STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of MADISON AREA TECHNICAL COLLEGE TEACHERS' UNION, AFT, WFT, AFL-CIO -- LOCAL 243 Requesting a Declaratory Ruling Pursuant to Section 227.41, Wis. Stats., Involving a Dispute Between Said Petitioner and FREDRIC T. WILLIAMS	Case 81 No. 52396 DR(M)-555 Decision No. 28854

Appearances:

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, by Mr. Timothy E. Hawks, 700 West Michigan Street, Suite 500, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Madison Area Technical College Teachers' Union, WFT, AFL-CIO, Local 243.

Witwer, Burlage, Poltrock & Giampietro, Attorneys at Law, by Mr. Lawrence A. Poltrock, 125 South Wacker Drive, Suite 2700, Chicago, Illinois 60606, appearing on behalf of AFT.

Mr. Steven E. Sobiek and Mr. Michael P. Maxwell, Wisconsin Right to Work Educational Foundation, Inc., 1400 East Washington Avenue, Suite 189, Madison, Wisconsin 53703, and Mr. Fredric T. Williams, 2922 Arbor Drive, Madison, Wisconsin 53711, appearing on behalf of Fredric T. Williams.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

Madison Area Technical College Teachers' Union, AFT, WFT, AFL-CIO, Local 243 filed a petition for a declaratory ruling under Sec. 227.41, Stats., with the Wisconsin Employment Relations Commission on March 17, 1995, to determine the constitutional and statutory rights of the parties as to a fair share rebate procedure and determinations of chargeable

expenses. The Commission assigned Lionel L. Crowley, a member of its staff, to act as Examiner on the petition. A pre-hearing conference was held on June 7, 1995, in the Commission's offices and the issues in dispute were narrowed to five areas, all of which relate to chargeable expense determinations made by the American Federation of Teachers, hereinafter the AFT. Hearing on these issues was held before the Examiner in Madison, Wisconsin, on September 6, 1995. The parties filed post-hearing briefs, which were exchanged on January 17, 1996. The parties reserved the right to file reply briefs fifteen days after receipt of the opposing party's brief. The parties did not file reply briefs and the record was closed on February 2, 1996.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. Madison Area Technical College Teachers' Union, AFT, WFT, AFL-CIO, Local 243, hereinafter referred to as the Union, is a labor organization which represents certain professional employes employed by the Madison Area Technical College.

2. The Union and Madison Area Technical College are parties to a collective bargaining agreement which includes a fair share agreement providing for the automatic deduction of fair share amounts from the salary of employes who are not members of the Union.

3. Fredric T. Williams is employed by Madison Area Technical College, is not a Union member, and is covered by the fair share agreement between the Union and the College.

4. Williams alleges that he cannot be required to make fair share contributions in the following five areas of expense. All disputed expenses are those of the American Federation of Teachers, hereinafter referred to as AFT:

1. "QuEST" education seminars.
2. State Federation rebates.
3. "Miscellaneous preparation and printing of literature" costs.
4. Newspaper advertising.
5. Publication costs.

5. QuEST is a biennial meeting which all AFT members and fair share fee payors may attend. QuEST consists of educational workshops which convey information/engender discussion with regard to potential bargaining table issues and/or job performance issues. The cost of QuEST for the year ended April 30, 1994, was $837,748 which AFT determined to be 100% chargeable.

6. Each affiliated AFT local must pay a per capita amount to the AFT. In turn, the By-Laws of the AFT require that the AFT rebate to each State Federation 20 cents per month for each member or fair share fee payor of the affiliated locals of the State Federation. Each State

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Federation does its own fair share fee chargeable expense calculation for the rebated money. The rebate amount for the year ended April 30, 1994 was $1,888,150 and AFT determined 100% of the rebates to the State Federations to be chargeable.

7. For the year ending April 30, 1994, the AFT had miscellaneous preparation and printing of literature costs of $117,314 which AFT determined to be 100% chargeable. When reviewing this category of expense, an auditor hired by AFT first reviewed the identity of the vendors who performed services and would have automatically excluded expenses from any vendor who had provided non-chargeable services in the past. No such vendors were used during the year in question. The auditor then reviewed specific individual expenditures in excess of $7,500. Roughly half of the $117,314 worth of expenses were covered by this audit methodology and no non-chargeable expenses were discovered.

8. Newspaper advertising expenses consist of the placement fee paid by the AFT for President of the AFT Albert Shanker's weekly articles, "Where We Stand," that appear in the Sunday edition of the New York Times. The 52 articles were reviewed by AFT for chargeable or non-chargeable content against the following standard:

> Direct publishing expenses of the weekly "Where We Stand" articles in the New York Times written by the president of the Federation on contract administration, collective bargaining and matters directly affecting wages, hours and working conditions are allocated based on the specific content of the articles. Expenses allocable to articles considered political or ideological in nature, or pertaining to general public relations of the teaching profession are nonchargeable.

An article was deemed by AFT to be entirely non-chargeable if any portion of the article was non-chargeable. AFT determined that 14 of the 52 articles were deemed chargeable (27% of the total cost) which produced a chargeable expense of $192,875. The auditor audited approximately 50% of the articles and concurred with AFT's determination.

9. The AFT publishes eight different publications as follows:

<u>American Teacher</u>
<u>American Educator</u>
<u>Action</u>
<u>Healthwire</u>
<u>Public Service Reporter</u>
<u>On Campus</u>
<u>Reporter</u>
<u>Lifetimes</u>

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These publications are available to all members and non-members alike. The AFT determined that $1,666,795 of publication expenses were chargeable while $683,582 were not. In determining whether topics or articles appearing in these publications are chargeable or non-chargeable, the AFT editors reviewed each publication. The chargeable and non-chargeable columns were each measured to determine the percentage of the publication that is chargeable. Any advertising is 100% non-chargeable. The chargeable costs were different for each publication. The determinations and calculations were reviewed and confirmed by the independent auditor.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The AFT's determination of AFT chargeable costs for "QuEST" education seminars, miscellaneous preparation and printing of literature, newspaper advertising and publication costs is correct within the meaning of Sec. 111.70(1)(f), Stats.

2. The AFT's determination of AFT chargeable costs for State Federation rebates is incorrect within the meaning of Sec. 111.70(1)(f), Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

DECLARATORY RULING 1/

1. Section 111.70(1)(f), Stats. allows the Union to charge Williams for the AFT cost of QuEST education seminars, miscellaneous preparation and printing of literature, newspaper advertising and publications which the AFT determined to be chargeable.

2. Section 111.70(1)(f), Stats. does not allow the Union to charge Williams for State Federation rebate amounts.

Given under our hands and seal at the City of Madison, Wisconsin, this 17th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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(Footnote 1/ appears on the next page.)

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.
227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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(Footnote 1/ continues on the next page.)

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(Footnote 1/ continues from the previous page.)

> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
>
> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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MADISON AREA VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECLARATORY RULING

ISSUES AND APPLICABLE STANDARDS

This proceeding raises issues regarding (1) whether certain categories of Union expenses are chargeable to Williams under a fair share agreement; and, if so, (2) whether the Union has met its burden of establishing that the level of its expenditures in chargeable categories is accurate.

Chargeable Expenses

As to the first issue, in Browne v. Milwaukee Bd. of School Directors, 83 Wis.2d 316 (1978), (herein Browne I) the Wisconsin Supreme Court held that as a matter of Wisconsin statutory law "the statute itself forbids the use of fair-share funds for purposes unrelated to collective bargaining or contract administration." The Court quoted with approval the trial court's comment that the statutory limitations on appropriate fair share expenditures are "more restrictive of the union's rights than the plaintiff's First Amendment rights."

In Milwaukee Board of School Directors (Browne), Dec. No. 18408 (WERC, 2/81) and Milwaukee Board of School Directors (Gerleman), Dec. No. 16625-A (WERC, 5/82), the Commission set forth the standard it would apply when determining the statutory validity of various categories of union expenditures. That standard was stated in Browne as follows:

> Our Supreme Court has had the opportunity to comment on the meaning of fair-share agreements as defined in MERA. In Milw. Fed. of Teachers, Local No. 252 v. WERC 9/ the Court stated: "Fair-share agreements are generally regarded as devices whereby all public employees in the bargaining unit are compelled to pay . . . his or her 'fair-share' of the (certified) union's actual cost of negotiations and representation . . . . Its validity rests on the theory that all employees who benefit from the majority union's representative efforts should financially support those efforts; the fair-share agreement is . . . related to the functioning of the majority organization in its representative capacity . . ."
>
> We cannot accept the Complainants' narrow interpretation of the term "collective bargaining process" to include only those functions relating to the negotiation of collective bargaining agreements, to the contract administration, and to the resolution of grievances arising under such agreements. The Complainants'

position completely ignores the efforts of unions leading up to obtaining status as bargaining representatives. A union can only obtain its representative capacity by organizing employes, protecting their rights to engage in such activity, and in obtaining voluntary recognition or certification as an exclusive collective bargaining representative, after it has demonstrated, informally or formally, that it represents a majority of the employes in an appropriate bargaining unit. The collective bargaining process is broader than negotiating an agreement and reducing it to written form, and in processing grievances thereunder. Abood held that the process of establishing an agreement itself may also require "subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." As discussed subsequently herein a union performs its representational interest in expending funds seeking the enactment of legislation beneficial to employes generally, and especially to municipal employes, and in opposing legislation which would tend to have an opposite effect.

On the other hand, Respondents too broadly construe the "fair-share agreement" provision when they would include expenditures for whatever unions traditionally and reasonably have done. The statutory language involved herein prohibits the Commission from accepting such an interpretation.

Our Supreme Court in Milw. Fed. of Teachers case has given the term "fair-share agreement" a meaning which goes beyond a narrow interpretation of the statutory provision. It refers to a union functioning as the "majority organization in its representative capacity". We deem that a union, which is the collective bargaining representative of employes in a collective bargaining unit, is pursuing its representative interest by expending sums of money, either directly or by payments to others, for activities, other than those found to be impermissible herein, relating to improving the wages, hours and working conditions of the employes in the bargaining unit involved, as well as the wages, hours and working conditions of other employes represented by said union and its affiliates, and that therefore such expenditures are properly included in the amount of fair-share payments by unit employes who are not members of said union.

In determining the propriety of the various categories of

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expenditures in issue herein, we must determine whether the particular category or activity involved is related to the representational interest in the collective bargaining process and contract administration. If it is not, the Complainants are correct in their assertion that the expenditure for such purposes, over their objection, constitutes an impermissible infringement on their first amendment rights. Because this fact finding process will often involve competing considerations, it may be necessary in some instances to balance the alleged infringement on constitutional rights against the considerations going to the representational interest in the collective bargaining process and contract administration.

9/ 83 Wis. 2d. 588.

Upon review of our Browne decision, the Wisconsin Supreme Court in Browne v. Milwaukee Board of School Directors, 169 Wis.2d 79 (1992), (herein Browne II) set forth the following as to the impact of constitutional law upon the categories of fair share expenditures:

> Consideration of the issues presented by this appeal must begin with a review of several United States Supreme Court decisions regarding fair-share fees. The cases include *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Lehnert v. Ferris Faculty Ass'n*, --- U.S. ---, 111 S. Ct. 1950 (1991).
>
> In *Hanson*, the Court upheld the constitutionality of a union shop agreement between a railroad and several unions. Under the union shop agreement, authorized by sec. 2, Eleventh of the Railway Labor Act (RLA), 45 U.S.C. sec. 152, all railroad employees, as a condition of continued employment, were required to become union members. Employees of the railroad challenged the provision as violative of their rights under the First and Fifth Amendments. The Court upheld the union shop agreement, reasoning that congress's determination that it would promote labor peace to require all employees benefitting from union representation to share the costs of such representation was certainly allowable. *Hanson*, 351 U.S. at 233-35. While the record in *Hanson* contained no evidence that union dues were used for ideological purposes, the Court noted that "(i)f 'assessments' are in fact imposed for purposes not germane to

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collective bargaining, a different problem would be presented." *Id*. at 235.

In *Street*, the union shop provision of the RLA was again challenged. Unlike *Hanson*, however, the record in *Street* indicated that union dues were in fact used to support political causes. Construing the RLA to avoid constitutional infirmity, the Court held that the union shop provision authorized compulsory union membership only "to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes," and not "to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." *Street*, 367 U.S. at 764. Thus, the court held that the use of union dues for political causes, over an employee's objection, violated the RLA. *Id*. at 768-69.

In *Abood*, the Court considered for the first time the constitutionality of a state statute authorizing a union shop arrangement in the public sector. The Michigan statute allowed public sector unions to charge nonunion employees a "service fee" equal in amount to union dues. Abood and other nonunion employees challenged the union shop provision as a violation of their freedom of association under the First and Fourteenth Amendments. The Court recognized that compelled support of a union interferes with a nonunion employee's "freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." *Abood*, 431 U.S. at 222. However, the Court held that pursuant to *Hanson* and *Street*, such interference is constitutionally justified by the legislative determination that a union shop is an important component in the structure of labor relations. The Court held that "(t)he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller" than in the private sector., *Id*. at 224.

However, the Court limited the purposes for which compelled union fees from an objecting nonunion employee could be constitutionally used:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or

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> assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Id. at 235-36. The Court noted that the line between chargeable and nonchargeable activities was "somewhat hazier" in the public sector than the private sector, but because there was no evidentiary record in the case, the Court declined to "try to define such a dividing line." *Id*. at 236.

The dividing line between chargeable and nonchargeable expenditures in the private sector was considered in *Ellis*. The Court, again applying the union shop provision of the RLA, considered among other issues the chargeability of extra-unit litigation[8] and organizing efforts. The Court applied two tests to the expenditures: first, whether they were "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," *Ellis*, 466 U.S. at 448; and second, whether they "involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a govern-mental interest." *Id*. at 456. The Court held that both extra-unit litigation expenses and organizing expenses failed the first test---neither was sufficiently related to the unions' duties as exclusive bargaining representative to be chargeable. *Id*. at 451-53.

In *Hudson*, the Court considered a question expressly left open in *Abood*---what procedural safeguards are necessary to " 'prevent() compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.' " *Hudson*, 475 U.S. at 302, *citing Abood*, 431 U.S. at 237. The procedure at issue in *Hudson* involved an automatic advance rebate to all nonunion employees of the amount the union determined to be nonchargeable, and a challenge procedure whereby nonunion employees could dispute the unions' computation of the nonchargeable amount. Applying the reasoning of its previous union shop decisions, the Court held:

> (T)he constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably

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> prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Id. at 310. The Court stated that the nonunion employee had the burden of objecting to the amount of the fee, but that the union must first provide adequate information regarding the basis of the fee to allow the nonunion members to object to it intelligently. *Id*. at 306. Because the union procedure before the Court involved an advance rebate of the nonchargeable fees to all nonunion employees, the Court did not comment on the nonunion employee's burden of objecting in the first instance to the use of agency dues for nonchargeable purposes.

Finally, in *Lehnert*, the Court considered the question expressly left open in *Abood*---what is the dividing line between chargeable and nonchargeable union activities in the public sector. The majority of the Court set forth the following test:

> (C)hargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert, --- U.S. at ---, 111 S. Ct. at 1959. Justice Scalia, joined by three other Justices, stated that he would hold chargeable only "the costs of performing the union's statutory duties as exclusive bargaining agent." Id. at ---, 111 S. Ct. at 1975 (Scalia, J., concurring in part and dissenting in part). As discussed below, the Court's application of the test to the various categories of expenses offers general guidelines to lower courts in determining the chargeability of public sector union activities.

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[8]"Extra-unit litigation" refers to litigation not having any connection with the particular bargaining unit. *Ellis*, 466 U.S. at 453.

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Burden of Proof

It is clear the Union bears the burden of proof. As held by our Supreme Court in Browne I:

> The plaintiffs contend that they should not be required to show that any portion of the dues are spent for political purposes because the burden is on the unions to prove that the funds are being spent for purposes related to collective bargaining. In *Allen*, *supra* at 373 U.S. 122, the court stated that the burden of proof was on the unions, but the court also held that dues should continue to be paid until that determination was made.

Here, the Union asserts it has met its burden by keeping detailed records of its expenditures broken into relevant chargeable and non-chargeable categories, by having those records independently audited, and by being willing to provide further supportive information in response to any specific objections.

Disputes over the propriety of union fair share expenditures can require resolution of claims that:

(1) the union did not spend the amount it claims for specific identified purposes;

(2) the union incorrectly applied the law when allocating the expenditures it made between chargeable/non-chargeable expenses; and,

(3) a combination of (1) and (2) above.

To meet its burden of proof in such disputes, a union must be able to establish that it spent the amount it claims it did for various purposes, and that it correctly applied the law when it allocated various expenditures as chargeable or non-chargeable. It can seek to do so through the testimony of union employes and presentation of union records, and/or through the testimony and records of an independent auditor who has (or whose firm has) reviewed the union's expenditures. However, it should be emphasized that the Commission remains the ultimate decisionmaker as to all issues of fact and law. Thus, for instance, while it is appropriate and relevant for an auditor to testify as to the legal standards utilized for the purposes of an audit, the same cannot be said of an auditor's testimony that those legal standards comport with applicable fair share law. It remains the Commission's role to make that determination.

RESOLUTION OF ISSUES

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Having set out the general standards applicable to the issues herein, we proceed to review the specific issues presented.

QuEST

In his brief, Williams asserts the following as to QuEST seminar expenses:

> First, a cursory glance at the "QUEST" seminar agenda shows that the seminar was full of political and ideological workshops. Specifically, the following workshops that were included in the "QUEST" seminar reflect the ideological and political nature of these programs:
>
> - Workshop #34: Reform as the Union's Agenda
> - Workshop #33: Opposition to School Reform: Fighting Back
> - Workshop #28: Health Care Reform
> - Theme Based Track #7A, #8A: The New Reform Agenda: How will it change our roles?
>
> It is clear from these few examples that the seminar was full of ideological and political workshops and clearly not a chargeable item to me.

The Union responds by arguing that all QuEST costs are appropriately chargeable to non-members because the "conference is educational in nature and covers work related topics such as teaching techniques and current educational issues . . . ."

In Milwaukee Board of School Directors (Browne), Dec. No. 18408 (WERC, 2/81) and Milwaukee Board of School Directors (Gerleman), Dec. No. 16635-A (WERC, 5/82), the Commission generally addressed the chargeable status of this type of expenses.

In Browne, the Commission held that expenditures for "membership meetings and conventions" are properly chargeable to the extent such meetings themselves relate to chargeable activities. It was uncontested in Browne that an example of appropriate chargeable activity would be meetings held to determine union proposals and positions regarding collective bargaining and contract administration.

In Gerleman, the Commission determined that expenses for:

> Special Ad Hoc Committees

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> Curriculum and Instruction, Constitution, Early Childhood, Nominating, Balloting, Reading, Testing, Semester & Final Exams, Crisis (Joint), Unitized Schools, Bilingual, Mainstreaming, Proficiency, Standards, Pre-Service Council, Minority Educators, Exceptional Education, Teacher Work Load, MTEA Loan Collection

were chargeable to the extent committee activity itself relates to chargeable activity. It was also concluded that expenditures by the state and national affiliates of the union for "programs designed to help the employe become more effective on the job or eliminate employer/employe friction" were chargeable.

Applying Gerleman in the context of an arbitration proceeding, an arbitrator 2/ found chargeable the publication expenses attributable to advising employes about an upcoming radio discussion by teachers regarding school issues. He held:

> The link between the "Teacher-to-Teacher article and the MTEA's representative interest is more tenuous, but still in my opinion exists. The program involved was an open-ended discussion of school related issues, and the facilitation of teacher discussion of school related issues will ultimately determine or impact negotiations proposals.

Most recently, in Lehnert, the Court held as follows:

> (8) The District Court and the Court of Appeals allowed charges for those portions of the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters. Informational support services such as these are neither political nor public in nature. Although they do not directly concern the members of petitioners' bargaining unit, these expenditures are for the benefit of all and we discern no additional infringement of First Amendment rights that they might occasion. In short, we agree with the Court of Appeals that these expenses are comparable to the *de minimis* social activity charges approved in *Ellis*. See 466 U.S., at 456.

Considering all of the foregoing, we are satisfied that QuEST expenses are properly chargeable to the extent the workshops in question enhance employe job performance potential,

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2/ Milwaukee Teachers Education Association, (McLaughlin, 7/87).

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help employes avoid job performance issues, and inform employes as to issues which may arise at the bargaining table. We have reviewed the QuEST workshop topics and conclude that they all serve one or more of the chargeable purposes noted above. The workshops Williams finds objectionable (school reform and health care reform) convey information/engender discussion with regard to potential bargaining table issues (school reform and health care reform) and also regarding matters impacting on job performance (school reform).

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Rebates

Williams argues the Union failed to establish how the money rebated to the Union's State affiliate was spent and thus that none of the rebate is chargeable to him. He cites Tierney v. City of Toledo, 917 F.2d 927, 936-37 (CA 6, 1990) and Warner v. Board of Education, 415 N.Y.S.2d 939, 943-44, (N.Y. Sup. Ct. Monroe County 1979) in support of his position.

The Union contends that the local dues it collects and rebates to the State affiliate are chargeable because it is the State affiliate's duty to break down the payments between chargeable and non-chargeable expenses. The Union asserts that if it is obligated to make a chargeable/non-chargeable accounting, the expenses in question would be counted twice. The Union argues that its treatment of the rebate as 100% chargeable has been accepted whenever this issue has been litigated before other state agencies and/or arbitrators.

The Tierney and Warner cases cited by Williams stand for the proposition that there must be an accounting of the expenditure of rebate money so that employes can make an informed choice as to whether to object to said expenditures. The Union asserts that this accounting occurs at the State level and we have no evidence otherwise.

However, we are troubled by a process which treats the rebate as 100% chargeable at the national Union level even though the Union does not in fact expend the money. Rather than being treated as 100% chargeable, we believe the rebate money should simply not be part of the chargeable/non-chargeable calculation at the national level. The money is spent and accounted for at the State level. Inclusion of the rebate at the national level simply skews the chargeable/non-chargeable calculation by in effect counting the money as if it were spent twice. Thus, we conclude the Union's treatment of the rebate money was improper.

Miscellaneous Literature

Williams contends that the Union failed to prove that the expenditures in this category were used only for items related to collective bargaining, contract administration or grievance adjustment. Thus, he argues these expenditures are not chargeable as to him.

The Union argues the Browne II decision supports its position that these expenditures are 100% chargeable. It asserts that this category of expenses includes printing costs for such items as salary surveys and pamphlets on collective bargaining and grievance handling and that the cost of non-chargeable items would be extracted if discovered.

In Gerleman, the Commission concluded that:

> Publishing newspapers, newsletters, reports, surveys, etc. which . . . related to the collective bargaining process and contract

administration

and "administrative costs allocable" to such matters were chargeable. At issue in this proceeding is whether the Union has met its burden of establishing that the expenditures in the category of "Preparation and printing of literature" met the above quoted standard.

The auditor's testimony at hearing and Independent Auditors' Report satisfy us that the above cited legal standard was applied when the audit of these expenditures was performed. Applying the appropriate legal standard, the auditor testified the expenditures were reviewed by vendor identity and that the expenses of vendors who have historically done non-chargeable work would have been excluded as non-chargeable. The auditor further testified that after the vendor analysis, expenditures of greater than $7,500 were then reviewed. This review led the auditor to actually examine roughly half of the $117,314 expenditure at issue herein and this audit sample did not produce any non-chargeable items.

From the foregoing evidence, we are satisfied that the Union met its burden as to this category of expenditure.

Newspaper Advertising

Williams alleges that the Union has failed to meet its burden of proof that this expense was used only for items related to collective bargaining, contract administration and grievance adjustment.

The Union contends that this expense reflects the cost of publishing the weekly column of its president in the New York Times. It argues that each column was reviewed for content and that the entire cost of a weekly column was deemed non-chargeable if any portion of the column dealt with a non-chargeable matter.

In Browne II, our Supreme Court specifically addressed the issue of advertising and held:

> The unions' notice listed as chargeable "(t)he public advertising of positions on the negotiation of, or provisions in, collective bargaining agreements, as well as on matters relating to the representational interest in the collective bargaining process and contract administration." WERC held that expenditures for public advertising "on matters relating to the representational interest in the collective bargaining process and contract administration" were chargeable.
>
> In Lehnert, the Court stated:

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> The Court of Appeals determined that the union constitutionally could charge petitioners for certain public-relations expenditures. In this connection, the court said: "Public relations expenditures designed to enhance the reputation of the teaching profession . . . are, in our opinion, sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters." 881 F.2d, at 1394. We disagree. Like the challenged lobbying conduct, the public-relations activities at issue here entailed speech of a political nature in a public forum. More important, public speech in support of the teaching professional generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it.
>
> Lehnert, --- U.S. at ---, 111 S.Ct. at 1964. Justice Scalia agreed that public relations expenses are nonchargeable because they are not "part of this collective bargaining process." Id. at ---, 111 S.Ct. at 1979-80.
>
> The unions and WERC urge that we read Lehnert narrowly and hold that public advertising specifically related to collective bargaining or contract administration is chargeable. They argue that public advertising is an important negotiating tool in the public sector. We agree, and affirm WERC's conclusion that costs for public advertising related to collective bargaining or contract administration are chargeable. Unlike the public relations expenses at issue in Lehnert, such public advertising expenses by definition are related to the unions' collective bargaining function. See Reese v. City of Columbus, No. C2-92-268, (S.D. Ohio May 7, 1992), slip op. at 12-13.

The State of Illinois Educational Relations Board upheld the chargeability of this expense in Triton College Faculty Association, Case Nos. 92-F5-0013-C (4/94) and reasoned:

> The standard which the AFT's auditors applied in reviewing the allocation of the AFT's expenses for newspaper advertising and "Focus on Education" is consistent with the test stated in Lehnert. Communications about the AFT's position on work-related matters are a consequence of the AFT's role as bargaining representative and

do not extend to matters beyond that role. Thus, such communications are germane to collective bargaining. As we concluded in East St. Louis (Dalan), public relations expenditures which are sufficiently germane to the bargaining relationship are justified by the government policy interest in labor peace and avoiding free riders and do not significantly increase the burden on free speech which is inherent in fair share fees. See Lehnert.

In addition, the auditors classified as nonchargeable public relations expenses aimed at improving the reputation of the teaching profession. These are the public relations expenses which the Court determined to be nonchargeable in Lehnert. Since the expenditures for newspaper advertising and "Focus on Education" which the AFT claims as chargeable include no expenses for improving the reputation of the teaching profession, the AFT's allocation of expenditures for newspaper advertising and "Focus on Education" is acceptable under Lehnert. We reached the same conclusion in East St. Louis (Dalan).[13] See Browne v. Wisconsin Employment Relations Commission, 169 Wis.2d 79, 485 N.W.2d 376, 140 LRRM 2647 (1992).

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[13] Coon also contends that the AFT's expenses for newspaper advertising are not chargeable because the New York Times is not available in his community and is aimed at an audience in the vicinity of New York City. Since the Supreme Court unanimously decided in Lehnert that fee payers may be charged a pro rata share of a national affiliate's expenses, the geographic distribution of the audience of the New York Times is not relevant.

In an arbitration in California (Los Angeles Unified School District, Tamoush, 8/93), the chargeability of this expense was rejected because:

> . . . Albert Shanker's column published in the New York Times, does, however, appear to meet the test of non-chargeability (i.e., for excluded lobbying or political purposes) since in that specific case the same articles are reprinted for the benefit of AFT Membership (and the representational obligation) in the AFT "Action" newspaper. While not every article printed in two forums would not be automatically non-chargeable, this particular expenditure stands out as one which is published not for the general benefit or influence of

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> Union Members nationally, but rather to influence the public. No matter how one looks at it the New York Times is not a publication read routinely by Union Members anywhere, but especially outside the New York metropolitan area. The same articles though, when printed in AFT "Action" are disseminated to Los Angeles UTLA Bargaining Unit Members. Accordingly, in this single unique case, it is the conclusion of the undersigned that the printing costs of paying for Albert Shanker's column in the New York Times, because it is reprinted in AFT "Action", should not be a chargeable expense. However, any expenditure relative to its creation and reprint in the AFT "Action" is chargeable.

After considering our Court's decision in Browne II and the portion 3/ of the Reese v. City of Columbus decision cited by our Court with approval, we conclude that advertising expenses such as Shanker's column are not excluded from chargeable status simply by their appearance in a nationally distributed publication. As Reese indicates, such expenses may "ultimately inure to the benefit of the members of the local." We are further satisfied that the legal standard applied to Shanker's column by the Union and auditor was appropriate under Wisconsin law as established in

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3/ The cited portion of the Reese decision states:

> (5) Plaintiffs claim that the list of totally chargeable and partially chargeable activities include activities which are totally nonchargeable. They first challenge Item 5:
>
> The public advertising of AFSCME's positions on the negotiation, ratification, or implementation of collective bargaining agreements.
>
> In *Lehnert*, the Court disapproved the expense of lobbying activities not related to ratification or fiscal approval of collective bargaining agreements. The activity in question related to the activities of a "Preserve Public Education" program. Likewise the Court disapproved public relations expenditures designed to enhance the reputation of the teaching profession. The Court found that neither of these activities were sufficiently related to the bargaining function of the union. Here, however, the advertising expense appears to be related directly to the union's collective bargaining activities. Advertising of the union's position on negotiation, ratification or implementation of collective bargaining activities is germane to the success of the union's efforts in those area and such expenses may ultimately inure to the benefit of the members of the local. These expenses are not unlike the strike preparation expenses approved in *Lehnert*. Plaintiffs have not shown a strong or substantial likelihood of demonstrating that these expenses are nonchargeable.

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Browne II because it included "contract administration, collective bargaining" and "matters directly affecting wages, hours and working conditions." (Emphasis added). Given the appropriate legal standard applied by the auditor, the audit of these expenses provides a sufficient basis for concluding the Union has thereby met its burden of proof. Therefore, these expenses are chargeable to Williams.

Publication Expenses

Williams asserts the Union has failed to meet its burden of establishing that the publications in dispute deal with collective bargaining, contract administration or grievance adjustment.

The Union contends that it has reviewed the content of the publications in question and made the appropriate allocation between chargeable and non-chargeable matters and that the Union's allocation has been independently audited and found to be correct.

In Lehnert, the Court held:

> (8) The District Court and the Court of Appeals allowed charges for those portions of the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters. Informational support services such as these are neither political nor public in nature. Although they do not directly concern the members of petitioners' bargaining unit, these expenditures are for the benefit of all and we discern no additional infringement of First Amendment rights that they might occasion. In short, we agree with the Court of Appeals that these expenses are comparable to the *de minimis* social activity charges approved in *Ellis*. See 466 U.S., at 456.

The record establishes that the Union and the auditor used the following standard when analyzing the content of the publications in question:

> **(d)** ***American Teacher, American Educator, Action, Healthwire, Public Service Reporter, On Campus, Reporter, and Lifetimes Publications, and Preparation and Printing of Literature***
>
> Direct printing and publishing expenses of the publications are allocated based on the specific content of articles in the publications as determined by the Federation's editorial department. Expenses allocable to articles considered

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> political or ideological in nature are deemed not to benefit nonmembers and are nonchargeable. Expenses allocable to reporting on legislative and lobbying activities, litigation activities, public relations activities, illegal strike activities and articles relating to enhancement of the reputation of the teaching profession as a whole are nonchargeable. The content of articles deemed chargeable were reviewed by editorial staff and are directly related to issues in collective bargaining, contract administration and grievance matters. Articles include topics such as collective bargaining contracts negotiated by locals throughout the country and arbitrations won by the Federation's locals. Articles also include topics such as salary and fringe benefit improvements, health and welfare areas such as asbestos removal, etc. Other articles deal with specific topics like class size and educational reform issues on new and advanced methods of classroom instruction. Expenses allocable to advertising, net of advertising revenue, are considered nonchargeable. Other preparation and printing of literature expenses are considered to be 100 percent chargeable.

We are satisfied this standard is consistent with Lehnert, Browne II and our previously recited Gerleman holding regarding publication expenses. We are further satisfied that the AFT staff and the auditor applied this standard when reviewing the publications. Williams had access to the publications in question as part of our record and did not raise any specific objection that some specific portion of a publication had been improperly allocated. Thus, we conclude the Union met its burden as to these publication expenses and they are properly chargeable to Williams.

Dated at Madison, Wisconsin, this 17th day of September, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

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