

A.B.D. No. 86-6

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

OAL DKT #PRB-2440-85
AGENCY DKT #AB-85-1

BART TALAMINI,

Petitioner,

v.

**CLIFFSIDE PARK
EDUCATION ASSOCIATION**

Respondent.

OAL DKT #PRB-2441-85
AGENCY DKT #AB-85-2

THOMAS MATARAZZO,

Petitioner,

v.

**CLIFFSIDE PARK
EDUCATION ASSOCIATION**

Respondent.

Wayne J. Oppito, Esq. for petitioners

Sheldon H. Pincus, Esq. (Bucceri & Pincus, attorneys) for
respondent

DECISION AND ORDER

On September 14, 1984, Bart Talamini and Thomas Matarazzo filed petitions of appeal with the Public Employment Relations Commission Appeal Board ("Appeal Board"). The petitions alleged that the amounts assessed upon the petitioners as a representation fee in lieu of dues by the Cliffside Park Education Association were

excessive. On October 11, 1984 the Respondent filed Answers. The Appeal Board transferred the matters as contested cases to the Office of Administrative Law. The cases were consolidated and assigned to Administrative Law Judge David J. Monyek. On October 3 and 4, 1985 Judge Monyek conducted a hearing and, on December 11, 1985, issued his Initial Decision. He concluded that the Appeal Board lacked jurisdiction to hear appeals which alleged simply that a representation fee was excessive, and that even assuming such jurisdiction, the fees paid by the petitioners were appropriate. He recommended that the petitions be dismissed. A copy of his report is appended to this Decision.

Timely exceptions and a response thereto were filed by the petitioners and the respondent respectively, and on January 28, 1986 the parties argued orally. The matter is now before the Appeal Board to affirm, reverse or modify the ALJ's Initial Decision.^{1/}

The petitioners hold full-time supervisory positions with the Cliffside Park Board of Education ("Board"). Talamini is a vice-principal and Matarazzo is a Supervisor of Social Studies (i.e. a department chairman). Talamini is represented by the Cliffside Park Administrators Association ("C.P.A.A."). Matarazzo is represented by the Cliffside Park Department Head/Supervisors Association ("C.P.D.H.S.A."). Both Associations are affiliated with

^{1/} The Office of Administrative Law has granted our request to extend the 45 day period of time to consider the Initial Decision.

the New Jersey Principals and Supervisors Association. The petitioners are members of and pay full dues to their respective majority representative organizations.

In addition to their full-time positions as supervisors, petitioners also hold extracurricular jobs with the Board. The C.P.E.A., the majority representative of the teachers and other non-supervisory professionals employed by the Board, represents extracurricular positions in Cliffside Park. Thus the C.P.E.A. represents Talamini and Matarazzo only in their extracurricular capacities.^{2/} Talamini receives \$2,504.00 as the varsity basketball coach. Matarazzo receives a total of \$1,676.00 as Director of Student Activities (\$1,358.00) and Class Advisor (\$318.00). In 1983-84 full-time C.P.E.A. members paid dues of \$286.00 which included dues for the C.P.E.A., the Bergen County, New Jersey and National Education Associations.^{3/} Part-time employees [defined by New Jersey Education Association ("N.J.E.A.") by-laws as those working 20 hours or less] paid half of those dues, or \$143.00 per year. The Association charged Matarazzo and Talamini 85 per cent of the part time dues structure, or \$121.55 in 1983-84, and

^{2/} The Public Employment Relations Commission has determined that a split representation in situations such as this is appropriate. See In re Ocean Township Board of Education, P.E.R.C. 82-9, 7 NJPER 446 (¶12198 1981) and Cliffside Park Bd. of Ed., H.O. No. 82-16, 8 NJPER 405, 410 n.17 (¶13187), adopted D.R. No. 83-10, 8 NJPER 540 (¶13248 1982).

^{3/} Dues are calculated by applying a multiplier of .00755 to the average full-time teacher's salary in New Jersey.

assessed similar fees for 1984-85 and 1985-86. The only other person who is a member of the C.P.E.A.'s unit functioning solely in an extracurricular capacity is an assistant football coach who teaches in another Bergen County district. This coach is already a member of the Bergen County, New Jersey and National Education Associations as a result of his full-time position. He was charged a representation fee based upon one-half of the local dues assessed by the C.P.E.A., a fee substantially less than the amounts paid by the petitioners. Persons holding extracurricular positions who are also in the C.P.E.A. unit by holding full or part time teaching positions do not pay any extra amounts in dues or representation fees attributable to the extracurricular jobs.

The dispute in this matter concerns the representation fees deducted by the C.P.E.A. from Talamini and Matarazzo for the 1983-84 academic year^{4/} The petitioners' contention, in a nutshell, is that the fees they pay to the C.P.E.A. are simply too high given their extracurricular positions and the amounts earned for doing those jobs. The petitioners point to N.J.E.A. surveys of compensation for extracurricular services and urge that their fees should have been based upon an average coaching or extracurricular salary, rather than the average full or part-time teaching salary in

^{4/} The petitioners also contest the fees assessed for subsequent academic years. The parties will be guided by this decision with respect to the amount, if any, to be refunded to the petitioners.

the state. Petitioners do not contest whether amounts spent by the C.P.E.A. and its County, State and National affiliates on rebatable activities exceed 15 per cent of each of their respective budgets. Nor do they contest the right of the C.P.E.A. to collect some representation fee from employees it represents only in extracurricular positions. They also do not challenge the existence, notification or operation of the respondent's demand and return system.

The respondent argues that given the limited question presented by the petitioners, the Appeal Board lacks jurisdiction to find that the fees are excessive. Alternatively C.P.E.A. argues that since the representation fees assessed are based upon regular membership dues as set by N.J.E.A. bylaws, the amounts are permissible. Respondent bases its argument on pertinent provisions of the New Jersey Employer-Employee Relations Act.

N.J.S.A. 34:13A-5.5 provides in pertinent part:

- b. The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.
- c. Any public employee who pays a representation fee in lieu of dues shall have the right to demand and receive from the majority representative under proceedings established and maintained in accordance with section 3 of this act, a return of any part of that fee paid by him which represents the employee's additional pro rata share of expenditures by the majority

representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms or conditions of employment or applied toward the cost of any other benefits available only to members of the majority representative. The pro rata share subject to refund shall not include the costs of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer.

C.P.E.A. maintains that the statute allows the use of any method to set representation fees, so long as it follows an organization's internal guidelines, and the resulting fee does not exceed 85 per cent of regular membership dues and assessments. The bylaws of the N.J.E.A. provide that professional members who work 20 hours a week or less shall pay half of normal dues. However, it was not until 1980 or 1981 that part-time N.J.E.A. members were allowed to pay less than full dues. Respondent maintained during oral argument that the N.J.E.A. was under no legal obligation, either then or now, to adjust either dues or representation fees for unit members who work less than full-time. C.P.E.A. argues that this Board, absent issues relating to member only benefits or partisan political or ideological lobbying unrelated to employee benefits, has neither the jurisdiction nor the grounds to order that the adjustment sought by the petitioners be made.

We disagree with the conclusion of the Administrative Law Judge and the arguments of the respondent that we lack the

jurisdiction to review an allegedly excessive representation fee in lieu of dues, even where it is not claimed that the majority representative is using fees paid by objecting non-members to finance member-only benefits and prohibited lobbying activities.

The Legislature created the Appeal Board to review amounts returned by majority representatives to non-members who requested refunds of the pro-rata share of their representation fees used by the majority representative to finance member only benefits and lobbying activity unrelated to collective negotiations and contract administration. However, the system created by the Legislature assumed that non-members would be assessed their "fair share" of the costs of representation. As originally introduced in the Assembly on February 9, 1978, A-688 labeled the fee to be charged non-members a "fair share" fee. Although called a "representation fee in lieu of dues" in the enacted version, the proposed "fair share fee" was calculated the same way and allowed non-members the same right to challenge the amount assessed by the majority representative. The statement accompanying the bill noted that the major purpose of the legislation was to correct the inequity of allowing non-members "to enjoy virtually equal benefits and protections without sharing in the costs, incurred by collective negotiations, grievance representation and other services." (emphasis supplied) The sponsor also noted that the purpose of an agency shop arrangement was to

"distribute fairly" the costs of the union's activities.^{5/} The law which was ultimately enacted is identical in all pertinent respects to the original bill^{6/} and we certainly do not read the change in nomenclature from "fair share fee" to "representation fee in lieu of dues" as a change in the nature or basis of the fee.

Boonton recognizes that the Legislature delegated to this Board the power to determine the "appropriateness of representation fees." 99 N.J. at 534. Because the power of an administrative agency should be liberally construed in order to allow it to accomplish its delegated tasks, Cammarata v. Essex County Park Commission, 26 N.J. 404, 411 (1958); The Hunterdon Central H.S. Teachers Assn v. Hunterdon Central H.S. Bd. of Ed., 174 N.J. Super. 468, 475 (App. Div. 1980), affmd o.b. 86 N.J. 43 (1981), we reverse the Administrative Law Judge and hold we have jurisdiction to review

5/ The New Jersey Supreme Court has used the sponsor's statement as a guide to ascertaining the purpose of the representation fee legislation. See Boonton Bd. of Ed. of the Town of Boonton v. Judith M. Kramer 99 N.J. 523, 529 (1985), cert. pending U.S. Supreme Ct. Dkt. No. 85-684.

6/ In addition to requiring a demand and return system with an appeal right to an administrative agency, the original bill required advance notice of the fee to non-members and a requirement that fees of objecting non-members be escrowed. These last two features were not written into the law ultimately enacted, but they are now required as a result of administrative agency and court decisions construing the law. See Kramer and Bd. of Ed. of Town of Boonton and Boonton Ed. Ass'n and NJEA, P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), direct certif. 99 N.J. 173 (1984), affmd as mod., sub. nom., Boonton Bd. of Ed. of the Town of Boonton v. Judith M. Kramer 99 N.J. 523 (1985), cert. pending U.S. Supreme Ct. Dkt. No. 85-684.

the petitioners' claims that the representation fees they pay to the C.P.E.A. are excessive.

The A.L.J. concluded that even assuming the Appeal Board had jurisdiction to review the propriety of the fees assessed upon the petitioner, the respondent had met its burden by showing that the fees were based upon a proper application of the N.J.E.A. constitution and bylaws. We find that such proof is not sufficient. The method a union uses to spread the costs of representation among its members, whether as a straight percentage of salary earned, or as here, by dues based upon an average salary or by some other method, is not ordinarily the concern of any person or entity outside the union since the arrangement is established consensually by an organization and those who choose to become its members. A representation fee is not paid voluntarily and thus a dispute over its amount is not a strictly internal union affair. Although the Legislature determined that "representation fees in lieu of dues" should be based upon the majority representative's dues, it did not intend that a majority representative would be given unreviewable discretion in determining an appropriate representation fee.

Because the N.J.E.A. does not base dues on a standard percentage of salary, the percentage of salary a Cliffside Park teacher pays in dues or representation fees varies. The \$121.55 paid by Matarazzo as a representation fee in lieu of dues amounts to 7.25 per cent of the \$1676.00 stipend he earns for his two

extracurricular positions. Talamini's fee represents 4.85 per cent of his salary.^{7/} In comparison, a full-time teacher on the lowest step of the 1983-1984 salary guide would pay \$243.10, or 1.76 per cent of his or her \$13,814 salary, as a representation fee, while a teacher on the highest salary rung would pay the same \$243.10, which would represent .75 per cent of the listed \$32,481.00 salary. Moreover, full and part time teachers in the C.P.E.A.'s unit are also compensated by fringe benefits and paid leave time, substantial economic benefits negotiated by the C.P.E.A. which are not received by Matarazzo and Talamini. They receive their primary salary and all their fringe benefits pursuant to agreements negotiated by the C.P.D.H.S.A. and C.P.A.A.

A dues and representation fee structure which is based upon a uniform percentage of each employee's salary would avoid the alleged inequity presented in this case. While we do not hold today that representation fees must be based upon a uniform percentage of employee salary, we do find in the Legislative history an assumption

^{7/} It should be noted that a teacher or administrator may be assigned to perform an extracurricular job he or she does not want as a board of education has a non-mandatorily negotiable right to determine who fills such positions. See Bd. of Ed. of Asbury Pk v. Asbury Park Ed. Ass'n, 145 N.J. Super. 495 (Ch. Div. 1976), affirmed in part, dismissed in part 155 N.J. Super. 76 (App. Div. 1977) and Bridgewater-Raritan Regional Bd. of Ed., P.E.R.C. No. 83-2, 8 NJPER 428 (¶13198 1982). Presumably the C.P.E.A. could have assessed Matarazzo the same fee if he held only the class adviser position which paid \$318.00, in which case the fee would represent 38 per cent of his stipend.

that the percentage of salary paid as a representation fee in lieu of dues by a non-member when contrasted with the portion of salary paid as a representation fee by other non-members or as dues paid by members must be of comparable ratios.

We recognize that union dues and representation fees are not an exact measure of the service that a majority representative and its affiliated organizations are providing to each person in the unit. Services to the holder of an extracurricular position might extend beyond the mere negotiation of a stipend for that position, as in Teaneck Bd. of Ed. and Teaneck Teachers Assn., P.E.R.C. No. 82-27, 7 NJPER 576 (¶12258 1981), revd and remd 185 N.J. Super. 269 (1982), affmd 94 N.J. 9 (1983), where a grievance concerning the non-reappointment of a teacher to an extracurricular job was litigated to the New Jersey Supreme Court. Unions do not present each person they represent with an annual bill for services directly attributable to that individual. Rather, the costs of representation are distributed to all. Because the benefits received by the petitioners, as holders of extracurricular jobs, are not comparable in amount or character to those received by regular full and part-time unit employees, we find that their payment of a markedly higher proportion of salary as a representation fee than is assessed other non-members is on its face unfair and excessive. We hold that a majority representative must demonstrate a rational basis for assessing a fee which on its face is "excessive." The fees paid by Talamini and Matarazzo, amounting to respectively 4.85

per cent and 7.25 per cent of their extracurricular stipends, are excessive given that full-time non-member teachers pay between .75 per cent and 1.76 per cent of salary as representation fees.^{8/} The full-time non-member teachers also receive paid leave and other fringe benefits having measurable economic value which are not received by the petitioners.

Because this case is one of first impression, we will remand the matter back to the Administrative Law Judge, rather than direct at this time a refund of all or any portion of the fees paid by the petitioners. The respondent will have the burden of proving that it has a rational basis for assessing fees to the petitioners which on their face are excessive. Such a showing would entail a demonstration of how the services provided by C.P.E.A. and its affiliates to holders of extracurricular positions justify the assessment of a higher percentage fee on such employees when compared with the services and benefits received by regular full and part-time employees in the unit. Alternatively the respondent can attempt to show what lesser sums are justifiable as a representation fee in lieu of dues for holders of extracurricular positions only.

^{8/} We are concerned in this case only with whether the fees paid by these two petitioners are excessive. However, we do observe for future guidance that we do not regard the difference in representation fees paid by full-time teachers at the top and bottom of the salary scale to be excessive. Moreover, the paid leave time and health benefits which are not reflected in these figures help to narrow the difference in the percentage amounts paid by these two hypothetical teachers.

ORDER

The Initial Decision of the Office of Administrative Law is reversed. The petitions are hereby remanded to the Office of Administrative Law for further proceedings consistent with this opinion.

BY ORDER OF THE APPEAL BOARD

ROBERT J. PACCA
Chairman

Chairman Pacca and Board Member Dorf voted in favor of this decision.

DATED: TRENTON, NEW JERSEY
February, 18 1986