STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DEBRA C. JONES, Complainant, vs. BREWSTER SCHOOL DISTRICT and BREWSTER EDUCATION ASSOCIATION, Respondents.	CASE NOS. 6849-U-87-1380 6850-U-87-1381 DECISION 2779 - EDUC
JERILYN DODSON, Complainant, vs. BREWSTER SCHOOL DISTRICT and BREWSTER EDUCATION ASSOCIATION, Respondents.	CASE NOS. 6851-U-87-1382 6852-U-87-1383 DECISION 2780 - EDUC PRELIMINARY RULINGS
GARY G. DREISSEN, Complainant, vs. BREWSTER SCHOOL DISTRICT and BREWSTER EDUCATION ASSOCIATION, Respondents.	CASE NOS. 6853-U-87-1384 6854-U-87-1385 DECISION 2781 - EDUC
MEREDITH SPENCER, Complainant, vs. BREWSTER SCHOOL DISTRICT and BREWSTER EDUCATION ASSOCIATION, Respondents.	CASE NOS. 6855-U-87-1386 6856-U-87-1387 DECISION 2782 - EDUC

The captioned matters are before the Executive Director for preliminary rulings pursuant to WAC 391-45-110. At this stage of the proceedings, it must be presumed that all of the facts alleged in the complaints are true and provable. The question at hand is whether the complaints (or any of them) state a

cause of action for unfair labor practice proceedings before the Public Employment Relations Commission.

The Filing and Docketing of the Cases

A document was filed with the Public Employment Relations Commission on April 20, 1987, naming Debra C. Jones, Jerilyn Dodson, Gary Driessen and Meredith Spencer as complainants "on their own and on behalf of similarly situated employees". The Brewster School District and the Brewster Education Association were named as respondents, and they stand accused of having enforced an unlawful union security agreement against employees who are not members of the union, in violation of the unfair labor practice provisions of Chapter 41.59 RCW.

The Commission's case docketing system makes no provision for multiple complainants or multiple respondents in the same case. Consistent with past practice in situations of this type, eight separate cases were docketed, as indicated above. For each individual complainant, one case has been docketed for the charges against the employer and one case has been docketed for the charges against the union.

The rules of the Public Employment Relations Commission make no provision for "class actions" or the like. The "on behalf of similarly situated employees" language of the complaint thus cannot be implemented. Any such employees would need to timely file and process their own unfair labor practice charges with the Commission. In the absence of any provision to create a class, it is not necessary to rule on the union's motion to strike a class action. On the other hand, the docketing of separate cases does not preclude the possibility that some or all of these and similar cases could be consolidated for the purposes of hearing and decision.

The Underlying Legal Principles

The Educational Employment Relations Act, Chapter 41.59 RCW, provides that collective bargaining agreements may include union security provisions, including an agency shop:

> **RCW 41.59.060 EMPLOYEE RIGHTS ENUMERATED--FEES AND DUES, DEDUCTION FROM PAY.** (1) Employees shall have the right to self-organization, to form, join, or assist employee organizations, to bargain collectively through representatives of their own choosing, and shall also have the right to refrain from any or all of such activities except to the extent that employees may be required to pay a fee to any employee organization under an agency shop agreement authorized in this chapter.
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> (2) The exclusive bargaining representative shall have the right to have deducted from the salary of employees, upon receipt of an appropriate authorization form which shall not be irrevocable for a period of more than one year, an amount equal to the fees and dues required for membership. Such fees and dues shall be deducted monthly from the pay of all appropriate employees by the employer and transmitted as provided for by agreement between the employer and the exclusive bargaining representative, unless an automatic payroll deduction service is established pursuant to law, at which time such fees and dues shall be transmitted as therein provided. If an agency shop provision is agreed to and becomes effective pursuant to RCW 41.59.100, except as provided in that section, the agency fee equal to the fees and dues required of membership in the exclusive bargaining representative shall be deducted from the salary of employees in the bargaining unit. (emphasis supplied)
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> **RCW 41.59.100 UNION SECURITY PROVISIONS--SCOPE--AGENCY SHOP PROVISION, COLLECTION OF DUES OR FEES.** A collective bargaining agreement may include union

> security provisions including an agency shop, but not a union or closed shop. If an agency shop provision is agreed to, the employer shall enforce it by deducting from the salary payments to members of the bargaining unit the dues required of membership in the bargaining representative, or, for nonmembers thereof, a fee equivalent to such dues. All union security provisions must safeguard the right of non-association of employees based on bona fide religious tenets or teachings of a church or religious body of which such employee is a member. Such employee shall pay an amount of money equivalent to regular dues and fees to a nonreligious charity or to another charitable organization mutually agreed upon by the employee affected and the bargaining representative to which such employee would otherwise pay the dues and fees. The employee shall furnish written proof that such payment has been made. If the employee and the bargaining representative do not reach agreement on such matter, the commission shall designate the charitable organization. (emphasis supplied)

Thus, the statute itself speaks in terms of a fee equivalent to the dues required of members of the employee organization.

The complainants claim that the fees requested of them under a union security agreement violate RCW 41.59.100, and thus violate RCW 41.59.140(1)(a), (b), (c) and 41.59.140(2)(a) and (b). Those provisions state:

> **RCW 41.59.140 UNFAIR LABOR PRACTICES FOR EMPLOYER, EMPLOYEE ORGANIZATION, ENUMERATED.** (1) It shall be an unfair labor practice for an employer:
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> (a) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in RCW 41.59.060.
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> (b) To dominate or interfere with the formation or administration of any employee

> organization or contribute financial or other support to it: . . .
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> (c) To encourage or discourage membership in any employee organization by discrimination in regard to hire, tenure of employment or any term or condition of employment, but nothing contained in this subsection shall prevent an employer from requiring, as a condition of continued employment, payment of periodic dues and fees uniformly required to an exclusive bargaining representative pursuant to RCW 41.59.100;
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> (2) It shall be an unfair labor practice for an employee organization:
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> (a) To restrain or coerce (i) employees in the exercise of the rights guaranteed in RCW 41.59.060: PROVIDED, That this paragraph shall not impair the right of an employee organization to prescribe its own rules with respect to the acquisition or retention of membership therein: or (ii) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
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> (b) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (1)(c) of this section; . . . (emphasis supplied)

Thus, the statute itself provides an administrative remedy for employees subjected to enforcement of an unlawful union security arrangement (i.e., one which does not comport with RCW 41.59.100).

The Public Employment Relations Commission has previously asserted jurisdiction in unfair labor practice cases where unlawful enforcement of union security has been alleged. In Mukilteo School District, Decision 1122-A (EDUC, 1981), the collective bargaining agreement required non-members to pay a representation fee. Referring to RCW 41.59.140(1)(c) and RCW 41.59.100, it was held that the union security provision and its implementation were not in violation of the statute. In

Pierce County, Decision 1840-A et seq. (PECB, 1985), unfair labor practice violations were found where the union had no set policy for dealing with employees who did not pay union dues and the employer had provided employees with misleading advice on the matter. It was noted that, in enforcing union security provisions, a union has a fiduciary duty to treat employees fairly. At a minimum, this includes informing an employee of his or her obligations.[1]

The Supreme Court of the United States has established certain procedural and substantive standards for unions to follow in the collection of agency shop fees under state public sector collective bargaining laws. Abood v. Detroit Board of Education, 431 U.S. 209 (1977) set forth rules of substance, holding under the First Amendment to the United States Constitution that non-members could be required to pay the costs of collective bargaining, contract administration and grievance adjustment, but could not be forced to pay fees for the support of ideological causes not germane to the union's duties as collective bargaining agent. This restriction on the use of agency shop fees was also stated as prohibiting the use of such fees to contribute to political candidates and to express political views unrelated to the union's duties as exclusive bargaining representative. The Michigan statute at issue in Abood was substantially the same as the provisions of Chapter 41.59 RCW calling for an agency shop fee in an amount equivalent to dues.

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1 The requirements of WAC 391-95-010 were also noted, under which a union must provide employees a copy of the collective bargaining agreement and specific advice as to their obligation, including the amount owed, the method used to compute, when payments are to be made and the effects of a failure to pay.

The question presented in Chicago Teachers Union v. Hudson, 475 U.S. 209 (1986) was whether a procedure used by the union and approved by the employer adequately protected the distinction drawn in Abood. The collective bargaining agreement authorized the union to specify the amount of the non-member fee, provided such fee did not exceed the members' dues. The union had established the non-member fee for the 1982-83 school year to be 95% of the dues paid by members, calculated on the basis of the union's financial records for the fiscal year ending June 30, 1982. Non-members could object to the fee after it was deducted, by writing the union president and instituting a three-stage procedure: (1) consideration by the union executive committee, with notice to the objector within 30 days of the decision; (2) appeal within 30 days to the union's executive board, which would consider the objection; and (3) appeal to an arbitrator paid by the union and selected by the union's president from a list maintained by the Illinois Board of Education. If an objection was sustained at any stage, the remedy would be a reduction in future deductions and a rebate for the objector. The Supreme Court held that the union procedure contained three constitutional defects. First, it failed to minimize the risk that nonunion employees' contributions might be temporarily used for impermissible purposes. Second, it failed to provide nonmembers with adequate information about the basis for the fee demanded. Third, it failed to provide for a reasonably prompt impartial decision.

In Capitol Powerhouse Engineers v. State, 89 Wn.2d 177 (1977), the Supreme Court of the State of Washington held, referring to Abood, that the union security provisions of RCW 41.06.150 were valid under the First Amendment to the United States Constitution. The union involved there had a readily accessible procedure for refund of monies which would otherwise be used for political purposes to which an employee objected. In Grant

v. Spellman, 99 Wn.2d 815 (1983) [GRANT II], the Supreme Court of the State of Washington gave the "religious" objection provisions of RCW 41.56.122 an interpretation that would preserve the constitutionality of that statute as against the establishment clause of the United States constitution. Thus, the Supreme Court of this State has indicated, by its decisions, an intention to interpret the union security provisions of this State's collective bargaining laws in a manner so as to make them valid under federal constitutional principles. The alternative (i.e., to apply a more literal or dogmatic interpretation at the risk of having the statute struck down as unconstitutional) has been rejected.

It follows that the words of RCW 41.59.100 may be subject to having the affirmative obligations set forth in Hudson engrafted onto them, as follows:

1) Adequate explanation of the basis of the fee. The union must provide adequate information explaining the basis for the agency shop fee to the employee. This includes identifying the expenditures for collective bargaining, contract administration and grievance adjustment that were provided for the benefit of nonmembers as well as members, not just the money that had been expended for purposes that did not benefit non-members.[2] The Union need not provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. The employee has the burden of raising an objection, but the union bears the burden of proving the proportion of political to total union expenditures.

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2 These requirements go beyond those of WAC 391-95-010, which pre-dates Hudson and merely calls for notice of the total fee, without background detail.

2) Reasonably prompt opportunity to challenge the amount of fee before an impartial decisionmaker. The non-member's objections must be addressed in an expeditious, fair and objective manner. The procedure cannot be controlled by the union. Special judicial procedures are not necessary, nor is a full administrative hearing with evidentiary safeguards (as had been mandated by the Seventh Circuit in the Hudson case). An expeditious arbitration might satisfy the requirement so long as the arbitrator's selection did not represent the union's unrestricted choice.

3) Escrow for amounts reasonably in dispute while challenges are pending. The risk that non-member contributions might be temporarily used for impermissible purposes must be minimized. A rebate after the fact was held not sufficient. On the other hand, escrow of 100% of the dues amount was not required. If information initially provided to the employee by the union includes a certified public accountant's verified breakdown of expenditures, including some categories that no dissenter could reasonably challenge, there would be no reason to escrow the portion of the nonmember's fees that would be represented by those categories. If the union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified.

Washington has not taken the step of establishing a specific state administrative procedure for "dues apportionment" cases such as the New Jersey procedure recently validated in Robinson v. New Jersey, 806 F.2d 442 (3rd Cir. 1986), cert. den., 55 USLW 3793, May 26, 1987. The court held in that case that a tripartite Appeal Board created by statute and appointed by the Governor was an unbiased, impartial tribunal within the meaning of Hudson.

Nor have the Washington statutes been amended, like those of New York[3] and Ohio,[4] to codify the Abood and/or Hudson requirements.

But those circumstances do not diminish the fundamental jurisdiction of the Public Employment Relations Commission to determine unfair labor practices charged under the already existing provisions of RCW 41.59.140 (1)(c) and (2)(b).

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3 New York statutes allow an agency shop fee deduction for non-members equivalent to dues paid by members for employee organizations which have:

> established and maintained a procedure providing for the refund to any employee demanding the return of any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms or conditions of employment.

"The New York Agency Shop Fee and the Constitution", an August, 1986 report by Professor Richard Briffault, urged the New York PERB to adopt administrative procedures for review of objectors' claims.

4 Under Ohio law, agency fee arrangements must include an internal rebate procedure for money used to support partisan politics or ideological causes not germane to collective bargaining. The Ohio State Employment Relations Board recently invalidated the rebate procedure utilized by four local education associations. Liptak and Ohio Education Association, Youngstown State University Chapter, (Ohio SERB, April 9, 1987), 25 GEER 832, June 8, 1987, noting that the normal procedure would be for the objector to follow the internal union process, then challenge the fee before SERB. In this instance, the Board declared the union's procedure (which failed to give objectors the information necessary to determine whether to object and to what they should object and the arbitrator used to review the process was selected solely by the union) to be arbitrary and capricious under Hudson. The union was also ordered to change its escrow procedure.

The Allegations of the Instant Complaints

The complaints enclose an excerpt from the collective bargaining agreement between the Brewster School District and the Brewster Education Association which requires, at Article II, Section 1, that non-members pay a representation fee to the union in an amount to be determined by the union. The fee is to be less than the regular dues paid by union members, as non-members are neither required nor allowed to make contributions to the "PULSE" and "NEA-PAC" political action funds. The complaints allege that the union has determined that the non-members' representation fee shall be equal to the members' full dues for the Brewster Education Association, Washington Education Association and National Education Association, so that only the PULSE and NEA-PAC amounts are eliminated from the amount claimed.

Looked at in isolation, the complaints filed in these matters appear to be premature. The rules of the Commission require, at WAC 391-45-050(3), that the statement of facts accompanying a complaint be clear and concise, including times, places and participants in occurrences. There is no allegation here that any of the individual employees have previously notified the union of their objection, that the union has refused to supply information, that the union has failed to respond to an objection in the manner described in Hudson, or that the union has declined to escrow disputed dues amounts. Were the complaints the only documents on file, the complaints would be dismissed as insufficient to state a cause of action.

On April 30, 1987, the Brewster Education Association filed a Motion to Dismiss. The premise for the union's motion is that "all of these objecting individuals . . . filed religious objection petitions with PERC". Based on that premise, the

union contended that the dues money is being held in escrow by the employer, and that the union has no access to such monies.

The docket records of the Public Employment Relations Commission disclose that "religious objection" cases have been docketed and heard under RCW 41.59.100 and Chapter 391-95 WAC for the following Brewster School District employees:

Case Number	Employee claiming non-association
6792-D-87-00066	Meredith Spencer
6793-D-87-00067	Gary Driessen (Withdrawn prior to hearing)
6794-D-87-00068	John Walden
6795-D-87-00069	Gale L. Broughton
6800-D-87-00070	Janet L. Barnes
6831-D-87-00071	Jerilyn Dodson

Thus, only three of the four named unfair labor practice complainants (Dodson, Spencer and Driessen) have also filed religious objection cases.[5]

As further background information in support of its motion, the union provided a copy of a March 10, 1987 letter which was sent (together with a packet of WEA and NEA budget information) to all agency shop fee payers in the Brewster School District. The evident purpose of the communication was to notify non-member employees that they could file written objections if they felt any part of the fee was being used for "political or ideological purposes not related to improving your working conditions". The union next recites that Jones, Dodson, Driessen and Spencer filed objections to the amount of the agency shop fee. In what could easily be taken as an admission against interest, the union indicates that it responded to each

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5 On June 9, 1987, the Commission received an affidavit from Debra C. Jones, contradicting the union's assertion that all of the unfair labor practice complainants had filed religious objection cases.

of the objections by notifying the employees that their requests would not be processed unless PERC resolved "the religious objections" in favor of the union.

On May 11, 1987, the complainants filed a response to the Motion to Dismiss which may be taken as amendatory to the complaints themselves, alleging that the Washington Education Association's procedure for handling objections by agency shop fee payers fails to comport with the advance disclosure requirements of Hudson.

On August 28, 1987, the Commission received a Notice of Intent to Make a Motion for Temporary Relief filed on behalf of Debra C. Jones. That notice, which can also be regarded as amendatory of the complaint, alleges that the WEA sent a $5.08 "agency shop refund" to Jones, by check dated August 12, 1987. This is claimed to be an admission that the amounts previously collected were in violation of the law. Pursuant to WAC 391-45-430, the preliminary ruling on those cases has been expedited.

It is clear that the union's motion to dismiss (and perhaps its conduct at earlier stages of the situation) have been based on an incorrect premise. It appears that a violation could be found in the case of the one individual (Jones) who has not had her agency shop fees held in escrow under Chapter 391-05 WAC. The requirements of Hudson for advance notice and prompt response to a stated objection may also have been violated. It should not be necessary, however, to glean the cause of action from admissions and bits and pieces in documents other than the complaint. With the direction provided here, the complainants will be required to amend their complaints.

NOW, THEREFORE, it is

ORDERED

1. [Decision 2779 - EDUC] The complaints filed by Debra C. Jones state a cause of action for failure of the organization (albeit possibly due to a mistake of fact) to escrow the amounts in dispute.

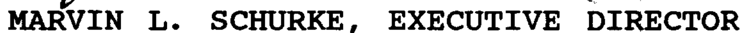
    a. Complainant Jones is directed to make her complaints in Case Nos. 6849-U-87-1380 and 6850-U-87-1381 more definite and certain, by fully setting forth the facts as required by WAC 391-45-050(3).

    b. Upon the filing of an amended complaint as required by the preceding paragraph "a.", Complainant Jones may proceed with a request for temporary relief under WAC 391-45-430.

2. [Decisions 2780, 2781, and 2782 - EDUC] The complaints filed by Dodson, Dreissen and Spencer (Case Nos. 6851-U-87-1382 through 6856-U-87-1387) fail to state a cause of action at the present time, as it appears their entire dues amounts have been or are being held in escrow pending disposition of their "religious objections" cases under Chapter 391-95 WAC. Any amended complaint must also fully set forth the facts as required by WAC 391-45-050(3).

Dated at Olympia, Washington, this 30th day of September, 1987.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, EXECUTIVE DIRECTOR