STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of

THE TEACHING ASSISTANTS' ASSOCIATION

Requesting a Declaratory Ruling Pursuant to Section 227.41,
Wis. Stats., Involving a Dispute Between Said Petitioner and

JAMES HUNTER

Case 10
No. 65577
DR(S)-8

Decision No. 32388

Appearances:

Timothy E. Hawks and **Michele Sumara,** Hawks, Quindel, Ehlke & Perry, S.C. Attorneys at Law, 700 West Michigan Avenue, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Teaching Assistants' Association.

James Hunter, 101 Van Vleck Hall E B, 480 Lincoln Drive, Madison, Wisconsin, 53706, appearing on his own behalf.

FINDINGS OF FACT, CONCLUSION OF LAW AND DECLARATORY RULING

Pursuant to its Internal Appeal Procedure, on February 3, 2006, the Teaching Assistants' Association (TAA) filed a petition with the Wisconsin Employment Relations Commission seeking a declaratory ruling pursuant to Sec. 227.41, Stats. as to the merits of a challenge filed by James Hunter with the TAA regarding union security payments made by Hunter pursuant to a "maintenance of membership" agreement between the TAA and the State of Wisconsin.

Hearing on the petition was held on August 8, 2006 and the parties thereafter filed written argument-the last of which was received January 22, 2007. At the Commission's request, the parties filed supplemental facts and argument-the last of which was received February 9, 2008.

Having reviewed the record and being fully advised on the premises, the Commission [1] makes and issues the following

FINDINGS OF FACT

1. The Teaching Assistants' Association, herein the TAA, is a labor organization that serves as the exclusive collective bargaining representative of certain employees of the State of Wisconsin, herein the State.

2. James Hunter, herein Hunter, is an employee of the State represented for the purposes of collective bargaining by the TAA. During the TAA's June 1, 2005-May 31, 2006 fiscal year, Hunter was not to be a member of the TAA. However, pursuant to "maintenance of membership" agreement between the State and the TAA, Hunter was obligated during the 2005-2006 TAA fiscal year to pay his fair share of the costs of collective bargaining and contract administration as measured by the amount of dues required of TAA members.

3. By letter and accompanying information packet dated September 25, 2005, the TAA advised Hunter and other non-TAA members of their right to: (1) claim an advanced rebate of the portion of TAA dues (21.15%) that the TAA asserted was not related to collective bargaining and contract administration; and (2) challenge the TAA assertion that 78.85% of the full dues amount could lawfully be taken from non-members. Requests for rebates/notice of challenge were to be filed within 30 calendar days of the date the non-member received the September 25, 2005 letter/packet. The TAA calculation of the percentage of dues that could be lawfully taken from non-members was based on an independent audit of expenditures.

4. On or about September 30, 2005, TAA fair share payments were deducted from Hunter's State paycheck and were deposited by the State into a TAA bank account on October 13, 2005.

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[1] Prior to the Commission's deliberations on this matter, Commissioners Gordon and Bauman disclosed to the parties that they had each received financial contributions from the Wisconsin Federation of Teachers/American Federation of Teachers (with whom the TAA is affiliated) during past campaigns for public office. Commissioner Bauman also disclosed her spouse's past and current membership relationship with said Federations. With their disclosures, Commissioners Gordon and Bauman advised the parties that they did not believe that the disclosed matters would have any influence on how this case would be decided but gave the parties the opportunity to object to their participation. Hunter filed an objection to their participation. Commissioners Gordon and Bauman considered the objection and concluded that the matters disclosed would not affect their ability to serve as impartial decision-makers in this case. They then participated in the Commission's deliberations and vote on this matter.

5. On October 19, 2005, the TAA deposited $500 into a savings account with the intent that those monies be used only to make payments to TAA represented employees who requested rebates and/or who filed successful challenges to the TAA calculations of fair share amounts attributable to collective bargaining and contract administration. In March 2006, the TAA transferred those monies into a formal escrow account.

6. On October 27, 2005, Hunter timely filed a claim for an advanced rebate and a challenge to the TAA assertion as to the amount of money that could lawfully be taken from non-members. In his challenge, Hunter contended that: (1) the TAA's procedure for non-member challenges to the taking of union security payments was unconstitutional because it failed to provide for an escrow of all fees collected from non-members during the period when a challenge could be filed; and (2) that the TAA unconstitutionally charged non-members for certain expense categories identified as "social progress","organizing","education" and "research."

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

CONCLUSION OF LAW

By taking and failing to escrow any of the fair share fee paid by Hunter during the time period when a request for rebate and/or a challenge could be filed by Hunter, the Teaching Assistants' Association violated the State Employment Labor Relations Act.

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

DECLARATORY RULING

The Teaching Assistants' Association shall refund to Hunter all fair share monies taken from him during the 2005-2006 fiscal year.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of March, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

THE TEACHING ASSISTANTS' ASSOCIATION (JAMES HUNTER)

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

Challenges to the TAA Procedure

Escrow

Hunter asserts the TAA procedure is flawed because: (1) TAA did not escrow 100% of all fair-share fees until the expiration of the period for filing a challenge; and (2) TAA did not escrow Hunter's fees for at least four months following the filing of his challenge. TAA contends that: (1) it was only obligated to escrow the fair share amounts reasonably in dispute once a challenge is filed; and (2) it honored the spirit of the escrow requirement once Hunter filed his challenge while pursuing its ultimately successful effort to establish a formal escrow account.

As to question of whether the law requires a 100% escrow of all fair share fees during the challenge period, Hunter focuses on the portion of the Wisconsin Supreme Court's decision in BROWNE V. WERC, 169 Wis. 2D 79, 115 (1992) which states:

> Hudson indicates that the breakdown of expenses need not be audited if there is a 100 percent escrow of all amounts reasonably in dispute. 10/
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> 10/ It must be noted that the amounts "reasonably in dispute" include all fair-share fees collected from nonunion employees prior to the expiration of the initial objection period. As Ellis stated, "(b)y exacting and using full dues, then refunding months later that portion is was not allowed to exact in the first place, the union effectively charges the employees for activities that are (nonchargeable)." ELLIS, 466 U.S. at 444, 104 S.Ct at 1890. WERC concluded and we affirm its decision, that in order to deduct a fair-share fee equal to full dues, the union must escrow 100 percent of all fair-share fees in an interest bearing account until the expiration of the objection period, and must continue to escrow 100 percent of the fair-share fees exacted from challenging nonunion employees until the arbitrator determines the properly chargeable amount.

However, when read in its entirely, the BROWNE decision indicates that the "reasonably in dispute equals 100 percent escrow" requirement only applies if the union does not have its expenditures independently audited. Quoting the United States Supreme Court's decision in CHICAGO TEACHERS UNION V. HUDSON, 475 U.S. 292 (1986), our Supreme Court stated in BROWNE at pp. 115-116:

> The Court stated: "If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis on an

> independent audit, and the escrow figure must itself be independently verified. HUDSON, 475 U.S. 116 at 310 n. 23, 106 S.Ct. at 10678 n. 23. The purpose of providing the information is to give the nonunion employees notice of the basis of the fee, and the purpose of the escrow is to ensure that the objecting employees' funds are not used, even temporarily, for purposes to which a nonunion employee may object. Without an escrow of the entire amount, a more thorough audit is required to protect this latter interest. With a 100 percent escrow of all fair-share fees reasonably in dispute, it is not.

Given all of the foregoing, it is apparent that if a union elects to have both its expenses and the allocation between chargeable and non-chargeable expenses independently audited, then it is not required to escrow 100 percent of the fair share fees and must only escrow that portion of the fee that is "reasonably in dispute" and that portion which the TAA is prepared to rebate to any non-member who so requests. Here, TAA elected to have both its expenses and the chargeable/non-chargeable allocation independently audited and provided access to those audits as part of the TAA notice to non-members such as Hunter. Thus, the TAA's obligation under BROWNE was limited to escrow of the fee amounts "reasonably in dispute" and that portion which the TAA is prepared to rebate to any non-member who so requests. Therefore, we reject Hunter's argument that the TAA was required to escrow 100 percent of the fair-share amount during the period when a challenge could be filed or during the period when a challenge is pending.

However, there remains a dispute between the parties as to whether the escrow requirement begins with the taking of fees during the period when a rebate request and/or a challenge can be filed or whether the escrow obligation only begins once a challenge is filed. Hunter asserts that the escrow must begin with the taking of fees during the challenge period to avoid the risk that monies of employees who may/will file a request for rebate and/or a challenge will be used for constitutionally impermissible purposes. TAA contends that the escrow obligation begins when/if a challenge is filed citing that portion of the Hudson decision which states "We hold today that the constitutional requirements for the Union's collection of agency fees include . . . an escrow for the amounts reasonably in dispute while such challenges are pending. " As to this portion of the dispute, we conclude Hunter has the better of the argument.

As reflected in the above-quoted footnote 10 of the Court's BROWNE decision, it is apparent that the "amounts reasonably in dispute" escrow obligation is in place "prior to the expiration of the initial objection period." Absent such a requirement, the union would be taking and spending the entire dues amount from non-members before it knows whether a non-member is going to request a rebate and/or "challenge" the union's calculation of the amount of dues attributable to collective bargaining and contract administration. In such circumstances, a union is then at least temporarily using non-members monies for purposes as

to which the non-member may reasonably object. Such a temporary use is not constitutionally or statutorily permissible. [2]

Here, even assuming that the account established on October 19, 2005 was an "escrow account" within the meaning of HUDSON/BROWNE, it is clear that during a portion of the period within which rebate requests and/or "challenges" could be filed by Hunter for the 2005-2006 fiscal year, the TAA had received fair share monies from Hunter (on October 13, 2005) and had not escrowed any portion thereof. Therefore, we conclude that the TAA's conduct did not comply with the constitutional and statutory requirements for taking fair share monies from Hunter during fiscal year 2005-2006.

Remedy

We are proceeding in this instance pursuant to the TAA's Internal Appeal Procedure. That Procedure does not contain any provisions related to our remedial authority. However, because the Procedure is applicable to individual challenges for a specified period of time, we think it clear that our remedy should not extend beyond providing relief only to Hunter and only for the 2005-2006 fiscal year. Thus, we reject Hunter's request for a broad remedy that would extend retroactively and prospectively to all fair share fee payors. [3] As to Hunter, we conclude that return of all fair share monies taken from him during the 2005-2006 fiscal year is the appropriate remedy. Because we have directed that all monies be returned and thus granted the maximum remedy we conclude can be awarded under the Internal Appeal Procedure, we

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[2] We note that in the Commission's BROWNE decision, we commented:

> As long as individuals are given a reasonable amount of time after receipt of adequate notice from the union, and prior to the union's using the fair share fee, we find a thirty day dissent period to be sufficient time to make a decision and submit one's "objection" or "challenge." p.43.
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> . . .
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> Those individuals must be given adequate prior notice and a reasonable period thereafter to exercise their right to "object" and/or "challenge," and until they have, an appropriate percentage of their fees must be placed in escrow. p. 43.

[3] Hunter seeks relief which he asserts is patterned after that ordered by the Commission and affirmed by the Court in BROWNE. We note that, unlike the instant Internal Appeal Procedure, BROWNE was a prohibited practice complaint case (originally filed in 1973) in which the Commission thus had broad statutory remedial authority that retroactively extended for a lengthy period of time given the date the complaint was originally filed. We also note that the retroactive relief granted in BROWNE was limited to the named complainants and thus did not extend to all fair share fee payors.

need not and do not reach the additional issues posed by Hunter regarding the validity of the TAA escrow account and whether TAA improperly charged non-members for certain expense categories identified as “social progress”, “organizing”, “education” and “research.”

Dated at Madison, Wisconsin, this 27th day of March, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

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