STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MENOMINEE TEACHERS EDUCATION ASSOCIATION,		
Complainant,		Case 19 No. 36999 MP-1854
vs.		Decision No. 23849-A
MENOMINEE INDIAN SCHOOL DISTRICT,		
Respondent.		

Appearances:
Mr. Michael L. Stoll, Staff Counsel, and Mr. Gordon E. McQuillen, Attorney, Wisconsin Education Association Council, 101 W. Beltline Hwy., P. O. Box 8003, Madison, Wisconsin 53708, for the Association.
Mulcahy & Wherry, S.C., 414 East Walnut Street, P. O. Box 1103, Green Bay, Wisconsin 54305-1103 by Mr. Dennis W. Rader, for the District.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Menominee Teachers Education Association filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on May 21, 1986, in which it alleged that the Menominee Indian School District had committed prohibited practices within the meaning of Sec. 111.70(3)(a)1 and 4 of the Municipal Employment Relations Act. The Association amended its complaint on September 24, 1986 in which it alleged additional facts and a violation of Sec. 111.70(3)(a)1, 3 and 4 of MERA. On November 10, 1986 the parties waived hearing in the matter and submitted the case to Examiner Jane B. Buffett, a member of the Commission's staff on a written record consisting of stipulated facts, stipulated documents and the Commission's case file in the matter. Briefs and reply briefs were submitted, the last of which was received by March 12, 1987.

FINDINGS OF FACT

1. Menominee Teachers Education Association (the Association), is a labor organization, with offices at 101 West Beltline Highway, Madison, Wisconsin.

2. Menominee Indian School District (the District), is a municipal employer, with offices at Keshena, Wisconsin.

3. The Association is the exclusive bargaining representative of certain District employes in a bargaining unit consisting of all certified, full-time and regular part-time teachers (1/2 time or more) including, but not limited to: librarians, counselors, non-supervisory social workers, psychologists and long term substitutes (employed 14 weeks or more).

4. The Association and the District were parties to a collective bargaining agreement in effect from August 15, 1984 through August 14, 1986. The parties agreed to extend all portions of that agreement relevant to the instant dispute through August 14, 1987. The agreement contains the following pertinent provisions:

ARTICLE II

Management Rights

> Management retains all rights to possession, care, control and management that it has by law, and retains the right to exercise these functions during the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly, and equivocally (sic) restricted by the express terms of the Agreement. These

rights include, but are not limited by enumeration to the following rights:

1. To establish and require observance of reasonable work rules and schedules of work;

2. To hire, promote, transfer, schedule, and assign employees in positions with the school system;

3. To establish quality standards and evaluate employee performance in accordance with evaluation procedure set forth in this contract;

4. To maintain efficiency of school system operations;

5. To take whatever action is necessary to comply with State or Federal laws;

6. To determine the methods, means and personnel by which school system operations are to be conducted;

7. To determine the educational policies of the school district;

8. To determine the means and methods of instruction, the selection of textbooks and other teaching material, and the use of teaching aids;

9. Nothing in this Agreement shall limit the district's contracting or subcontracting of work or shall require the district to continue in existence of any of its present programs in its present form and/or location or on any other basis.

ARTICLE V

Fair Share

A. . . .

B. The employee agrees that effective fifteen (15) days after the date of the initial employment or thirty (30) days after the opening of school, it will deduct an amount equivalent to the monthly dues certified by the Association. The Association will notify the district of the amount prior to any deductions being made.

C. . . .

ARTICLE VI

Emergency

A. Energy Crisis - In the event that school operations must be curtailed because of an energy crisis, the determination as to how to meet such crises shall be made by the school district. Changes in terms and conditions of employment (other than salaries and wages) shall be negotiated between the Board and the Association.

B. Emergency Crisis - In the event that school operations must be curtailed because of failure of the physical plant to meet minimum State and local health and safety codes, fire, and acts of God, the determination as to how to meet such crises shall be made by the school district. Changes in terms and conditions of employment (other than salaries and wages) shall be negotiated between the Board and the Association. Teacher contracts will be fulfilled within the fiscal year.

ARTICLE VIII - Grievance Procedure

. . .

J. This Article shall not prevent the Association from discussing mutual concerns with the Administration.

ARTICLE XVII

Term of Agreement

A. . . .

B. This Agreement was reached as a result of collective bargaining and represents the full and complete agreement between the parties and supersedes all previous agreements between the parties. It is agreed that any matter relating to this current contract term, whether or not referred to in this Agreement, shall not be open for negotiations except as the parties may specifically agree thereto. All terms and conditions of employment not covered by this Agreement, which are not mandatory items for negotiations, shall continue to be subject to the Board's direction and control. No verbal agreements or past practices shall alter the written Agreement between the parties.

C. . . .

5. Since at least the 1976-1977 school year, and prior to September 1, 1985, the District had allowed employes in the bargaining unit represented by the Association to authorize the District to withhold voluntary deductions (i.e., withholding deductions not required by state or federal law or by the collective bargaining agreement between the District and the Association) from their paychecks for any employe-selected purpose, and the District withheld the voluntary deductions authorized by the employes and forwarded the monies withheld to the organizations designated by the employes, all without charge to the employes.

6. District Superintendent John Tomasich, in a memo to all staff members dated August 27, 1985, announced that, effective September 1, 1985 the District would be charging $1.00 per transaction for voluntary payroll deductions. The memo noted the decision was a result of the increased cost of bookkeeping, postage and office time. The District's concern over an increase in the number of employes using the voluntary payroll deduction was also a factor in the decision. The payroll deduction charge was implemented as noted in the Superintendent's memo.

7. United Northeast Educator's Executive Director Ronald Bacon, on behalf of the Association, wrote to Tomasich requesting the following information regarding the imposition of the service charge:

1. Under what authority (statute or contractual) did the District make said decision?

2. Under what line item in the revenue portion of the approved budget allows for the additional income?

3. How did the District arrive at the fee of $1.00?

4. What person, at what "agency", gave the District advise (sic) alledging that the fee was legally OK?

On September 23, 1985 Tomasich responded to Bacon by letter. On March 19, 1986 Tomasich sent a memo to the Board of Education reporting the following:

> I received a phone call from Mr. Ron Bacon of United Northeast Educators requesting that the Board rescind its unilaterial (sic) decision to charge $1.00 for deductions made.

Mr. Bacon reported to me that (1) the unilateral decision by the Board did not comply with the Master Contract, (2) that the unilateral change affects working conditions and wages, (3) that since this unilateral change affects working conditions and wages, it should have been negotiated.

I indicated to Mr. Bacon that this decision was made by the Board under "Management Rights", however, that I would present, to the Board, his request for their consideration.

It would be my suggestion that the Board review the matter and place the item on the agenda for the meeting on April 7, 1986, at which time a decision can be made on Mr. Bacon's request.

Should you have any questions concerning the matter, please contact me.

8. Tomasich, in a notice to all staff members on or about August 27, 1986, notified employes that they would have to sign the following authorization form to have such voluntary deductions made from their pay checks.

DEDUCTION AUTHORIZATION FORM

I, _____ , do hereby authorize the Menominee Indian School District to deduct from each of my payroll checks and forward to the following organizations the stated amounts of money listed below:

$_____ to _____ .
$_____ to _____ .
$_____ to _____ .
$_____ to _____ .
$_____ to _____ .

I understand that a service fee of $1.00 per transaction (four deductions - $4.00) will be deducted to be retained by the District for the cost of this service.

Signed: _____

Dated: _____

9. Bacon subsequently appeared before the District's Board to request bargaining over the authorization form noted in Finding of Fact 8, above. The Board refused the request.

10. Section 103.457, Stats., provides:

> Listing deductions from wages
> An employer shall state clearly on the employe's pay check, pay envelope, or paper accompanying the wage payment the amount of and reason for each deduction from the wages due or earned by the employe, except such miscellaneous deductions as may have been authorized by request of the individual employe for reasons personal to himself. A reasonable coding system may be used by the employer.

11. The allocation of the cost of a voluntary payroll deduction is primarily related to wages, hours and conditions of employment.

12. The imposition of a service charge for voluntary payroll deductions was not bargained between the parties.

13. The Association did not give up its right to bargain by either contract or inaction.

14. There is no evidence the District bargained with individual employes.

15. There is no evidence the District discriminated against employes in regard to any conditions of employment.

CONCLUSIONS OF LAW

1. The allocation of the cost a voluntary payroll deduction is a mandatory subject of bargaining.

2. By unilaterally deciding to charge $1.00 service fee for voluntary payroll deductions, and by implementing that decision, the District violated its duty to bargain and thereby committed a prohibited practice within the meaning of Sec. 111.70(3)(a)4 and, derivatively, of Sec. 111.70(3)(a)1, Stats.

3. By seeking authorization of individual teachers for the payroll deduction and notifying them of the $1.00 service charge per deduction, the District did not bargain individually with its employes, and thus did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)1 and 4, Stats.

4. There is no evidence the District discriminated against employes in regard to any condition of employment, and thus, the District did not commit a prohibited practice within the meaning of Sec. 111.70(3)(a)3, Stats.

ORDER 1/

IT IS HEREBY ORDERED that the Menominee Indian School District, its officers and agents, shall immediately:

1. Cease and desist from making unilateral changes in mandatory subjects of bargaining without bargaining with the collective bargaining agent.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Act:

   (a) Make employes whole for the loss they have incurred as a result of the District's prohibited practice by reimbursing them for service charges for voluntary payroll deductions.

   (b) Notify all of its employes by posting, in conspicuous places in its place of business where employes are employed, copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the District Administrator and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

   (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of the Order, as to what steps have been taken to comply herewith.

1/ 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.

(Footnote 1 Continued on Page 5)

3. IT IS FURTHER ORDERED that the remaining portions of the complaint, shall be and hereby are dismissed.

Dated at Madison, Wisconsin this 13th day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/ Examiner

1/ Continued

(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

"APPENDIX A"

NOTICE TO ALL EMPLOYES

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

WE WILL NOT impose a service charge for voluntary payroll deductions without fulfilling our duty to bargain over said charge with the exclusive bargaining representative, Menominee Education Association.

WE WILL reimburse employes for service charges for voluntary payroll deductions.

WE WILL NOT change any matters primarily related to wages, hours, and conditions of employment without fulfilling our duty to bargain with the exclusive bargaining representative, Menominee Education Association.

Menominee Indian School District

By _____
John Tomasich, Superintendent

Dated this _____ day of _____ , 1987.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MENOMINEE INDIAN SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint alleges the District violated MERA by refusing to bargain, when, during the term of the contract, it unilaterally discontinued the practice of offering free voluntary payroll deductions to its employes. The District does not deny the events alleged in the complaint, and the parties have entered into a factual stipulation. However, the District responded it had not committed a prohibited practice since voluntary payroll deductions and the payments of fees for such deductions are permissive subjects of bargaining, and further, the Association had waived by contract, its right to bargain the subject.

POSITIONS OF THE PARTIES

Fundamental to the Association's position is its assertion voluntary payroll deductions and their cost are mandatory subjects of bargaining. Since it believes it never waived its right to bargain over changes in mandatory subjects, the District is obligated to bargain before implementing such a change. It further asserts the District committed a second unilateral change, as well as individual bargaining, by its September, 1986 action of requiring individual employes to sign authorization forms for the deductions which indicated an assent to the $1.00 service charge.

The District asserts the unilateral change in the payroll deduction was within the rights assigned to the District by the collective bargaining agreement. It asserts ARTICLE II - Management Rights preserves for the District all control over the District excepting those rights explicitly limited by contract. It asserts the Association has waived the right to mid-term bargaining through ARTICLE II - Management Rights, ARTICLE V - Fair Share, ARTICLE VI - Emergency, ARTICLE VIII - Grievance Procedure, and ARTICLE XVIII - Term of Agreement. It argues there is no evidence the District ever led the Association to believe the payroll deduction was permanent. The decision to require the $1.00 service charge, according to the District, was reasonably related to the cost of the payroll deduction and within Chapter 120, Stats., regulating School District Government, which, among other things, outlines duties of the School District Treasurer. Finally, the District argues in the alternative that payroll deductions are not a mandatory subject of bargaining, and, consequently, the District is free to terminate the practice without bargaining. In its reply brief, the District reasserts its earlier arguments, and adds that the Association cannot logically argue both that the District refused to bargain and that it engaged in individual bargaining with employes. Additionally, it asserts the Association waived its right to bargain when it extended the contract, and finally it disputes the Association's interpretation of the Commission case law regarding ARTICLE XVII - Term of Agreement.

The Association, in its reply brief, elaborates its argument that the contract language did not waive its right to bargain and further argues it could not be found to have waived its rights by inaction, since it had no notice of the District's intention prior to entering into the 1984-86 contract.

DISCUSSION

I. Alleged Violation of Sec. 111.70(3)(a)1 - Unilateral Change During Term of the Collective Bargaining Agreement.

A. Mandatory/Permissive Nature of the Allocation of the Costs of Voluntary Dues Deduction

Absent a valid defense, an employer is prohibited by MERA from changing wages, hours and conditions of employment relating to mandatory subjects of bargaining until it has discharged its duty to bargain, unless the labor organization has waived its right to bargain said subject. 2/ The first line of

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2/ E.g. Brown County, Dec. No. 20857-B (WERC, 7/85).

inquiry, then, is whether the allocation of costs of voluntary payroll deductions are a mandatory subject. Mandatory subjects are those which "primarily relate" to wages, hours and conditions of employment in contrast to those subjects that "primarily relate" to formulation or implementation of management policy. 3/

The practice at issue in this case was a fringe benefit. At the request of an employe, the District deducted certain monies from the employe's paycheck and remitted them to the designated payee, all without charge to the employe. This service was an item of value which involved the indirect cost to the District of the labor involved in administrating the deduction and the direct cost of stamps and stationery. Such fringe benefits are regularly found to be mandatory subjects of bargaining as in the case of insurances, 4/ parking spaces, 5/ and Christmas turkeys. 6/ This is not a case in which an item, arguably a fringe benefit, is basically a matter of management policy, such as, for example, the provision of in-service training for employes. 7/ There is no allegation the practice interfered with management policy, indeed the District's notice to its employes cites the economic cost of deductions as the reason for the service charge. Economic costs to an employer does not, absent more, make a subject permissive. 8/ Clearly, then, the allocation of the costs of voluntary payroll deductions is a mandatory subject of bargaining.

This conclusion stands despite the holding of Sauk County, 9/ cited by the District for the proposition that payroll deductions are permissive. In that case, the employer had discontinued the fair share and dues deduction during the hiatus following contract expiration, and the Examiner found the employer was not obligated to maintain those provisions. Even assuming, for the sake of analysis, that the imposition of a service charge for voluntary payroll deductions in the instant case are the same as dues deductions, Sauk County does not establish they are permissive subjects of bargaining. Dues deductions fall into the category of subjects which are mandatory as regards the employer's duty to bargain in contract negotiations and in mid-term, but which do not have to be maintained by the employer following contract expiration. 10/ These subjects are those that do not define the employer-employe relationship, but rather run to the benefit of the union as an institution. Thus, fair share and dues deductions do not survive the hiatus because they primarily benefit the union, not because they are permissive subjects. 11/

B. Alleged Waiver by Contract.

The District argues in the alternative that even if payroll deductions are mandatory subjects of bargaining, the District was excused from that duty by the Association's contractual waivers. In examining alleged contractual waivers of

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3/ Beloit Education Association v. WERC, 73 Wis.2d 89 (1977) and City of Brookfield v. WERC, 87 Wis.2d 819 (1979).

4/ E.g. Milwaukee Sewerage Commission, Dec. No. 17302, (WERC, 9/79).

5/ City of Milwaukee, Dec. No. 19091 (WERC, 10/01).

6/ Richland County (Pine Valley Manor), Dec. No. 22939-A (Roberts, 4/86).

7/ Milwaukee Board of School Directors, Dec. No's. 17504-8 (WERC, 12/79).

8/ Madison Metropolitan School District, Dec. No's. 22129 and 22130 (WERC, 11/84) Cert. denied 134 Wis.2d 457 (1987).

9/ Sauk County, Dec. No. 22552-A (Roberts, 11/85), aff'd. Dec. No. 22552-B (WERC, 6/87).

10/ Gateway Vocational, Technical and Adult Education District, Dec. No. 14142-A (Greco, 1/77), aff'd. Dec. No. 14142-B (WERC, 2/78).

11/ See also, as regards fair share, Town of Allouez, Dec. No. 15022-B (WERC, 1/77).

the right to bargain, the Commission has long held that a waiver of this statutory right must be clear and unambiguous. 12/ In State of Wisconsin, 13/ the Commission was confronted with a zipper clause similar to that in the instant ARTICLE XVII - Term of Agreement, which arguably waived bargaining as to all subjects not incorporated in the agreement. Analyzing that clause, the Commission stated:

> Blanket waivers of the duty to bargain, such as that contained in the foregoing language, generally have been construed restrictively in refusal to bargain cases, and waiver has been found only where an examination into the background shows that the union clearly and unmistakably waived its interest in the matter. The reason for not giving blanket waivers an expansive construction, as though these were mere contract interpretation cases, is that the origin of the duty to bargain is statutory, not contractual. Further, the backdrop to this legislation "recognizes that there are 3 major interests involved: that of the public" as well as that of employers and employes. Moreover, the legislature has found as a fact that collective bargaining is an essential ingredient for labor peace. Consequently, in view of the public interest and the statutory nature of the duty to bargain, the rule has evolved that waiver of the duty to bargain can be found only on evidence which is clear and unmistakable. (Internal footnotes omitted)

The Commission further explained that such waivers would be given effect only when bargaining history or other circumstances indicated clear intent to waive bargaining. That view has been subsequently reaffirmed in Deerfield Community School District 14/ and State of Wisconsin. 15/

Under this standard, none of the cited provisions effectively waives the Association's right to bargain the District's unilateral change in the past practice regarding voluntary deductions. The first provision cited, ARTICLE II - Management Rights, merely preserves for the District the right it has under MERA excepting those rights it has expressly modified by contract, and is not a waiver of bargaining rights. 16/

The grievance procedure also fails to waive bargaining rights. That provision, enabling the Association and District to discuss matters of mutual concern, is best interpreted in light of its context, the grievance procedure and there is no evidence the parties intended it to substitute discussion for bargaining in all matters subject to MERA. Nor is there evidence to justify transforming an enabling provision, which enables discussion to take place in addition to the traditional grievance procedures, into a restrictive provision, which waives bargaining.

The next alleged waiver is found in ARTICLE V - Fair Share. In cases where the parties have bargained over a matter and reached an agreement which is sufficiently detailed and comprehensive, the labor organization is deemed to have waived bargaining over other details concerning the same matter. 17/ Similarly, waiver is found where the agreement clearly relegates an area of action, such as the right to establish reasonable work rules, to the employer. 18/ The question,

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12/ City of Brookfield, Dec. No. 11406-A (Bellman, 7/73) aff'd. (WERC, 9/73).

13/ Dec. No. 13017-D (WERC, 5/77).

14/ Dec. No. 17503 (WERC, 12/79) aff'd. CirCt Dane, 1/81.

15/ Dec. No. 19341 (WERC, 1/82).

16/ City of Green Bay, Dec. No. 12411-B (WERC, 4/76 Slavney dissenting).

17/ E.g. Jt. School District No. 1, City of Green Bay, Dec. No. 16753-A (Yaeger, 12/79) Aff'd. Dec. No. 16753-B, 6/81) Aff'd. Dec. No. 81 CV 1947, CirCt Brown, 1/83;

18/ Milwaukee County, Dec. No. 15420-A (WERC, 6/82).

then is whether the fair share provision waived bargaining over voluntary payroll deductions. Both fair share and voluntary payroll deductions are amounts of money deducted from employes' paychecks and remitted to a third party payee, but the similarity ends there. Whereas the voluntary deductions could involve any payee and any amount of money, the fair share involves only one payee, the Association, and the same amount is deducted from each affected employe's paycheck. More important, the most distinguishing characteristic of fair share is that it is an involuntary assessment charged employes who are not members of the Association. The involuntary nature of fair share clearly differentiates it from the voluntary payroll deduction. Thus since fair share and voluntary payroll deductions are separate subjects, by agreeing to the fair share provision, the Association did not waive its right to bargain over a change in the voluntary payroll deduction.

Additionally, the District cites ARTICLE VI - Emergency which gives the District the right to determine how to meet the crises of energy or physical plant problems while providing that changes in terms and conditions of employment (other than salaries and wages), are bargainable. Contrary to the District's argument, however, the specific inclusion of those statutory rights does not indicate the parties intended to waive other statutory bargaining rights, for not only does the Commmission decline to lightly infer a waiver of statutory rights (as discussed above), but even under principles of ordinary contract interpretation, the express inclusion of some bargaining rights must be viewed in the light of the provision in which it appears: A provision that gives the District unilateral powers to respond to certain designated emergencies.

Finally, the language of ARTICLE XVII - Term of Agreement Subsection A must be taken on its face, for what it is: A duration provision that creates a one-year duration for economic issues and a two-year duration for other issues. Surely, this duration provision is not a clear and unmistakable waiver of statutory bargaining rights.

The above conclusion that the Association did not waive its bargaining rights is strengthened by consideration of the nature of the action taken by the District. The District's action was the discontinuation of a past practice rather than the establishment of a wholly new condition of employment. As such, it falls into the category of matters specifically addressed in State of Wisconsin. In rejecting the employer's defenses in that case, the Commission said:

> Such contractual literalism, however, would mean the union has agreed that the employer unilaterally may abrogate the common law of the shop and all employe rights thereunder. It is most unlikely the parties intended such a result for two reasons: first, rights in past practices and customs in the public sector enjoy constitutional protection, the waiver of which is perceived niggardly; and, second, in the labor relations context, such an abrogation of the common law of the shop probably is impossible. "We must assume that intelligent negotiators acknowledged so plain a (point) unless they state a contrary rule in plain words." Finally, such contractual literalism would jeopardize the objective of labor peace which the legislature sought to secure by imposing on employers the duty to bargain. Just as the courts presume the common law continues unless the legislature expressly provides otherwise, and strictly construe statutes in derogation of the common law, so also it is a far more reasonable presumption that the parties intend to continue the common law of the shop, including the rights and duties thereunder, and that the zipper/waiver provision of the labor agreement does not in itself repeal rights under prior practices and customs. 19/ (Internal citations omitted)

C. Alleged Waiver By Inaction

The District asserts the Association waived its right to bargain, at least for the 1986-87 contract period when it agreed to extend the contract expiring August 14, 1986, without renewing its demand to bargain the service charge, citing

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19/ State of Wisconsin, see footnote 12/ above.

as authority City of Stevens Point. 20/ However, the Association filed the instant complaint on May 21, 1986, prior to the expiration of the 1984-86 contract. Therefore, the District had notice of the Association's demand to bargain the imposition of the service charge, and the Association was not, by agreeing to the extension, waiving its bargaining rights.

In summary, since the Association had not waived its right to bargain the cost of the voluntary payroll deduction by either contractual waiver or by inaction, the District, by unilaterally discontinuing the past practice, committed a violation within the meaning of Sec. 111.70(3)(a)4 Stats., and derivatively, Sec. 111.70(3)(a)1 Stats.

II. Alleged Violation of Sec. 111.70(3)(a)4, Stats. - Individual Bargaining

The Association alleges that by establishing an authorization form which included the employe's acknowledgment of the $1.00 service charge, and by requiring employes to execute the form before payroll deductions would be implemented, the District bargained with individual employes. The record contains no more than the form itself and the date of its implementation. With no evidence of any personal interaction between agents of the District and individual employes, the authorization form by itself does not demonstrate the District sought to bargain individually, by either seeking to induce employes to assent to the discontinuation of the voluntary deduction practice, or by seeking to induce them to encourage the bargaining representative to consent to the change. This finding is further supported by the existence of Sec. 103.457, Stats., 21/ which addresses authorization of paycheck deductions. The form on its face purports to accomplish no more than the clear authorization of deductions and acknowledgment of the service charge. Although there is no evidence of the District's intent in noting on the form the $1.00 service charge for the deduction, the form could conceivably serve as notification to the employe of the service charge, or as accounting for the full salary payment. Given the presence of several possible lawful uses of the authorization form, and the absence of clear and convincing evidence of individual bargaining, the establishment and issuance of the authorization forms is not found to be individual bargaining and that portion of the complaint is dismissed.

III. Alleged Violation of Sec. 111.70(3)(a)3, Stats. - Discrimination.

Inasmuch as there is no evidence whatsoever to support a finding that the District encouraged or discouraged membership in the Association by discrimination in regards to hiring, or tenure, as other terms and conditions of employment, that portion of the complaint is dismissed.

IV. Remedy

The Examiner has issued an order that the District cease and desist from changing wages, hours and conditions of employment without discharging its duty to bargain; that it restore the status quo ante by making employes whole for all charges for payroll deductions; that it bargain, upon demand, with the Association over any changes in wages, hours and conditions of employment, and that it post appropriate notices. Insofar as attorney's fees are not required by any specific statutory language or by agreement between the parties, Commission

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20/ Dec. No. 21646-A (Rubin, 1/85) aff'd. Dec. No. 21646-B (WERC, 8/85).

21/ In a letter dated July 8, 1987, the Examiner informed the parties she would take administrative notice of said statute, and gave them the opportunity to address its relevance and significance.

policy denies such fees in this case. 22/ Additionally, the facts in this case do involve the kind of frivolous conduct envisioned by Commissioner Torosian in his dissent as the basis for awarding attorney's fees. Accordingly, the Association's request for the award of attorney's fees is denied.

Dated at Madison, Wisconsin this 13th day of August, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett
Jane B. Buffett, Examiner

22/ Madison Metropolitan School District, Dec. No. 16471-D (WERC, 5/81).