A.B.D. No. 89-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION APPEAL BOARD

OAL DKT NO. PRB-1165-87
AGENCY DKT NO. AB-87-5

JAMES K. DALY,

Petitioner,

v.

HIGH BRIDGE TEACHERS' ASSOCIATION,

Respondent.

Hugh L. Reilly (National Right to Work Legal Defense Foundation, Inc.) for petitioner

Richard A. Friedman (Zazzali, Zazzali, Fagella & Nowak) and **Robert H. Chanin, Bruce R. Lerner** (Bredhoff & Kaiser, Washington, D.C) for respondent

DECISION ON RECONSIDERATION

On November 18, 1988 the Public Employment Relations Commission Appeal Board issued a decision and order.[1/] That decision (1) modified and adopted a partial summary decision upholding the validity of respondent High Bridge Teachers' Association's demand and return system; (2) remanded the case to determine the propriety of the 1986-1987 representation fee assessed petitioner James Daly and other issues which could not be resolved before determining the propriety of the fee; and (3) adopted a settlement of petitioner's fee challenges for dues years prior to 1986-1987.

1/ A.B.D. No. 89-1, 14 NJPER 700 (¶19300 1988) reviewing the Initial Decision of Administrative Law Judge Joseph Lavery.

On November 29, 1988 petitioner wrote to the Appeal Board stating that A.B.D. No. 89-1 had been issued without receipt of his exceptions to the Initial Decision. The petitioner had commented on the Initial Decision, filing a motion to have it remanded and a "consent motion" to extend the time to file exceptions. The Association had filed exceptions and a memorandum opposing remand and petitioner filed a reply. Although petitioner's "consent motion" was never granted or denied, there was ample time for the filing of exceptions between the issuance of the Initial Decision on August 30, 1988 and the Appeal Board decision on November 18, 1988.[2/] On December 6, 1988 petitioner was advised to submit his exceptions as part of a motion to reconsider pursuant to N.J.A.C. 1:20-18.2. On January 26, 1989, after receiving an extension of time, petitioner filed his exceptions. The Association has filed a response. A.B.D. No. 89-1 has been administratively stayed pending this determination.

Petitioner first excepts to Judge Lavery's listing (Initial Decision at 12) of the "facts" relevant to the summary disposition motion to contend that two affidavits attached to his motion for summary disposition were not considered. The ALJ referred to the affidavits (Initial Decision at 2,5,6,7). They were

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2/ Petitioner apparently believed that his "motion for remand" had to be decided before he filed exceptions to the Initial Decision. However the Appeal Board did not indicate that it would proceed in that fashion nor do the rules require that an agency head separately consider procedural and substantive exceptions to an initial decision.

part of the record considered by him and by us. This exception is denied.

Petitioner's second exception is that the ALJ should have fully discussed whether the demand and return system met Constitutional standards. This exception is rejected. The Initial Decision reflects that the ALJ understood the pertinent standards and correctly applied them.

Petitioner's third exception states that the ALJ erred in endorsing the arbitrator's use of the percentage of chargeable expenses in the NJEA budget to determine chargeable expenses for the local and county education associations. Respondent's challenge to this "evidentiary presumption" is premature. This exception is rejected for the reasons stated in A.B.D. No. 89-1 at 6.

Petitioner next excepts to the finding that the respondent's failure to include in its notice the expenditures of the local education association did not "harm" petitioner. This exception is rejected for the reasons stated in A.B.D. No. 89-1 at 5. However, the omission of the information from the notice may be relevant to the respondent's ability to prove affiliate expenditures. The respondent's demand and return system includes this information. It is apparent that the omission in this case was one of oversight rather than design.

Petitioner's fifth exception is rejected. The independent auditor is not required to determine whether the respondent's expenditures are chargeable or non-chargeable. A.B.D. No. 89-1 at

6. That is a legal, not a financial determination. Additional caselaw cited by petitioner and respondent shows that the weight of authority favors the respondent's position on the role of the auditor.

Petitioner's sixth exception is that the demand and return system is invalid because he was unable to understand the financial information disclosed. Accepting the petitioner's representation, the demand and return system notice is nonetheless valid on its face. The purpose of the auditing requirement is to have an independent person, capable of comprehending financial information, check that the Association actually spent its money as represented in the notice. See Chicago Teachers' Union v. Hudson, 699 F. Supp. 1334, 1342 (N.D. Ill. 1988) (after remand from U.S. Supreme Court). The recipient of the notice need not receive an explanation of accounting principles or procedures. The notice must include a description of activities the Association deems chargeable to nonmembers and those that it deems non-chargeable, with a breakdown of expenditures allocated to each category. So long as this information is presented in an understandable form it explains the basis of the fee.[3/] Respondent's demand and return system fulfills this requirement.

Since the Appeal Board satisfies Hudson's impartial tribunal requirement, any alleged defects in the procedure used to

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3/ The notice can include the raw figures used in calculating the fees which may later be subject to review in a fee challenge.

select the arbitrator would not invalidate the respondent's demand and return system. Thus petitioner's seventh exception is rejected.

Petitioner's final exception questions the terms used to define non-chargeable activities. As stated in A.B.D. No. 89-1 at 6, any dispute over the definition of non-chargeable activities is academic until specific expenditures are actually challenged. Petitioner will have the opportunity to do so on remand. This exception is rejected. The definition dispute is not relevant to the validity of the demand and return system.

ORDER

Petitioner's motion to reconsider is granted. On reconsideration A.B.D. No. 89-1 is unchanged.

BY ORDER OF THE APPEAL BOARD

WILLIAM L. NOTO
Chairman

Chairman Noto and Board Members Verhage and Dorf voted for this decision.

DATED: TRENTON, NEW JERSEY
February 14, 1989