

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of :  
WISCONSIN COUNCIL OF COUNTY :  
AND MUNICIPAL EMPLOYEES, :  
AFSCME, AFL-CIO :  
Seeking an Authorization Referendum :  
to Implement a Fair Share Agreement :  
Involving Certain Employees of :  
GRANT COUNTY :  
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Case 24  
No. 37378 MR-186  
Decision No. 24128

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. John H. Bowers, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO.  
Melli, Walker, Pease and Ruhly, S.C., Attorneys at Law, by Mr. Jack D. Walker, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Grant County.

ORDER

Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO, herein the Union, having on August 7, 1986, filed a petition with the Wisconsin Employment Relations Commission asking that the Commission conduct a referendum among certain employees of Grant County which would authorize implementation of a fair share agreement; and the Union having on July 15, 1986, filed a complaint with the Wisconsin Employment Relations Commission alleging that Grant County had committed a prohibited practice under Sec. 111.70, Stats., by refusing to stipulate to a fair share referendum; and the County thereafter having raised certain issues regarding the Union's petition for referendum; and the parties having filed written argument with respect to said issues, the last of which was received on October 9, 1986; and the Commission having reviewed the matter;

NOW, THEREFORE, it is

ORDERED

1. That the pendency of the Union's July 15, 1986, prohibited practice complaint blocks further processing of the instant referendum petition, but only until such time as the Union waives in writing the effects of the conduct complained of in said complaint on the outcome of the petitioned-for referendum.

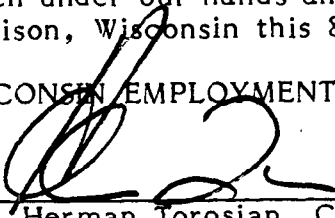
Any share agreement constitutionally and not material to or property, alleged in

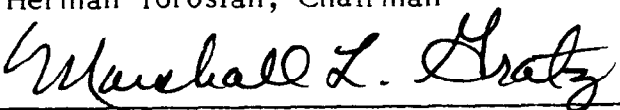
execute a WERC stipulation for referendum form in this matter constitutes a bar to the conduct of the petitioned-for referendum.

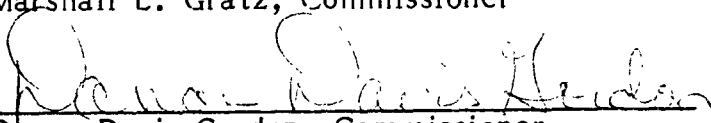
Given under our hands and seal at the City of  
Madison, Wisconsin this 8th day of December 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
Marshall L. Gratz, Commissioner

  
Danae Davis Gordon, Commissioner

## GRANT COUNTY

### MEMORANDUM ACCOMPANYING ORDER

#### Background

In April, 1986, a mediation-arbitration award established the terms of a 1984-1985 collective bargaining agreement covering certain professional employees of the County. Part of that agreement stated:

#### **ARTICLE 4 - FAIR SHARE - DUES CHECKOFF**

4.01 The Union, as the exclusive representative of all of the employees in the bargaining unit, shall represent all such employees, both Union and non-union, fairly and equally, and all employees in the bargaining unit shall be required to pay their proportionate share of the costs of such representation as set forth in this article.

4.02 No employee shall be required to join the Union, but membership in the Union shall be made available to all employees who apply consistent with the Constitution and By-Laws of the Union. No employee shall be denied Union membership on the basis of age, sex, race, religion, handicap, national origin, marital status, or sexual orientation.

4.03 The Employer shall deduct each month an amount, certified by the Union, as the uniform dues required of all Union members or a fair share service fee as established and certified by the Union, consistent with Section 111.70 of the Wisconsin Statutes. With respect to newly hired employees, such deductions shall commence on the month following the completion of the probationary period.

4.04 The aggregate amount so deducted, along with an itemized list of the employees from whom such deductions were made, shall be forwarded to the Union within the month in which such deductions were made. Any changes in the amount to be deducted shall be certified to the Employer by the Union at least thirty (30) days prior to the effective date of such change. The Employer shall not be required to submit any amount to the Union under the provisions of this Agreement on behalf of employees otherwise covered who are on layoff, leave of absence, or other status in which they receive no pay for the pay period normally used by the Employer to make (sic) such deductions.

4.05 The provisions of 4.01, 4.02, 4.03, and 4.04 shall become effective the month following certification by the Wisconsin Employment Relations Commission (WERC) that a majority of employees eligible to vote have voted affirmatively in support of the fair share agreement.

In May, 1986, the Union asked the County to stipulate to the referendum mentioned in Article 4.05 of the parties' contract. The County declined. Thereafter the Union filed both a prohibited practice complaint alleging the County's refusal constituted a prohibited practice and the instant petition for referendum. The complaint is being held in abeyance pending issuance of this decision.

#### Issues:

The pertinent correspondence between the parties and the Commission reveals that the only issues requiring Commission determination herein are, as phrased by the County:

1. May a referendum be conducted while the prohibited practice complaint is pending?

2. May a referendum be conducted where the result of the referendum could be implementation of a fair share provision by which the County would violate government employees' constitutional rights?

#### Positions of the Parties:

The County initially asserts that as the Commission's blocking complaint rule is applicable to referendum proceedings, citing Green County, Dec. No. 20030-D, (WERC, 10/83) and as the Union has not waived any effect of the prohibited practice claim on the outcome of the referendum, it is inappropriate to proceed to conduct the referendum. Should the Union waive any effect of the complaint on the referendum, the County urges the Commission to overrule the Cedar Lake doctrine Dec. No. 9770 (WERC, 6/70) and delay the referendum until the complaint is ruled upon. The County asserts that the Union ought not be able to enjoy any strategic advantage in the minds of the voters simply because it filed a complaint that is both facially flawed and inextricably intertwined with the referendum itself.

Should the Commission conclude that the referendum is not blocked by the complaint, the County urges that, prior to conducting the referendum, the Commission should allow the County to litigate the issue of whether the fair share provision will be implemented consistent with constitutional requirements. The County asserts that there must be a forum where employers can discover whether a fair share clause will constitutionally be implemented. The County submits that it ought not be required to violate employee's constitutional rights or to risk the Sec. 111.70(7m)e., Stats., mandated remedies for noncompliance with an interest arbitration award before the Commission allows the legality of the fair share clause to be litigated. As Commission decisions in Richland County, Dec. No. 23103 (WERC, 12/85); Winter Joint School District, Dec. No. 16951-D, (WERC, 2/83) and City of New Berlin, Dec. No. 17748-A (WERC, 5/81) appear to foreclose the County from litigating the issue in declaratory ruling or prohibited practice proceedings, the County contends that a referendum proceeding should be an available forum.

The Union responds to the "blocking complaint" issue by indicating that if the doctrine is applicable herein, then the Union will take appropriate action to remove the "block".

As to the issue over the administration of the fair share proposal, the Union argues that the County lacks standing to raise the issue of the compliance with the Chicago Teachers Union v. Hudson, \_\_\_ U.S. \_\_\_, 89 L.Ed. 232 (1986) (herein Hudson) and that, in any event, the issue does not arise unless and until a fair share provision becomes operative.

#### Discussion

As to the blocking complaint issue, the County correctly notes that absent a waiver by the complainant of the effects of the alleged unlawful conduct on the outcome of the election or referendum, the Commission will not proceed to process the petition during the pendency of the related unfair labor practice/prohibited practice complaint. School District of Platteville, Dec. No. 21645-A (WERC, 6/84); Green County, Dec. No. 20030-D (WERC, 10/83), aff'd by operation of law, Dec. No. 20030-E (WERC, 10/83). In view of that policy we will not proceed to further process the instant petition while that complaint is pending unless and until a waiver of effects is received from the Union. Because we decline the County's invitation to overrule Cedar Lake, 1/ we will view the blocking nature of the complaint to have been removed upon receipt of such a waiver. 2/

We therefore turn to the issue of whether a referendum proceeding is a proper forum in which to hear and decide contentions that the fair share provision involved, if and when implemented, might not be lawfully administered.

In our view, the instant referendum hearing--like a Sec. 111.70, Stats., scope of bargaining declaratory ruling--is not an appropriate forum for that purpose. For, the Sec. 111.70(6) MERA purposes of encouraging voluntary agreements and providing speedy and effective resolution of disputes will be better served if the processes for bargaining, impasse resolution and pre-fair share referendum are allowed to proceed to their conclusions rather than being interrupted pending the resolution of potentially complex factual and legal disputes concerning fair share administration. Allowing those processes to proceed might result in no fair share agreement to implement, rendering the delays entirely unnecessary.

The County's stated concern here is to avoid adverse legal consequences to itself in the event that this sequence of events comes to pass: the referendum outcome favors a fair share agreement; the parties enter into a fair share agreement covering a period of time following the certification of referendum results; the County deducts monies in favor of the Union pursuant to the terms of that fair share agreement; an affected employee brings legal action against the County on the grounds that the fair share agreement is being administered by the Union in a manner that is violative of the Constitutional rights of bargaining unit employees; the employee's legal action is ultimately found to have merit; and the County is declared to have been a party to unlawful activity and/or ordered to grant the affected employee some form of relief.

The County claims that prior Commission decisions have effectively precluded the County from obtaining a Commission ruling about the lawfulness of the Union's administration of a fair share provision without subjecting itself to an automatic imposition of attorneys fees, costs and interest under the Sec. 111.70(7m)e. Stats., mandated remedy for cases in which a party refuses without good cause to implement a Sec. 111.70(4)(cm), Stats., interest arbitration award. We do not agree that our prior decisions place the County in so untenable a position.

First, the Commission's decisions precluding declaratory ruling litigation of constitutional concerns about fair share administration have arisen solely in scope of bargaining obligation declaratory ruling proceedings under Sec. 111.70(4), Stats. As noted, such proceedings interrupt the bargaining and impasse resolution processes and need not and ought not become mired in the complexities of questions as to the likely lawfulness of the anticipated administration of the fair share provision at issue. Thus, the Commission has not to date been asked to address such issues in the context of a discretionary Sec. 227.06 declaratory ruling proceeding. Such a proceeding would not interrupt the bargaining and impasse resolution processes. Moreover, contrary to the Union's contentions herein, the County has a legitimate concern at stake in avoiding becoming a party to unlawful payments of fair share deductions to the Union. For those reasons, the Commission would be inclined to hear and decide contentions that the Union's administration of a fair share provision does not meet the constitutional requirements elucidated in the Supreme Court's Hudson decision in an otherwise ripe and proper Sec. 227.06, Stats., petition proceeding seeking a declaratory ruling as to whether the municipal employer would violate MERA if it were to refuse to pay over fair share monies to the Union in the circumstances of the case involved. We have stated the foregoing general inclination here because of the importance of the constitutional and statutory rights involved and because of the potentially widespread significance of the rulings that would be forthcoming in such matters. However, because the Commission has the discretionary authority to decline to hear and decide Sec. 227.06 Stats. employment

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.

In sum, our decisions allow the County to test the lawfulness of the Union's implementation of the fair share without any risk that Sec. 111.70(7m)e. will apply--by pursuing a 222.06 declaratory ruling while complying with the fair share provision in the interim. Moreover, our decisions do not automatically require application of all of the Sec. 111.70(7m)e. remedies even if the employer refuses to pay over fair share monies, sets those monies aside pending a determination of its claim that the Union's procedure does not meet the requirements of Hudson, and the procedure is ultimately held to be lawful.

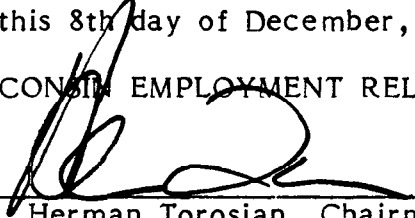
Except for the blocking complaint noted in Order paragraph 1, there appears to be no basis for refusing to direct the petitioned-for referendum. Therefore, we intend to direct the petitioned-for referendum when and if the blocking complaint bar noted in Order paragraph 1 has been eliminated.

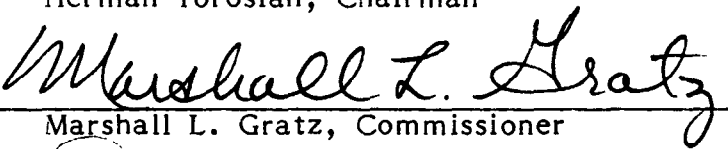
We recognize that there is no fair share agreement currently in effect, and that the referendum alone will not create one. Nevertheless, although the underlying collective bargaining agreement has expired and the terms of a successor agreement are not now settled, the fair share provision in the expired agreement implicitly authorizes the conduct of a referendum, and the referendum will at a minimum determine the basis upon which the parties' current round of collective bargaining is to take place as regards the fair share issue.


Dated at Madison, Wisconsin this 8th day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Herman Torosian, Chairman

  
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