also indicates that the deductions had not been made retroactively in the past. It appears from the foregoing that this case involved a good faith dispute as to what the Award and resulting agreement required. It is not a case of a party knowingly and intentionally refusing to implement what the award admittedly requires, and unlike the situation in New Berlin, 17/ there was no pre-arbitral forum in which the dispute could have been resolved. Based upon the foregoing, it is concluded that it would be inappropriate to award costs and attonreys fees in this case.

Dated at Madison, Wisconsin this 7th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

17/ Dec. No. 17748-A (WERC, 5/81).