

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

PHILLIP VAN KIRK and  
LEONARD LA PAZ

and

WISCONSIN PROFESSIONAL POLICE  
ASSOCIATION/LAW ENFORCEMENT  
EMPLOYEE RELATIONS DIVISION

Case 6  
No. 43059  
A-4541

Appearances:

Mr. Phillip Van Kirk and Mr. Leonard La Paz, appearing pro se.

Cullen, Weston, Pines and Bach, Attorneys at Law, by Mr. Richard Thal, appearing on behalf of the Association.

ARBITRATION AWARD

Wisconsin Professional Police Association/LEER Division, hereinafter referred to as the Association, is a party to a collective bargaining agreement with Waukesha County which contains a provision entitled, "Modified Fair Share". The Association has established a written "Fair Share Procedure" which provides non-members covered by a fair share agreement a method of challenging the amount of the fair share payment required. The procedure provides the Wisconsin Employment Relations Commission will appoint a staff member or a member of its panel of arbitrators to act as an arbitrator to decide challenges to the fair share amounts by non-members. In accordance with this procedure, the Association, on October 31, 1989, filed a written request to the Commission for the appointment of an arbitrator on the challenges by Phillip Van Kirk and Leonard La Paz. The Commission designated the undersigned to act as the arbitrator and hearing was held in Wauwatosa, Wisconsin on February 1, 1990. At the hearing, the parties agreed to bifurcate the hearing on whether the fair share provision applied to the challengers, and if it was determined that it did, then a second hearing would be held with respect to the amount of the fair share. The hearing was transcribed and the parties filed post-hearing briefs with respect to the applicability of the fair share provision by June 19, 1990.

ISSUE

The parties stipulated to the following:

Does Sec. 2.01 (Modified Fair Share) of the collective bargaining agreement between the Association and Waukesha County permit bargaining unit members who have been fee payers to stop paying fees? 1/

## PERTINENT CONTRACT PROVISIONS

### ARTICLE II

#### MODIFIED FAIR SHARE

2.01 The parties agree that all new employees hired after the signing of this Agreement and employees who are voluntarily paying their fair share of the costs of representation by the Association on the date this Agreement is signed, as well as all employees who thereafter voluntarily agree to pay such costs shall be required to continue paying such costs for the duration of this Agreement.

No employee shall be required to join the Association, but membership in the Association shall be available to all employees who apply, consistent with the Association's constitution and bylaws.

2.02 No employee will be denied membership because of race, color, creed or sex. This Article is subject to the duty of the Wisconsin Employment Relations Commission to suspend the application of this Article wherever the Commission finds that the Association has denied an employee membership because of race, color, creed or sex.

2.03 The Association will represent all of the employees in the bargaining unit, members and nonmembers, fairly and equally and shall certify the amount that employees would pay as their proportionate share of the costs of the collective bargaining process and contract administration.

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1/ Although the statement of the issue involves an interpretation of the collective bargaining agreement between the Association and Waukesha County, the County was notified of the issue and while not waiving any of its rights, chose not to participate in the hearing or brief the matter.

- 2.04 The Employer agrees that it will deduct from the earnings of all such employees the amount of money certified by the Association as being the monthly dues uniformly required of all employees. Changes in the amount of dues to be deducted shall be certified by the Association thirty (30) days before the effective date of the change. Deductions shall be made each month, and the total of such deductions shall be paid to the Association.
- 2.05 The Employer shall not be liable to the Association, employees or any party by reason of the requirements of this Article for the remittance or payment of any sum other than that constituting actual deductions from employees' wages earned.
- 2.06 The collective bargaining representative shall identify and save the County harmless against any and all claims, demands, suits, orders, judgments or other forms of liability against the County that arise out of the County's compliance with this modified fair share agreement.
- 2.07 Any employee who may be subject to the provisions of the modified fair share agreement and who is not a member of the Association will, if they object, be reimbursed by the Union for any portion of the dues deducted not strictly related to the collective bargaining process or contract administration.

## BACKGROUND

The facts underlying the instant case are undisputed. The Association and Waukesha County entered into their first collective bargaining agreement in 1980 for the 1980 and 1981 calendar years. This agreement contained a Modified Fair Share Agreement, Article II, Sec. 2.01, which is identical to the present Article II, Sec. 2.01. In 1980, the challengers in this matter, Phillip Van Kirk and Leonard La Paz, signed up as members of the Association and fair share payees pursuant to the modified fair share agreement. By letters dated October 11, 1988, from Van Kirk and La Paz, respectively, to the Waukesha County Personnel Director and to the Association, both challengers withdrew their individual membership in the Association and requested that the County discontinue deducting dues and/or fair share amounts from their pay. On that same day, October 11, 1988, the County, citing Article II of the agreement, refused to stop fair share deductions. The challengers, by letters dated February 2, 1989 and February 15, 1989, sought to have the County cease fair share deductions and on September 6, 1989, requested the

rebate calculated by WPPA as well as challenged the fair share amounts deducted. The Association and the challengers agreed that the undersigned would resolve their dispute over the interpretation of Sec. 2.01 before proceeding on to the challenges to the fair share amount.

### Challenger's Position

The challengers contend that Sec. 2.01 of the Agreement indicates that the fair share provision is "modified", which allows them to withdraw from the Association and not have any amounts deducted for fees. They allege that the Association has acknowledged that the wording of Sec. 2.01 is vague and weak. The challengers argue that they have abided by all the rules and there is no basis to support a conclusion that they are grandfathered into the Association. They dispute the Association's claim that the County has sided with the Association, rather the County simply has no stand other than to abide by the arbitrator's ruling. The challengers submit that there is no wording which indicates they were grandfathered into any contract subsequent to the 1980-1981 agreement. They maintain that the "Modified Fair Share" language provides for withdrawal, as does the membership card, and they have complied with these provisions. They request a ruling in their favor and the return of dues deducted since January 1, 1989.

### Association's Position

The Association contends that the challengers are obligated to continue to pay fair share fees. The Association argues that Sec. 2.01 of the agreement is "modified" because in 1980 bargaining unit members were given a window of opportunity to exempt themselves from the fair share. It points out that the challengers did not exempt themselves but agreed to pay fair share amounts and are bound by Sec. 2.01 to continue paying such fees. It submits that the intent of the parties, namely the Association and the County, with respect to Sec. 2.01 is controlling and that those not taking the opportunity to exempt themselves from the fair share in 1980 are now bound to continue such payments. The Association relies on Markesan School District, unpublished (Fleischli, 1982) in support of its position that Sec. 2.01 requires the involuntary payment of fair share fees by all except those who opted out in 1980.

The Association further asserts that Sec. 2.01 must be read so as not to conflict with the statutory purpose of a fair share agreement as defined in Sec. 111.70(1)(f), Stats. It points out that the purpose of fair share agreements is to prevent non-union employees from becoming freeloaders and a fair share agreement requires non-members to pay the appropriate costs of representation. According to the Association, interpreting Sec. 2.01 as espoused by the challengers would conflict with, and frustrate the purpose of, the fair share agreement.

The Association maintains that although it contains the word "modified", Sec. 2.01 is a fair share agreement under Sec. 111.70(1)(f), Stats. as it simply grandfathered those who opted out in 1980 and obligated all others, including the challengers, to make fair share payments. It claims that nothing in the contract permits the challengers to exempt themselves now and they

continue to be obligated to pay fair share fees. It asks that the challengers be required to continue to pay the fair share fees and the proceeding move on to the issue of the amount of fair share rebates.

## DISCUSSION

The sole issue in this proceeding is whether the challengers under Section 2.01 of the agreement are permitted to withdraw from paying fair share fees. A review of Section 2.01 persuades the undersigned that they are not.

First, to clear up any confusion with respect to membership in the Association and the payment of fair share fees, Section 2.01 provides that no employee shall be required to join the Association. This provision is not limited to new employees nor does it exempt present employees, and must be interpreted as not requiring membership of anyone but allows members to resign from Association membership. Thus, no employee is required to be a member of the Association. Members have certain rights and obligations including the payment of dues. Dues are different from fair share fees and while non-members cannot be required to pay dues, they can be required to pay fair share amounts, pursuant to a fair share agreement. 2/ While there is a valid fair share agreement in effect, resignation of a member may extinguish his/her obligation to pay dues but does not extinguish his/her obligation to pay fair share fees. Thus, the challengers may resign from the Association and not pay dues, but they may still be required to pay fair share fees.

Section 2.01 of the agreement provides, in part, that:

". . . all new employees hired after the signing of this Agreement and employees who are voluntarily paying . . . on the date the Agreement is signed, as well as all employees who thereafter voluntarily agree to pay . . . shall be required to continue paying . . . for the duration of this Agreement."

Essentially, Section 2.01 applies to three groups of employees. The first group is all employees hired after the agreement is signed. These are subject to fair share fees whether they agree to pay voluntarily or not. The second group is the employees who are voluntarily paying on the date of signing of the agreement. Those voluntarily paying on the date of signing are presumably members or those who have agreed to have deductions made. These too must continue payment if later they decide not to make payments voluntarily. The third group is those employees who at the time of signing the agreement were not making any payments voluntarily or otherwise and then later decide to become members or agree to pay fair share fees. These also must continue to make payments. That leaves only one group left, and that group consists of employees who were not making any payments at the time of the signing of the agreement and

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2/ Sec. 111.70(l)(f), Stats.

never voluntarily agreed to such payments thereafter. These employees would still be excluded under the terms of Section 2.01. The challengers previously argued in their letters notifying the County they were withdrawing their authorization that the inclusion of the word "voluntarily" in Sec. 2.01 allows them to opt out of paying fair share fees. Section 2.01 provides that all new hires must pay fair share fees without exception. It seems inconsistent that the next two groups could opt out solely because the word "voluntarily" appears in the text. Rather, it merely identifies payers who, at that point in time, were making such payments voluntarily as being covered by the fair share provision, and all three groups would be treated the same thereafter. Inasmuch as the challengers voluntarily made payments on or after the signing of the 1980 agreement, they are covered by the fair share agreement and must continue payments even though they have resigned their membership in the Union.

Section 111.70(1)(f) provides that a municipal employer and a labor organization may enter into an agreement under which all or any of the employees under a contract can be required to pay fair share fees. (Emphasis added). Thus, a fair share agreement can require that all employees pay it or that any pay it. The term "modified" in Section 2.01 of the agreement likely refers to the fact that the provision does not apply to all employees but exempts the fourth group noted above. The use of the word "modified" is in the headnote and does not appear in the text of Section 2.01. Thus, the meaning of Section 2.01 is determined by the text and not the section heading. Thus, the challenger's reliance on the word "modified" is misplaced.

Section 2.01 provides that payment continues for "the duration of this Agreement." The challengers presumably argue that this language allows a window period to permit fair share payers to withdraw from paying fair share amounts. No evidence was introduced that anyone had interpreted the contract to allow a post-contract release from fair share payment and no evidence was presented of any attempted change in the fair share provision to be applied retroactively to counteract such an interpretation. Thus, it is concluded that Sec. 2.01 merely excluded those who were not making payments when the agreement was entered into in 1980 and still excludes them unless they have voluntarily agreed to make the payments. All others are required to continue to make fair share payments whether or not they are members or choose not to be members. Therefore, the challengers must continue to pay the fair share fees.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

Section 2.01 of the collective bargaining agreement between the Association and Waukesha County does not permit bargaining unit members who have been fee payers to stop paying fees.

Dated at Madison, Wisconsin this 16th day of July, 1990.

By David E. Shaw /s/  
David E. Shaw, Arbitrator