

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN STATE EMPLOYEES UNION (WSEU) :
AFSCME, COUNCIL 24, AFL-CIO, :
:
Complainant, : Case 335
: No. 48580 PP(S)-196
vs. : Decision No. 27971-A
:
STATE OF WISCONSIN, :
:
Respondent. :
:
- - - - -

Appearances:

Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, for the Union.
Mr. Thomas Kwiatkowski, Legal Counsel, Department of Employment Relations, 137 East Wilson Street, P.O. Box 7855, Madison, Wisconsin 53707-7855, for the State.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Wisconsin State Employees Union (WSEU), AFSCME, Council 24, AFL-CIO, herein, the Union, on January 4, 1993, filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission in which it alleged the State of Wisconsin, herein, the State, had committed unfair labor practices within the meaning of Chapter 111, Stats. On March 1, 1994, the Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. Hearing was held on March 18, 1994 in Madison, Wisconsin. At the close of the hearing, the parties made oral argument and declined opportunity to file briefs. A transcript was taken and received April 5, 1994. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wisconsin State Employees Union (WSEU) AFSCME, Council 24, AFL-CIO, herein, the Union, is a labor organization with offices at 5 Odana Court, Madison, Wisconsin 53719.

2. The State of Wisconsin, herein, the State, is a state employer with offices at 137 East Wilson Street, Madison, Wisconsin 53707.

No. 27971-A

3. The Union is the exclusive bargaining agent for employees in a bargaining unit of clerical and related employees.

4. The Union and the State are signatories to a series of collective bargaining agreements. During the relevant period, the agreement contained the following provision:

Section 2: Dues Deduction

2/2/1 Upon receipt of a voluntary written individual order from any of its employees covered by this Agreement on forms presently being provided by the Union, the Employer will deduct from the pay due such employee those dues required as the employee's membership in the Union. A list of all employees from whose (sic) dues have been deducted shall be sent to the appropriate local with that local's dues deduction check. At the same time, a copy of said list of employees shall also be sent to Council 24.

2/2/2 Such orders shall be effective only as to membership dues becoming due after the date of delivery of such authorization to the payroll office of the employing unit. New individual orders will be submitted on or before the 25th day of any month for deduction the following pay period. Such deductions shall be made from the employee's pay for the first pay period of each month, except that where the payroll of the department is processed by the centralized payroll of the Department of Administration such deductions shall be evenly divided between the A and B pay periods. Deductions shall be made only when the employee has sufficient earnings to cover same after deductions for social security, federal taxes, state taxes, retirement, health insurance, income continuation insurance, and life insurance. Deductions shall be in such amount as shall be certified to the Employer in writing by the authorized representative of the local Union.

. . . .

2/2/4 Such orders may be terminated in accordance with the terms of the order the employee has on file with the Employer. However, under no circumstances shall an employee be subject to the deduction of membership dues without the opportunity to terminate his her (sic) order at the end of any year of its life or earlier by the employee giving at least 30 but not more than 120 days written notice to the Employer and local Union.

. . .

2/2/7 The Union shall indemnify and save the Employer harmless against any and all claims, demands, suits, or other forms of liability which may arise out of any action taken or not taken by the Employer for the purpose of complying with the provisions of this Section.

5. Mr. Terry Enge, a member of said bargaining unit, has been employed by the State as a clerical employee in the medical assistance office of the Central Wisconsin Center for the Developmentally Disabled (CWC) in Madison, Wisconsin for thirteen years. He codes and processes medical records. He has had two years of college. The Personnel Director at CWC is Brian Fancher.

6. On or about June 25, 1992, as Enge walked through a hall of his work site, he was stopped by a woman who asked him if he had voted in the Union election. When he replied that he was not aware that he could vote, the woman replied: "Yes, you can. You just sign the green card." Enge believed the card was a permission to vote. He filled in the lines calling for his address, phone numbers, date of birth, place of employment, civil service classification, and local union number. He signed and dated the card.

7. The "green card" which Enge signed has been used as a dues authorization card by the Union for a least twenty years with only minimal changes. It is a double-sized green postcard. One half of the front portion is printed as a business reply card and addressed to the Union at 5 Odana Court, Madison, Wisconsin. The other half of the front portion offers the following instructions for completing the card:

TO HELP YOU FILL OUT THIS CARD. . .

1. Your name.
2. Your social security number.
3. The agency you work in such as U.W., DOT, DOA, DHSS, etc.
4. The agency division or campus department or campus.
5. This lets us deduct union dues from your pay check. If you don't know the local union name or number, leave it blank.
6. The date, AND your signature.
7. Your social security number, again.
- 7A. Blue Collar, Clerical, Technical, Security, Prof-S.S. or R.S.A.
8. Your name and home address.
9. Your birthdate, for SENIORITY purposes only.
10. Home and work phone numbers.
11. Same as 3.
12. Same as 4.
13. Your classification (such as Typist, Program Assistant, BMH, or Institutional Aide).
14. Your work address.
15. If you don't know the local name or number leave it blank.
16. The date AND your signature (again).

The numbers of the instructions correspond to the numbers of the lines to be filled in on the backside of the card.

Dues, contributions or gifts to AFSCME are not deductible as charitable contributions for federal income tax purposes. Dues paid to AFSCME, however, may qualify as business expenses and may be deductible in limited circumstances subject to various restrictions imposed by the Internal Revenue Service.

10. It is the practice of the parties that after the double card is returned to the Union, the Union forwards the top half to the payroll department which then deducts dues for the referenced employee. The bottom half is retained by the Union for its membership records.

11. Sometime after signing the green card, Enge was called by an employee in the payroll department regarding the green card. Enge told her that he had not intended to authorize dues deductions. Ultimately Enge telephoned Personnel Director Brian Fancher to tell him he did not wish to have dues deducted from his paycheck.

12. The Payroll department never deducted dues from Enge's paycheck.

13. By failing to deduct Union dues from the paycheck of employee Terry Enge for whom it had a valid dues deduction authorization card, the State interfered with employee rights to support a labor organization, in part, by a system of payroll deductions for dues.

CONCLUSION OF LAW

1. By failing to honor dues deduction authorizations executed by employee Mr. Terry Enge, the State interfered with employees in their exercise of rights guaranteed under Sec. 111.82, Stats., in violation of Sec. 111.84(1)(a) Stats.

2. By failing to honor dues deduction authorizations executed by employee Terry Enge, the State did not violate Sec. 111.84(1)(c), Stats.

ORDER 2/

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.

(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

IT IS ORDERED that

1. The State, its officers and agents including Central Wisconsin Center Personnel Director Brian Fancher shall immediately:

A. Cease and desist from interfering with employee rights by failing to honor dues deduction authorizations executed by employees.

B. Take the following affirmative action which the Examiner finds will effectuate the policies of the State Employment Labor Relations Act:

1. Reimburse the Union for all dues with interest 3/ which would have been deducted from Terry Enge's paychecks but for the State's refusal to honor the Dues Deduction Authorization.
2. Henceforth deduct dues from Mr. Enge's paychecks until such time as the authorization is validly revoked.
3. Notify all employees at the Central Wisconsin Center for the Developmentally Disabled in the bargaining unit represented by the Union by posting in conspicuous places where those employees are employed, copies of the Notice attached hereto and marked "Appendix A." That Notice shall be signed by the Personal Director at CWC and a representative of the Department of Employment Relations and shall be posted immediately upon receipt of a copy of the 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 with other material.

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

3/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was filed with the Commission.

4. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as the steps it has taken to comply with this Order.

2. The complaint as to the alleged violation of Sec. 111.84(1)(c) is dismissed.

Dated at Madison, Wisconsin this 20th day of May, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the State Employment Relations Act, we hereby notify our employees that:

WE WILL honor dues deduction authorizations executed by employees.

WE WILL reimburse the Union for all dues with interest that would have been deducted from Mr. Terry Enge's paychecks if the State had not failed to honor his dues deduction authorization.

Dated _____ By _____
Brian Fancher,
Personnel Director
Central Wisconsin Center

On behalf of the
Department of Employment
Relations

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

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

BACKGROUND

Terry Enge, a clerical employee at Central Wisconsin Center for Development Disabilities, on or about 25 June, 1992, signed a dues authorization card. He subsequently asserted that he had not understood that he was signing an authorization for dues payment to be deducted from his paycheck. After he informed the payroll department and Personnel Director Fancher of his desire to not have such dues deducted, the State did not honor the dues authorization card. The Union then filed the instant unfair labor practices complaint asserting the State's failure to deduct dues from Mr. Enge's paycheck violated Sec. 111.84(1)(a) and (c), Stats.

POSITIONS OF THE PARTIES

The Union

The Union points to earlier Commission cases for the proposition that the State's failure to honor a dues deduction authorization is an unfair labor practice. It points to the clear language of the "green card", the dues authorization instrument, and finds it an enforceable contract. The Union points to the subsection of the State Employment Relations Act to indicate that Enge had recourse to terminate the dues deduction after a certain period. The Union notes that Mr. Enge was in full possession of his faculties and was able to legally contract himself to have dues deducted from his paycheck when he signed the dues deduction card.

The State

The State notes the State Employment Relations Act gives employees the right to form, join or assist labor organizations or to refrain from such activities. It sees this case as a matter of protecting Mr. Enge's right to refrain. It asserts that in this case, the employee did not understand what he was signing. Instead of realizing that he was signing a dues authorization card, he thought he was registering to vote in the Union election. The State believes the dues authorization card was misrepresented to Mr. Enge by the woman who handed it to him.

If the Union should prevail in this matter, the appropriate relief, according to the State, would be a prospective order that the State deduct dues payments from Mr. Enge's paycheck.

DISCUSSION

Alleged Violation of Sec. 111.84(1)(a), Stats.

The facts in this case were undisputed and are noted in detail in the Findings of Fact. The State does not deny its general obligation to honor authorizations executed by its employees to have deductions made from their paychecks for union dues. This obligation exists as a part of the collective bargaining agreement, see Finding of Fact 4, which is statutorily enabled by Sec. 20.921, Stats., and Sec. 111.84 (1)(f) Stats. 4/ In State of Wisconsin

4/ Sec. 20.921 provides:

"20.921 Deductions from salaries. (1) OPERATIONAL

(DILHR) 5/ the Commission concluded that the State's failure to deduct dues pursuant to previously executed authorizations was a violation of Sec. 111.84(1)(a) which provides:

111.84 Unfair labor practices. (1) It is an unfair labor practice for an employer individually or in concert with others:

(a) To interfere with, restrain or coerce state employes in the exercise of their rights guaranteed in s. 111.82. 6/

DEDUCTIONS. (a) Any state officer or employee may request in writing through the state agency in which the officer or employee is employed that a specified part of the officer or employee's salary be deducted and paid by the state to a payee designated in such request for any of the following purposes:

. . . .

2. Payment of dues to employee organizations.

. . . .

5. (b) The request under par. (a) shall be made to the state agency in such form and manner and contain such directions and information as is prescribed by each state agency. The request may be withdrawn or the amount paid to the payee may be changed by notifying the state agency to that effect, but no such withdrawal or change shall affect a payroll certification already prepared. However, time limits for withdrawal of payment of dues to labor organizations under subch. V of ch. 11 shall be as provided under s. 111.84(1)(f)."

Sec. 111.84(1)(f) provides:

1. It is an unfair labor practice for an employer individually or in concert with others:

. . . .

(f) To deduct labor organization dues from an employee's earnings, unless the state employer has been presented with an individual order therefore, signed by the state employee personally, and terminable by at least the end of any year of its life or earlier by the state employee giving at least thirty but not more than one hundred twenty days written notice of such termination to the state employer and to the representative organization, except where there is a fair share agreement in effect. The employer shall give notice to the Union of receipt of such notice of termination.

5/ Dec. No. 11979-B (WERC, 11/75).

6/ 111.82 **Rights of State employes.** State employes shall have the right of self-organization and the right to form, join or assist labor

The State asserts, however, the general rule does not govern in the instant case because Mr. Enge, not understanding what he had signed, did not execute a valid authorization. (The record does not show whether Mr. Enge indicated his misunderstanding about the card at the time he asked the Personnel Director to not honor the card, or later.) Referring in his testimony to the day he signed the card, Mr. Enge said, "I guess I just didn't realize what I had signed here." 7/

The extent of what Mr. Enge knew, and what he could have known with reasonable attention, can be learned by reviewing the context of his signing the card. Passing by a polling area during a Union election, Mr. Enge was asked whether he had voted. When he said he didn't know that he could vote, he was offered a card and told he could vote if he signed it.

Mr. Enge testified that he thought he was signing a voter registration card. Although the circumstances of his encounter with the Union member might support such an inference, review of the card itself clearly indicates that the card authorizes a payroll deduction. That information is not buried in a field of fine print, but is legible and unambiguous. The very top of the card gives the names of the State and the Union. Immediately under that identification reads: AUTHORIZATION FOR PAYROLL DEDUCTION FOR EMPLOYEE ORGANIZATION DUES. Additionally, the signature line in the top half of the card is at the end of a sentence that reads:

I hereby request and authorize the [State Agency and Employing Unit] as my remitting agent, to deduct from my earnings each month until this authorization is changed or revoked, as provided below, a sufficient amount to provide for the monthly payment of the prevailing rate of dues

A second signature line is at the bottom of the bottom half of the card. Immediately above that signature line are two sentences, both beginning with the word "dues" that describe possible tax implications of union dues.

Presumably, by signing the card, Mr. Enge had opportunity to see these two explanations of dues and dues deductions that were immediately above the two signature lines. There is no suggestion that Mr. Enge, who has had two years of college and works as a clerical employee in charge of coding and processing medical records, was unable to read the card. There is no indication that Mr. Enge was told not to read the card or in any way rushed or coerced into signing. The State cannot rely on Mr. Enge's negligence in failing to read the card to conclude his signature was invalid. 8/

The State asserts that the authorization card was misrepresented to Mr. Enge. The evidence reflects that he was told that the card was a prerequisite for voting. There is no evidence, however, that he was told that

organizations, to bargain collectively through representatives of their own choosing under this subchapter, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. Such employees shall also have the right to refrain from any or all of such activities.

7/ Tr. 32.

8/ See Grant Marble Co. v. Abbot, 142 Wis. 279 (1910).

the right to vote was the only effect of the card. The verbal representation was, then, not incorrect, but partial. This situation is analogous to cases under the National Labor Relations Act in which union authorization cards 9/ are obtained from employees who are told that signing the card will help the union to get a union representation election. The National Labor Relations Board has consistently held that such authorization cards are valid notwithstanding the incompleteness of the verbal information given as long as the employee was not told that supporting a Union election was the only purpose of the card. 10/

Having concluded that the authorization card was valid and binding, this Examiner finds unambiguous Commission precedent holds that the State had no lawful option but to honor the authorization and its failure to do so violated Sec. 111.84(1)(a), Stats. As the Commission ruled in a prior case in which the State had failed to honor dues deduction authorization of those employees who were reclassified to positions in a different union:

...dues check-off authorizations and the termination of same are governed by Secs. 20.921 and 111.84(1)(f), Stats. Neither individual employees nor the State can ignore the statutory provisions. 11/

9/ The cards at issue in those cases did not authorize dues deductions, but authorize the Union to represent the employee for collective bargaining.

10/ E.g. Essex Wire, 77 LRRM 1016 (1971).

11/ State of Wisconsin, Dec. No. 17901-B (WERC, 10/82).

Alleged Violation of Sec. 111.84(1)(c), Stats.

Sec. 111.84(1)(c) provides:

111.84 Unfair labor practices. (1) It is an unfair labor practice for an employer individually or in concert with others:

. . .

(c) To encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment. This paragraph does not apply to fair-share or maintenance of membership agreements.

The Union presented no evidence to show that any employee suffered any discrimination in regards to hiring, tenure or any other term or condition of employment and that allegation is dismissed herein.

The Remedy

The State argues that if the Union should prevail, the relief should be prospective only. That is, the State should be ordered to commence deducting dues payments until such authorization is validly revoked, but should not be required to reimburse the Union for the dues and statutory interest thereon 12/ that would have been remitted from Mr. Enge's paycheck had the dues authorization been honored.

This argument is rejected. In the earlier case in which the State failed to honor authorized dues deductions from three reclassified employees, 13/ the Commission determined that the appropriate remedy for failure to make deduction is the reimbursement equivalent to the dues that would have been deducted but for the State's violation. Consistent with that ruling, the remedy ordered in this case requires the State to make such reimbursement. In addition, after the issuance of this order, dues will be deducted from Mr. Enge's paycheck until such time as the authorization is validly revoked.

The Union has requested the award of attorney's fees in this matter. I conclude that the State's legal position in this dispute was debatable and not frivolous and does not require the imposition of attorney's fees under

12/ See Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) providing for interest for remedies arising under the Municipal Employment Relations Act, and State of Wisconsin, Dec. 25281-C, for remedies arising under the State Employment Relations Act.

13/ For citation, see Footnote 10/.

Commission precedent. 14/

Dated at Madison, Wisconsin this 20th day of May, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Jane B. Buffett, Examiner

14/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).