

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of
RACINE UNIFIED SCHOOL DISTRICT
Requesting a Declaratory Ruling
Pursuant to Section 111.70(4)(b),
Wis. Stats., Involving a Dispute
Between Said Petitioner and
RACINE EDUCATION ASSOCIATION

Case 96
No. 36622 DR(M)-393
Decision No. 23850

Appearances:

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Suite 600 Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701-1664, by Mr. Jack D. Walker and Ms. Joann M. Hart, on behalf of the District.
Schwartz, Weber, Tofte & Nielsen, S.C., Attorneys & Counselors, 704 Park Avenue, Racine, Wisconsin 53403, by Mr. Robert K. Weber and Mr. Bruce Meredith, Staff Counsel, Wisconsin Education Association Council, 101 West Beltline Highway, P. O. Box 8003, Madison, Wisconsin 53708, on behalf of the Association.

ORDER GRANTING MOTION TO QUASH SUBPOENAS

The Racine Unified School District having on March 3, 1986, filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 111.70(4)(b), Stats., as to whether the District was obligated to bargain with the Racine Education Association over certain matters; and hearing 1/ having been conducted on April 15, 1986, in Madison, Wisconsin, before Peter G. Davis, a member of the Commission's staff; and during said hearing the Association having made a Motion to Quash two subpoenas through which the District sought to acquire certain information from the Association which the District believed relevant to its position that the Association's fair share proposal is an illegal subject of bargaining; and the parties having submitted written argument in support of and in opposition to said Motion, the last of which was received on May 9, 1986; and the Commission having considered the matter and concluded that the Motion to Quash should be granted;

NOW, THEREFORE, it is

ORDERED

That the Motion to Quash is hereby granted.

Given under our hands and seal at the City of
Madison, Wisconsin this 24th day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

1/ A second day of hearing was held June 24, 1986 at the conclusion of which the parties agreed to await the instant ruling before determining the need for more hearing or establishing a briefing schedule.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTION
TO QUASH SUBPOENAS

BACKGROUND

This Motion arises in the context of a District contention that the Association's fair share proposal is inter alia unconstitutional and therefore is a prohibited subject of bargaining. Through the subpoenas in question, the District seeks a copy of any procedures which the Association has implemented to provide the constitutional protections mandated by the United States Supreme Court in Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986). The Association contends that such information is irrelevant because its fair share proposal is facially legal and thus a mandatory subject of bargaining. The arguments of the parties are more fully set forth below.

The fair share proposal in question states:

ARTICLE XVI(A)

FAIR SHARE AGREEMENT

1. All employees in the bargaining unit shall be required to pay, as provided in this Article, their fair share of the costs of representation by the Association. No employee shall be required to join the Association, but membership in the Association shall be available to all employees who apply, consistent with the Association's constitution and bylaws.
2. The District shall deduct in equal installments from the earnings of all employees in the collective bargaining unit, except exempt employees, their fair share of the cost of representation by the Association, as provided in section 111.70(1)(f), Wis. Stats., and as certified to the District by the Association. The District shall pay said amount to the business office of the Association on the date upon which said deduction shall be determined by the Association; however, all employees shall be required to pay their full annual fair share assessment regardless of the date on which their fair share deductions commence. The District will provide the Association with a list of employees from whom deductions are made with each remittance to the Association.
 - a. For purposes of this Article, exempt employees are those employees who are members of the Association and whose dues are deducted and remitted to the Association by the District pursuant to Article XVI(B) or paid to the Association in some other manner authorized by the Association. The Association shall notify the District of those employees who are exempt from the provisions of this Article and shall notify the District of any changes in its membership affecting the operation of the provisions of this Article.
 - b. The Association shall notify the District of the amount certified by the Association to be the fair share of the cost of representation by the Association and the date for the commencement of fair share deductions at least two weeks prior to any required fair share deduction.

3. The Association agrees to certify to the District only such fair share costs as are allowed by law, and further agrees to abide by the decisions of the Wisconsin Employment Relations Commission and/or courts of competent jurisdiction in this regard. The Association agrees to inform the District of any change in the amount of such fair share costs.
4. The Association shall provide employees who are not members of the Association with an internal mechanism within the Association which is consistent with the requirements of state and federal law and which will allow those employees to challenge the fair share amount certified by the Association as the cost of representation and to receive, where appropriate, a rebate of any monies to which they are entitled. To the extent required by state or federal law, the Association will place in an interest-bearing escrow account any disputed fair share amounts.
5. The Association does hereby indemnify and shall save the District harmless against any and all claims, demands, suits, or other forms of liability, including court costs, that shall arise out of or by reason of action taken or not taken by the District, which District action or non-action is in compliance with the provisions of this Article, and in reliance on any lists or certificates which have been furnished to the District pursuant to this Article; provided that the defense of any such claims, demands, suits or other forms of liability shall be under the control of the Association and its attorneys. However, nothing in this section shall be interpreted to preclude the District from participating in any legal proceedings challenging the application or interpretation of this Article through representatives of its own choosing and at its own expense.

POSITIONS OF THE PARTIES

The District contends that the Association's fair share proposal fails on its face to comply with the constitutional safeguards required by Hudson. The District initially asserts that the proposal's reference to an "internal procedure" for employees wishing to challenge the fair share fee cannot be reconciled with Hudson's requirement of a decision by an impartial decision-maker. The District then argues that the proposal lacks a Hudson mandated procedure for providing employees with information regarding the basis upon which the fair share fee was calculated. The District asserts that it is no longer appropriate to rely upon assertions by a union that it will implement the fair share proposal in a manner which will meet this and other constitutional requirements. The District contends that if an unconstitutional fair share proposal is certified in a final offer, it risks becoming an unwilling party to an unlawful contract under which it violates the constitutional rights of some of its employees.

The District alleges that the Commission's declaratory ruling process is the appropriate manner in which to seek a determination of the legality of a proposal, citing City of New Berlin, Dec. No. 17748-A (WERC, 5/81). The District argues that it is placed in an unacceptable "double jeopardy" dilemma if it must wait to challenge the proposal until after an interest arbitration award. If the District challenges the proposal at that juncture by refusing to implement the award, it is exposed to an award of attorneys fees and damages. If it implements the fair share proposal, the District faces Hudson suits from its employees. Both such "solutions" require the District to defend an additional, unnecessary lawsuit and/or force the District to violate employees' First Amendment rights.

The District argues Hudson demonstrates that a facially legal proposal does not preclude a finding that the underlying fair share system is unconstitutional. The District therefore asserts that the Commission ought not rely upon the rationale in Winter Joint School District No. 1, Dec. Nos. 16951-D, 18293-B (WERC, 2/83), New Berlin, or Richland County, Dec. No. 23103 (WERC, 12/85).

to the effect that the inquiry should stop with the question of facial legality. The District also emphasizes that the Commission decided these cases before Hudson's establishment of the procedural safeguards which are constitutionally required.

In conclusion, the District notes that the Association has conceded that it has been compelled to establish a Hudson procedure. The District asserts that to resolve the challenge to the legality of the proposal, the Commission must allow the District to obtain the Association's Hudson procedure. The District therefore asks that the Commission deny the Motion to Quash.

The Association counters by arguing that the Commission has consistently ruled that fair share proposals are mandatory subjects of bargaining provided they are couched in the language of Sec. 111.70(1)(f), Stats. citing Richland County, New Berlin and Winter. The Association asserts, that if anything, the instant proposal on its face provides greater protection to employees subject to fair share than did the proposals found facially legal in the above-cited cases.

The Association contends that the District's concerns about the adequacy of the Hudson procedure can be addressed in either a prohibited practice or Sec. 227.06 declaratory ruling proceeding neither of which would delay the collective bargaining process.

The Association alleges that the proposal's reference to an "internal" mechanism is not inconsistent with providing the impartial decisionmaker as required by Hudson. Indeed, the Association notes that the proposal guarantees that the "internal mechanism" will be consistent with the requirements of state and federal law. The Association therefore argues that the District's position regarding the implications of the term "internal" should be rejected.

Given the foregoing, the Association urges the Commission to grant the Motion to Quash.

DISCUSSION

The issue before us is whether the present existence of or content of a Hudson mandated procedure is relevant or material 2/ to a determination of the District's duty to bargain over the Association's fair share proposal. Because we conclude that such information is not relevant or material, we have granted the Motion to Quash.

The District herein asks us to conclude that when determining whether there is a duty to bargain over a proposal, it is relevant to look behind the proposal itself to examine the manner in which the proposal would be implemented. In this specific case, we are being asked to examine the procedures the Association would utilize when attempting to implement the fair share proposal in a constitutional manner. We reject that invitation because the breadth of the question before us

2/ ERB 10.16(2) provides:

(2) RULES OF EVIDENCE. Hearings, so far as is practical, shall be conducted in accordance with the rules of evidence and official notice as provided in s. 227.10, (227.08) Stats.

Section 227.08(1), Stats. provides:

(1) Except as provided in s. 19.52 (3), an agency or hearing examiner shall not be bound by common law or statutory rules of evidence. The agency or hearing examiner shall admit all testimony having reasonable probative value, but shall exclude immaterial, irrelevant or unduly repetitious testimony. The agency or hearing examiner shall give effect to the rules of privilege recognized by law. Basic principles of relevancy, materiality and probative force shall govern the proof of all questions of fact. Objections to evidentiary offers and offers of proof or evidence not admitted may be made and shall be noted in the record.

is limited to whether the Association's fair share proposal, on its face, is consistent with existing statutory and constitutional requirements. 3/

Our conclusion herein is consistent with Richland County where, in a declaratory ruling proceeding in which a fair share proposal was being challenged as an illegal subject of bargaining, we quashed a subpoena which sought information inter alia regarding past union expenditure of fair share monies as well as "procedures for nonmember employees to challenge the fair share amounts and receive refunds and/or reductions of the fair share amount." While the District correctly notes that Richland County was issued prior to Hudson, the fact that the constitutional requirements vis-a-vis fair share are now clearer is irrelevant because our focus is limited to the language of the proposal.

If it is determined that the language used comports on its face with the law, the proposal will be found mandatory. 4/ Because the information sought by the District is not relevant or material to the legality of the proposal on its face, we have granted the Motion to Quash.

Dated at Madison, Wisconsin this 24th day of July, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Chairman

Marshall L. Gratz /s/
Marshall L. Gratz, Commissioner

Danae Davis Gordon /s/
Danae Davis Gordon, Commissioner

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- 3/ There are presently no contentions before us that the proposal is permissive even if legal and we have previously found legal fair share proposals to be mandatory. Town of Allouez, Dec. No. 15022-B (WERC, 1/77).
- 4/ We have not determined the facial legality of the instant proposal because we wish to fully consider all District argument. We therefore reserve our response to the District's argument regarding the use of the term "internal mechanism" and to any other arguments regarding other aspects of the proposal to our decision on all remaining challenged proposals before us in this proceeding.