

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN LODGE No. 35,
POLICEMEN'S BENEVOLENT ASSOCIATION,

Respondent,

-and-

Docket No. CO-H-93-356

ORLANDO RODRIGUEZ, ROBERT W. NELSON,
ROBERT MCGRUFF, THOMAS PHOTTS, ANTHONY D. BENSON,
STEPHEN GRACIO, JORGE L. MEDINA, TONY LAFORTE,
EDWARD CROPSKI, WAYNE MATTHEWS, DAN E. MORRIS,
SUSO DAVILA, RAFAEL PEREZ, FRED PETTERSON,
HARRY LEON, CHARLES S. WOODWARD, SR., JEROME BOYD,
ERIC JOHNSON, RONALD GOLDEN, MELVIN STEVENS,
BRIAN BEVERLY, FRANK SIMONS, MIGUEZ A. RUEZ,
JOHN MULLIGAN, ELIZER AGRON, DONALD MORRIS,
PAUL BAKER, WILLIAM MALDONADO, JR., E. PERRY,
MICHAEL HEARNE, KEVIN WILKES, LUIS SANCHEZ, and
S.E. QUARHES,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission finds that Camden Lodge No. 35, Policemen's Benevolent Association violated the New Jersey Employer-Employee Relations Act by collecting representation fees before establishing and maintaining a demand and return system and without notifying non-members pursuant to N.J.A.C. 19:17-3.3(a)(1) and (3).

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S.E. QUARHES,

Charging Parties.

Appearances:

For the Respondent, Loccke & Correia, attorneys
(Charles E. Schlager, Jr., of counsel)

For the Charging Parties, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION AND ORDER

On April 5, 1993, 33 employees of the City of Camden filed an unfair practice charge against their majority representative, Camden Lodge No. 35, Policemen's Benevolent Association. The charge alleges that the PBA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection

5.4(b)(1),^{1/} by requiring the City to deduct representation fees from the paychecks of unit members and remit the fees to the PBA, and by failing to promptly notify fee payers, provide a demand and return system, provide a statement of expenditures, establish the appropriateness of the fee, and have a written agreement authorizing the deductions.

On August 25, 1993, a Complaint and Notice of Hearing issued.^{2/} On December 30, the PBA filed its Answer denying that it had violated the Act and asserting a number of affirmative defenses.

On March 2, 1994, Hearing Examiner Regina A. Muccifori conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On June 10, 1994, the Hearing Examiner issued her report and recommendations. H.E. No. 94-25, 20 NJPER 261 (¶25130 1994). She found that the PBA had violated the Act by collecting representation fees without having established a valid demand and return system. She recommended that the PBA refund fees for the period it collected them without a demand and return system.

1/ This subsection prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

2/ The Complaint captioned the charging party as FOP Lodge 1 and assigned a "CO" docket number appropriate for unfair practice charges filed by labor organizations. We have recaptioned the case to reflect that the charging parties are 33 individuals. At this late date, we will not change the docket number to "CI," the appropriate designation for unfair practice charges filed by individuals.

However, she did not recommend that the PBA refund fees for the period after a demand and return system was established, even though the system contained some defects. She recommended that the defects be cured and fee payers be given an opportunity to seek refunds. She also found that the PBA did not enter into a written agreement with the City authorizing fee deductions until June 1993.

On June 12, 1994, the charging parties filed exceptions. They claim that the PBA should be prohibited from collecting fees and that it should refund all fees because it still does not have a written agreement authorizing fee deductions and because the demand and return system is invalid.

On June 13, 1994, the PBA filed exceptions. It claims that the Hearing Examiner erred in requiring it to have negotiated a new representation fee agreement before it could collect fees. It contends that upholding the recommended decision would grant greater rights to incumbent unions that win representation elections than challenging unions that win. Prevailing incumbents could continue to collect fees after the contract expires pending a new contract. See N.J.S.A. 34:13A-5.8. Prevailing challengers would have to wait until the employer agrees to enter into a new written representation fee agreement. The PBA also claims that the return of all representation fees collected before it established a demand and return system allows nonmembers to enjoy a free ride; and some of the charging parties are PBA members and do not pay fees. The charging parties filed a reply claiming that the PBA waived its right to assert that some of the charging parties are PBA members.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-6).

N.J.S.A. 34:13A-5.5 provides that a majority representative and a public employer may reach a negotiated agreement requiring all nonmember employees in the unit to pay a representation fee in lieu of dues for services rendered by the majority representative.

N.J.S.A. 34:13A-5.6 authorizes public employers to withhold the fee by payroll deduction, but only if the majority representative has established and maintained a "demand and return" system that provides a pro rata refund of those expenditures that the statute expressly states cannot be charged to nonmembers. In re Boonton Bd. of Ed., 99 N.J. 523 (1985), aff'g as mod. P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), cert. den. 106 S. Ct. 1388 (1986).

The Hearing Examiner found that the PBA did not establish a demand and return system until October 31, 1993. The PBA has not excepted to that factual finding, but argues that requiring it to refund fees collected before then would give nonmembers a free ride.

N.J.S.A. 34:13A-5.6 provides that a representation fee shall be available only to a majority representative that has established and maintained a demand and return system. We have read that provision literally and have ordered the refund of fees where no demand and return system was in place. See Boonton, 9 NJPER at 479. The PBA did not have any demand and return system in place until October 31, 1993. Accordingly, we will order that any fees

collected from nonmember charging parties before October 31, 1993 be refunded.

The charging parties contend that even after October 31, 1993, the PBA continued to have an inadequate demand and return system and still does not have a written agreement with the City authorizing the deduction of representation fees. It urges a full refund of all fees and an order prohibiting the PBA from collecting fees until it complies with all legal requirements.

The Hearing Examiner addressed those aspects of the demand and return system that the charging parties contested before her. She found that the PBA had not provided an adequate explanation of the basis of the fee. She also found that the requirement that objectors make a written request by certified mail may inhibit employees from using the demand and return system. She recommended an order requiring the PBA to correct those deficiencies within 30 days. We agree with these findings and recommended order. The Hearing Examiner rejected the charging parties' claim that the demand and return system fails to provide for pro rata returns of amounts not chargeable to nonmembers. We also reject that claim. The PBA's demand and return system permits objectors to request a "rebate for additional expenditures for political activity or member benefit." We agree with the Hearing Examiner that, in essence, the system provides for a pro-rata return.

Although the charging parties did not specifically plead that the PBA violated the Act by failing to provide nonmembers with

an adequate explanation of the basis of the fee in accordance with the requirements of N.J.A.C. 19:17-3.3(a), the parties fully and fairly litigated that issue. The Hearing Examiner found noncompliance with that regulation and recommended an order requiring compliance within 30 days. See Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982). We agree with her analysis and order the PBA to comply with the requirements of N.J.A.C. 19:17-3.3(a).

Finally, we address the requirement that fees be deducted pursuant to a negotiated agreement and examine if and when the PBA met that requirement. On December 28, 1992, the PBA was certified as the majority representative of patrol officers. On January 8, 1993, the PBA notified the City of its certification and submitted lists of unit members who were to have union dues and eyeglass plan contributions deducted from their pay;^{3/} unit members who were to have representation fees and eyeglass plan contributions deducted from their pay; and superior officers who were to have only dues deducted from their pay. The PBA also notified all unit members that it would represent them in contract and grievance matters and notified fee payers about the fee and eyeglass plan deductions. On January 15, the City began deducting representation fees on behalf of the PBA.

^{3/} The PBA assumed the former majority representative's eyeglass plan.

According to the PBA's president, he asked the City's business administrator for some kind of agreement on representation fees. In June 1993, the administrator sent the president a letter recognizing the PBA as the majority representative and authorizing it to collect representation fees. The administrator told the president that the letter would suffice because an agreement on representation fees was spelled out in the predecessor union's contract and that the parties were abiding by that contract.

N.J.S.A. 34:13A-5.5 authorizes agreements between public employers and majority representatives to collect representation fees in lieu of dues from nonmember unit employees. Where a negotiated agreement is reached, fees may be deducted from a nonmember's pay. N.J.S.A. 34:13A-5.6. As with negotiations over other employment conditions, when an agreement is reached, it "shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative." N.J.S.A. 34:13A-5.3 and 5.5.

The Hearing Examiner found that the June 10, 1993 letter from the City's administrator to the PBA's president constituted a written agreement sufficient to permit the collection of representation fees. We agree. The record supports the finding that the PBA and the City agreed to continue the terms of the predecessor contract, including the provision authorizing the deduction of representation fees, and that the June 1993 letter reflected that agreement.

At a minimum, from that point on, the PBA and the City had entered into an agreement sufficient to permit fee deductions. Thus, once the PBA established its demand and return system on October 31, 1993, the City could have validly deducted agency fees from the wages of nonmembers. Because we have found that the absence of a demand and return system precluded the PBA from being able to collect fees before October 31, 1993, we need not decide whether the PBA's January 1993 request to the City that it deduct fees coupled with the City's acquiescence constituted an agency fee agreement under N.J.S.A. 34:13A-5.6.

ORDER

Camden Lodge No. 35, Policemen's Benevolent Association is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing the nonmember charging parties in the exercise of the rights guaranteed to them by the Act, particularly by collecting representation fees before establishing and maintaining a demand and return system and without notifying nonmembers pursuant to N.J.A.C. 19:17-3.3(a) (1) and (3).

B. Take this action:

1. Refund to the nonmember charging parties all of their representation fees collected or held in escrow before November 1, 1993, together with interest in accordance with R.4:42-11.

2. Within 30 days, correct its demand and return system to comply with the requirements of N.J.A.C. 19:17-3.3.

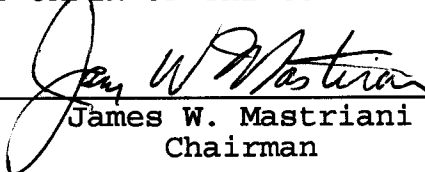
3. Within 10 days of the adoption of the revised demand and return system, inform all unit employees who have not been members of the PBA at any time since November 1, 1993 of the contents of this system and their right to demand refunds of fees collected from them since November 1, 1993.

4. Within 60 days of receiving any objections pursuant to the preceding paragraphs, process any objections to completion and then inform any fee payers who have filed demands that they may still contest the amount of any refund by filing an appeal with the Public Employment Relations Commission Appeal Board.

5. Notify the Chairman of the Commission within 20 days of receipt what steps the Respondent has taken to comply with this order.^{4/}

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: December 16, 1994
Trenton, New Jersey
ISSUED: December 19, 1994

^{4/} In light of the notice requirements in N.J.A.C. 19:17-3.3 and this order, there is no need for the PBA to otherwise notify employees of its violation.

H.E. NO. 94-25

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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Respondent,

-and-

Docket No. CO-H-93-356

FOP LODGE #1

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the PBA violated the Act by collecting representation fees prior to executing a written agreement with the City of Camden authorizing the deduction of fees and without establishing and providing a legally valid demand and return system. The Hearing Examiner further finds that the PBA violated the Act by failing to comply with N.J.A.C. 19:17-3.3(a)(1), (2) and (3).

The Hearing Examiner recommends that the PBA refund representation fees to the individuals named in the charge for the period it collected fees without a written agreement or a demand and return system in place. However, the Hearing Examiner does not recommend a refund of fees collected once a demand and return system was provided, even though the system contained some defects. Rather, the Hearing Examiner recommends that the defects be corrected and that representation fee payers be given a copy of the revised system and the opportunity to demand appropriate refunds. Further, the Hearing Examiner recommends that the PBA provide the information required by N.J.A.C. 19:17-3.3, that it has not already provided.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Charging Party.

Appearances:

For the Respondent,
Loccke & Correia, attorneys
(Charles E. Schlager, Jr., of counsel)

For the Charging Party,
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 5, 1993, FOP Lodge #1 filed an unfair practice charge (C-1)^{1/} with the Public Employment Relations Commission against Camden Lodge No. 35, Policemen's Benevolent Association. The charge was filed on behalf of thirty-three police officers employed by the City of Camden who pay representation fees in lieu

^{1/} C- refers to the Commission exhibits received into evidence at the March 2, 1994 hearing held in this matter. CP- and R- refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. "T" refers to the transcript of the hearing.

of dues to the PBA.^{2/} The FOP alleges that the PBA violated the New Jersey Employer-Employee Relations Act, (Act) N.J.S.A. 34:13A-1 et seq., specifically, section 5.4(b)(1)^{3/} by, but not limited to, unlawfully requiring the City to deduct and remit representation fees from bargaining unit employees; by failing to promptly notify the employees from whom the representation fee has been deducted; failing to provide a demand and return system; failing to provide bargaining unit employees with a statement of expenditures; failing to establish the appropriateness of the agency fee being charged to non-members; and failing to deduct the representation fees pursuant to a written agreement authorizing said deductions.

On August 25, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1) and on December 30, 1993, the respondent filed an Answer (C-2) denying the allegations of the charge.

^{2/} Specifically, the charge was filed on behalf of: Orlando Rodriguez, Robert W. Nelson, Robert McGriff, Thomas Photts, Anthony D. Benson, Stephen Gracio, Jorge L. Medina, Tony LaForte, Edward Cropski, Wayne Matthews, Dan E. Morris, Suso Davila, Rafael Perez, Fred Petterson, Harry Leon, Charles S. Woodward, Sr., Jerome Boyd, Eric Johnson, Ronald Golden, Melvin Stevens, Brian Beverly, Frank Simons, Miguez A. Ruez, John Mulligan, Elizer Agron, Donald Morris, Paul Baker, William Maldonado, Jr., E. Perry, Michael Hearne, Kevin Wilkes, Luis Sanchez, and S.E. Quarhes. The charge seeks a remedy for them, not the FOP.

^{3/} This subsection prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

After three adjournments by the PBA and consented to by the FOP, a hearing was held on March 2, 1994 in Trenton, New Jersey at which time the parties were afforded the opportunity to examine witnesses, present relevant evidence and argue orally. The parties waived oral argument and filed post-hearing briefs by May 4, 1994. The PBA filed a reply brief by June 7, 1994.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The PBA has been the certified majority representative of a unit of patrol officers employed by the City of Camden since December 28, 1992. For the six years prior to that time, the FOP was the majority representative (T9-T10). The PBA represents all employees in the unit, regardless of whether they are PBA members. The PBA refers to non-members as agency shop members (T10-T11). The instant charge was filed on behalf of 33 agency shop members (C-1).^{4/}

The PBA members pay \$12.57 per pay period to the union; \$11.50 is for dues and \$1.07 is for an eyeglass plan. The agency

^{4/} At the hearing, the PBA submitted into evidence several statements, it allegedly received, signed by individuals named in the charge stating that they wanted their names removed from the charge (R-3). However, I cannot accept these statements as withdrawals from the instant charge, as the PBA failed to prove that these individuals actually signed the statements. Moreover, I have not received any notification from these individuals or their counsel that they desire to withdraw from the instant matter.

shop members pay a representation fee of 85% of the dues paid by union members or \$8.30 per pay period and also pay the \$1.07 per pay period towards the eyeglass plan (T11-T14). The PBA based the 85% figure on the fact that this was the maximum allowed by the Commission and this was what the FOP had previously deducted. Further, the PBA looked at what their expenditures would be and what the FOP's previous expenditures were. The PBA also figured it should collect the maximum because agency shop members had never received a refund from the FOP previously and because it would need every dollar to bargain (T19-T20).

2. Richard DiRenzo is the treasurer of the PBA. He has held this position for the past two years and has been a PBA member for 21 years. He is responsible for the financial matters of the Local. He takes in all incoming monies, deposits them into the PBA account and issues checks for the payment of bills. As treasurer, he is also familiar with collective negotiations. At the time of the hearing, the PBA and the City were in collective negotiations for a new agreement. The previous agreement between the City and the FOP expired December 31, 1992 (T8-T9; T16).

On January 8, 1993, DiRenzo sent a letter (CP-1) to Cindy Zaggarelli, City Payroll Supervisor, informing her that on December 28, 1992, the PBA was certified as the bargaining agent for all rank-and-file members. Attached to the letter were three lists; the first was a list of officers who were to have PBA dues and eyeglass money deducted; the second was a list of officers who were to pay

representation fees and eyeglass deductions; and the third, was a list of superior officers who were to have only PBA dues deducted. The PBA also sent the City Business Administrator a copy of the Commission election results certifying the PBA as the majority representative (T16-T17; CP-1).

3. Also, on January 8, 1993, the PBA sent a letter to agency shop members (CP-4a) and a letter to all patrolmen in the department (CP-4b; T20-T21). The letter to agency shop members informed them that a representation fee and an eyeglass deduction were being taken out of their pay each pay period, as well as the amount of each. The letter to all patrolmen informed them that the PBA was certified as the majority representative for all rank-and-file members and that it would represent all members in contract and grievance matters (CP-4a; CP-4b). These letters were sent through the inter-departmental mail, which is the platoon mail box whereby mail is distributed to each individual in the platoon at roll call by his supervisor. Officers in the department generally receive all their mail including subpoenas, certified mail, departmental mail, and notifications of union and police activities through inter-departmental mail (T22-T23, T29-T30, T46-T47). The letters were also posted on the bulletin boards in the police building and the district house (T52-T53). The PBA never received back any copies of CP-4a or CP-4b that were not delivered (T47-T48).

4. The PBA did not receive any objection from the City to its January 8 letter regarding the deductions to be taken from unit members. It began deducting the representation fees on January 15, 1993 (T16-T17). The PBA later informed the City that it needed written confirmation from City Business Administrator, Pat Keating, that it could collect the representation fees. Finally, on June 10, 1993, Keating sent a letter to the then President of the PBA, Louis Hannon, advising that the City recognized the PBA as the negotiations representative and authorizing it to collect agency shop fees (CP-3; T17-T18, T48). Keating informed Hannon that the letter would suffice because the parties were abiding by the existing contract and the existing contract addressed agency shop fees (T48). Hannon testified that he understood this to be an agreement between the City and the PBA regarding the assessment of representation fees (T48).

5. Sometime at the end of September or the beginning of October 1993, the PBA posted a demand and return system (CP-5) on the two main bulletin boards in the police building and on the bulletin board in each district house. It also mailed a copy to each agency shop member by postal mail (T24-T25). The current President of the FOP, James Mulligan, personally received a copy of the demand and return system from DiRenzo in October 1993 (T41). The PBA never distributed a written statement of expenditures to representation fee payers (T26-T27). The PBA has not received any appeals from non-members under its demand and return system (T33-T34).

ANALYSIS1. The Issue of the Written Agreement Authorizing the Deduction of Representation Fees

N.J.S.A. 34:13A-5.5(a) provides:

Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all non-member employees in the unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative. Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

A written agreement between a majority representative and the employer is required before representation fees can be collected from non-members. West New York Police Supervisors Ass'n. and John Santa Maria, P.E.R.C. No. 89-60, 15 NJPER 21 (¶20007 1988), aff'd 235 N.J. Super. 123 (App. Div. 1989); Baran and FOP Lodge #59, A.B.D. No. 91-2, 16 NJPER 502 (¶21221 1990). Accordingly, the PBA could not collect fees based on the union security provisions of the FOP's expired contract, as the FOP's ouster as the majority representative nullified the agency shop clause of the expired agreement. Baran; See also Modine Manufacturing Co. v. Grand Lodge, International Association of Machinists, 216 F.2nd 326 (6th Cir. 1954).

Here, the PBA sent a letter on January 8, 1993 to the City specifying what officers were to have representation fees deducted and the City acquiesced by deducting the fees. However, this does

not amount to a written agreement authorizing such deductions. Rather, the PBA's January 8 letter constituted an offer to the City to enter into a representation fee agreement. It was not until June 10, 1993, when the City accepted the PBA's offer in writing by issuing a letter recognizing the PBA as the majority representative and authorizing it to collect the fees. At this point, a written agreement authorizing the deduction of representation fees, pursuant to N.J.S.A. 34:13A-5.5(a), was formed. See Restatement, Second, Contracts, §3, §22; Diversified Services, Inc., 225 NLRB No. 158, 93 LRRM 1068 (1976).^{5/} Therefore, the PBA's collection of representation fees prior to its receipt of the City's June 10, 1993 letter violated the Act.

2. The Issue of the Demand and Return System

N.J.S.A. 34:13A-5.6 provides that no representation fees may be available to the majority representative unless that representative has first established a demand and return system. N.J.A.C. 19:17-3.3(a)(2) adds that a copy of the demand and return system must be provided by the majority representative to persons subject to the representation fee, prior to the deduction of the fee. See, Boonton Bd. of Ed. and Boonton Ed. Ass'n. and NJEA,

^{5/} In Diversified, the NLRB held that in order to constitute a bar, a contract need not be encompassed within a single formal document, but may consist of an exchange of the written proposal and written acceptance.

P.E.R.C. No. 84-3, 9 NJPER 472 (¶14198 1983), aff'd as mod. sub nom., Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den 106 S. Ct. 1388 (1986). In the instant matter, the record reveals that the PBA did not establish and provide a demand and return system until the end of September or October 1993 (T24-T25; T41). Thus, I find that the PBA violated the Act by collecting fees prior to establishing and providing a demand and return system. N.J.S.A. 34:13A-5.6. Boonton; N.J.A.C. 19:17-3.3.^{6/}

Moreover, the demand and return system that was eventually provided is legally defective in some respects.^{7/}

N.J.S.A. 34:13A-5.6 in pertinent part provides:

Where a negotiated agreement is reached, pursuant to section 2 of this act [Section 34:13A-5.5], a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative; provided, however, that

^{6/} The exact date the demand and return system was established and provided was not proven at the hearing. DiRenzo testified that he posted and mailed it in October 1993, but later testified that it was posted and mailed the end of September, 1993 (T24-T25). FOP President James Mulligan testified that he was handed a copy of the demand and return system in October 1993 (T41). Since the PBA failed to precisely show when the system was established and provided, for purposes of this proceeding, I find that it was established and provided October 31, 1993.

^{7/} In its charge, the FOP does not plead in detail what aspects of the demand and return system are defective. However, in its brief, it specifies that the system does not contain a statement of expenditures nor does it provide for pro rata returns as described in N.J.S.A. 34:13A-5.6. Therefore, I reviewed the demand and return system on its face, including, particularly, the inadequacies alleged.

membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in section 2(c).^{8/}

In Boonton, the New Jersey Supreme Court stated that the system must be "uncomplicated, efficient, and readily accessible." Further, such a process must contain no features or conditions that would in any manner inhibit or restrain a non-member employee from utilizing it. Boonton at 551-552.

In Chicago Teachers Union v. Hudson, 475 U.S. 292, 121 LRRM 2793 (1986), the U.S. Supreme Court pronounced that:

The constitutional requirements for the Union's collecting of agency fees include an adequate explanation of the basis for the fee, a

^{8/} This section, N.J.S.A. 34:13A-5.5(c), in pertinent part provides:

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 and 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 reflect, however, the costs of support 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.

reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Here, I find that the system fails to meet the first requirement of Hudson, that the union provide an adequate explanation of the basis of the fee. The system merely provides for a posting of the audit of expenditures; however, Hudson requires that a union must personally provide adequate information about the basis of the fee to each non-member; specifically, it must identify and distinguish between expenditures which are related to collective negotiations and contract administration and those which are not. See also Boonton; Baran.

Additionally, I find its requirement of a written request for rebate by certified mail to be a term which may inhibit or restrain employees from using it in violation of Boonton. See also Weaver v. Univ. of Cincinnati, 764 F. Supp 1241, 140 LRRM 2942 (S.D. Ohio 1991) aff'd 970 F.2nd 1523, 140 LRRM 2948 (6th Cir. 1992) U.S. cert. den. in 142 LRRM 2584 (2/22/93).

However, I reject the FOP's claim that the demand and return fails to provide for "pro-rata returns", as described in N.J.S.A. 34:13A-5.6. Although on its face, it does not provide for "pro-rata returns", it does state that the representation fee shall not be more than 85% of regular membership dues and that the preliminary amount of money determined to be expended for members-only benefits is not more than 15% of each members regular dues. Further, the system provides for a rebate for additional

expenditures for political activity or member benefit. Thus, in essence the system provides for a pro-rata return, although it does not clearly specify one.

3. The Issue of Notification to Employees

N.J.A.C. 19:17-3.3 provides:

(a) Prior to the commencement of payroll deductions of the representation fee in lieu of dues for any dues year, the majority representative shall provide all persons subject to the fee with an adequate explanation of the basis of the fee, which shall include:

1. A statement, verified by an independent auditor or by some other suitable method of the expenditures of the majority representative for its most recently completed fiscal year. The statement shall set forth the major categories of expenditures and shall also identify expenditures of the majority representative and its affiliates which are in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of benefits only available to non-members of the majority representative.

2. A copy of the demand and return system established by the majority representative pursuant to N.J.S.A. 34:13A-5.6, including instructions to persons paying the representation fee in lieu of dues as to how to request review of the amount assessed as a representation fee in lieu of dues.

3. The name and address of the financial institution where the majority

representative maintains an account in which to escrow portions of representation fees in lieu of dues which are reasonably in dispute. The interest rate of the account in effect on the date the notice required by (a) above is issued shall also be disclosed.

4. The amount of the annual representation fee in lieu of dues, or an explanation of the formula by which the representation fee is set, and the schedule by which the fee will be deducted from pay.

Here, the PBA violated (a) (1),^{9/} (2) and (3), quoted above, as it failed to provide any of the information required under these subsections prior to the commencement of payroll deductions of the representation fee.^{10/} However, I do not find that subsection (a) (4) was violated. I credit DiRenzo's and Hannon's testimony that the PBA sent a copy of CP-4a to each agency shop member on January 8, 1993 through inter-departmental mail, which is the usual way officers received their mail (T20-T23; T46-T48). CP-4a informed agency shop members of the representation fee and of the amount to be deducted for it per pay period and was sent prior to commencement

^{9/} The notice requirement of (a) (1) could have been satisfied when the PBA first became the majority representative in January 1993, by providing the information discussed in Baran, that is, adequate information about the basis of the fee based on the PBA's anticipated expenditures and the fee previously accessed by the FOP.

^{10/} However, I find that the PBA eventually met the requirements of (a) (2) when it provided its demand and return system (CP-5) in October 1993. Moreover, I find that (a) (3)'s requirements were also met then except with respect to providing the interest rate of the escrow account for representation fees.

of the deduction. Therefore, it satisfied the requirements of subsection (a) (4).^{11/}

Finally, I find that the FOP's allegation that the PBA failed to establish the appropriateness of the fee being charged to non-members is not within the Commission's jurisdiction. Rather, this allegation, involving the amount of the fee and how it is determined, is within the jurisdiction of the Appeal Board.^{12/} Boonton, 99 NJ at 534-535.

Based upon the record and the briefs and arguments of the parties, I make the following:

Conclusions of Law

1. The Respondent PBA violated section 5.4(b) (1) of the Act when it collected representation fees prior to the execution of a written agreement between the PBA and the City of Camden authorizing the deduction of representation fees.

2. The Respondent PBA violated section 5.4(b) (1) of the Act when it collected representation fees prior to establishing and providing a legally valid demand and return system.

^{11/} Although current FOP President Mulligan testified that he never received a copy of CP-4a or heard of any other officer receiving it, this is not proof that no officer ever received it. Moreover, DiRenzo testified that the PBA never received back any copies of CP-4a that were not delivered (T42-T43, T48).

^{12/} The FOP's allegation in its brief that the PBA violated N.J.A.C. 19:17-3.1 and N.J.A.C. 19:17-3.2 by deducting fees prior to the commencement of its fiscal year will not be addressed, as it was not pled in its charge.

3. The Respondent PBA violated section 5.4(b)(1) of the Act by failing to notify persons subject to a representation fee, pursuant to N.J.A.C. 19:17-3.3(a)(1), (2) and (3).

4. The Charging Party FOP's allegation that the Respondent PBA failed to establish the appropriateness of the fee is not within the jurisdiction of the Commission. Rather, it is within the jurisdiction of the Appeal Board.

Recommended Order

I recommend that the Commission ORDER the following:

A. The Respondent PBA cease and desist from:

1. Interfering with, restraining or coercing the individuals named in the charge in the exercise of the rights guaranteed to them by the Act by a) collecting representation fees prior to establishing and providing a legally valid demand and return system; and b) failing to notify persons subject to a representation fee pursuant to N.J.A.C. 19:17-3.3(a)(1) and (3).^{13/}

B. That the Respondent PBA take the following affirmative action:

^{13/} I do not recommend that the Commission also order that the PBA cease and desist from collecting representation fees prior to the execution of a written agreement between the PBA and the City authorizing the deduction of representation fees and cease and desist from failing to notify persons subject to a representation fee pursuant to N.J.A.C. 19:17-3.3(a)(2), as the PBA has already done so. See supra pp. 7, 12.

1. Refund to the individuals named in the charge all of their representation fees collected or held in escrow since January 15, 1993 through October 31, 1993, together with simple interest in accordance with R.4:42-11.^{14/}

2. Within 30 days, correct its demand and return system to comply with the requirements of Boonton and Hudson and N.J.A.C. 19:17-3.3.

a. Within 10 days of the adoption of the revised demand and return system, inform all unit employees who have not been members of the PBA at any time since November 1, 1993 of the contents of this system and their right to demand appropriate refunds of fees collected from them since November 1, 1993.

b. Within 60 days of receiving any objections pursuant to the preceding paragraphs process any objections to completion and then inform any fee payers who have filed demands that they may still contest the amount of any refund by filing an appeal with the Appeal Board.


^{14/} I do not recommend that the Commission order that representation fees collected after October 31, 1993 be refunded, because, at that point, a demand and return system was provided, albeit the system contained defects. Bacon and District 65, U.A.W., P.E.R.C. No. 87-72, 13 NJPER 57 (¶18025 1986) aff'd App. Div. Dkt. No. A-2994-86T8 (8/16/88) certif. den., 114 N.J. 308). There is no evidence that any of the individuals named in the charge asked for a rebate from the PBA after receipt of the system (T33-T34). Moreover, none of the individuals filed an appeal with the Appeal Board. Therefore, I do not believe it would effectuate to purposes of the Act to order a refund for fees collected after October 31, 1993.

3. Within 30 days, supply the information required by N.J.A.C. 19:17-3.3(a)(1) and supply the interest rate of the escrow account for representation fees, required by N.J.A.C. 19:17-3.3(a)(3).

4. Post in all places where notices to employees are customarily posted, copies of the attached Notice marked as Appendix "A". Copies of such notice on forms to be provided by the Commission shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That Charging Party FOP's allegation that the Respondent PBA failed to establish the appropriateness of the fee be dismissed.


Regina A. Muccifori
Hearing Examiner

Dated: June 10, 1994
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere, restrain or coerce the individuals named in the charge in the exercise of the rights guaranteed to them by the Act by a) collecting representation fees prior to establishing and providing a legally valid demand and return system; b) failing to notify persons subject to a representation fee pursuant to N.J.A.C. 19:17-3.3(a)(1), (2) and (3).

WE WILL refund to the individuals named in the charge all of their representation fees collected or held in escrow since January 15, 1993 through October 31, 1993, together with simple interest computed in accordance with R.4:42-11.

WE WILL within 30 days, correct the demand and return system to comply with the requirements of Boonton and Hudson and N.J.A.C. 19:17-3.3.

WE WILL within 10 days of the adoption of the revised demand and return system, inform all unit employees who have not been members of the PBA at any time since November 1, 1993 of the contents of this system and their right to demand appropriate refunds of fees collected from them since November 1, 1993.

WE WILL within 60 days of receiving any objections pursuant to the preceding paragraphs process any objections to completion and then inform any fee payers who have filed demands that they may still contest the amount of any refund by filing an appeal with the Appeal Board.

WE WILL within 30 days, supply the information required by N.J.A.C. 19:17-3.3(a)(1) and supply the interest rate of the escrow account for representation fees, required by N.J.A.C. 19:17-3.3(a)(3).

Docket No. CO-H-93-356

Camden Lodge #35,
Policemen's Benevolent Association
(Public Employee Representative)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.