A.B.D. No. 86-4

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

OAL DKT #PRB-5272-85
AGENCY DKT #AB-85-4

GEOFFREY W. REES,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA

Respondent.

Geoffrey W. Rees, petitioner pro se

Steven Weissman, Esq. for respondent (Communications Workers of America, AFL-CIO District 1)

DECISION AND ORDER

On October 23, 1984, Geoffrey W. Rees filed a petition of appeal with the Public Employment Relations Commission Appeal Board ("Appeal Board"). The petitioner is employed by the State of New Jersey and is represented for purposes of collective negotiations by Respondent, Communications Workers of America, AFL-CIO ("CWA"). He pays a representation fee in lieu of dues to the CWA. The petition and attached exhibits state that Rees demanded and received from the CWA rebates of a portion of his representation fees paid to the CWA and its affiliated Local between July, 1982 and December, 1983. Rees received $46.16 in rebates for this period which included interest paid at 5.25 per cent. The petition states that Rees questions neither the principal amount of the refunds nor the way

the refund was calculated (i.e. there is no challenge to how the CWA arrived at the percentage of its expenditures which were subject to rebate). The petition asks to see the interest actually earned on the accounts held by the CWA to escrow representation fees and alleges that the interest paid to him by the CWA was too low. An Answer to the petition was filed by the CWA. The matter was transferred to the Office of Administrative Law as a contested case on August 20, 1985 and was assigned to Administrative Law Judge Joseph Lavery. On December 13, 1985, Judge Lavery issued his "Initial Decision-Summary Decision" which granted a motion for summary decision filed by the CWA and disposed of all issues in the case. Pursuant to N.J.S.A. 52:14B-10, the matter is now before the Appeal Board to affirm, reverse, remand or modify the order issued by Judge Lavery.

Two affidavits submitted by Vera McGee, a Washington, D.C.-based CWA official provided information concerning CWA's deposits of representation fees paid by New Jersey State employees. CWA maintains a "Political Objector Escrow Account" in the National Savings and Trust Bank in Washington, D.C. CWA places in that account 40 per cent of the representation fees it collects from non-member State employees who have requested rebates of their proportionate share of expenditures by the CWA on member-only benefits or partisan political or ideological lobbying unrelated to collective negotiations. Interest on that account, according to the affidavits, was paid at 5.25 per cent prior to January, 1984 and has

been paid since at 5.50 per cent.[1/] McGee's affidavit states that the interest received by representation fee payers on their rebates is exactly the interest earned by CWA on their representation fees. After receiving the first affidavit, Rees asserted that he should have received interest at 5.50 per cent for a portion of the time his refund was held by the CWA because all of it was not actually paid over to him until the fall of 1984, nine months after CWA began receiving the higher interest rate. CWA has apparently complied with this request. Rees' sole remaining contention as phrased in Judge Lavery's October 16, 1985, prehearing order is:

> Whether the CWA must pay interest on representation fee payers' escrowed monies comparable to that which banks themselves earn through bank investments. In the alternative, whether CWA may pay interest in the amount normally allocated by a bank at the "passbook" level of interest employed with escrow accounts.

Stated more simply, is the CWA under a duty to secure the highest interest rates available for escrowed representation fees? CWA, asserting that no factual issues were in dispute, moved for a summary decision. It asserted that no case law holds that it is required to search out the highest interest rates available. The CWA conceded that higher interest accounts were available, but were impractical to administer because they required that deposits be made for fixed periods of time, and/or the interest rates fluctuated

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1/ McGee's first affidavit mistakenly listed the pre-1984 interest rate paid on the account at 5.35 per cent.

from week to week. CWA states that these fluctuations would make it difficult to accurately fix each fee payer's rebate because the interest would have to be calculated separately based upon which weeks his or her monies were in escrow, problems which would be avoided in an account paying a fixed rate of interest. The petitioner did not respond to the CWA's motion. He had previously asserted that CWA has a duty, presumably akin to that of a fiduciary, to search out and use the most lucrative generators of interest, instead of straight interest-bearing accounts.

Initially we agree with Judge Lavery that there are no factual issues in dispute and the case can be decided summarily. See Judson v. Peoples Bank and Trust of Westfield, 17 N.J. 67, 75 (1954). We now consider whether a majority representative must maximize interest it receives on escrowed representation fees which are subject to rebates.

The use, even temporarily, of representation fees paid by objecting non-members may infringe Constitutional rights. It gives the union an "involuntary loan" to pursue activities unrelated to collective negotiations or contract administration which the non-members may find objectionable. See Ellis v. Railway Clerks, ___ U.S. ____, 104 S. Ct. 1883, 1890, 80 L. Ed. 2d. 428 (1984) and Matter of Bd. of Ed. of the Town of Boonton and Judith M. Kramer, 99 N.J. 523, 550-551 (1985). If a majority representative escrows representation fees, then the violation of objecting non-members' rights is avoided so long as the amount escrowed is

always more than the proportionate amount spent by the union on rebatable activities. If a non-member is entitled to a refund, then it follows that the union should return to him the interest earned on the rebate while it was in the escrow account. However, we find nothing in the Act or the decisions construing it and other "agency shop" systems which would require the union to obtain the best interest rates possible for escrowed representation fees.[2/]

Since the maximum representation fee in New Jersey is 85 per cent of a majority representative's dues, an organization which always spends 15 per cent or less of its budget on rebatable activities would never use or have to escrow any non-member's funds. For organizations which exceed the 15 per cent cushion, an escrow arrangement can prevent the use of representation fees to finance member-only benefits or partisan political or ideological lobbying. The CWA's escrow arrangement achieved that aim.

2/ In Hudson v. Chicago Teachers Union Local No. 1, 743 F. 2d. 1187, 117 LRRM 2314, (7th Cir. 1984), cert. granted 105 S. Ct. 2700 (1985), the U.S. Court of Appeals for the Seventh Circuit theorized that even where the union puts dissenters' fees in an interest-bearing escrow account, it might "forego a high interest right to punish dissenters (even though it would be punishing itself at the same time)." The court, which had also recognized the union might be motivated to secure a high interest rate since the escrowed fees might eventually be retained by the union, then stated its opinion that it would be best if the union turned over both management and custody of an escrow account to a financial institution. 117 LRRM at 2321. These comments were not part of the actual holding in Hudson which was recently argued before the U.S. Supreme Court.

For the period covered by his petition, Rees paid representation fees to the CWA and its affiliated local totalling $315.88 of which $43.05 was refunded to him, representing 13.66 per cent of his fee.[3/] After receiving Rees' request for a rebate, the CWA escrowed 40 per cent of his representation fees. Since Rees received only 13 per cent of his fee back, the majority of the money held in escrow was turned over to CWA. Thus while both CWA and Rees (as well as other representation fee payers receiving rebates) would have benefited from a higher interest rate, CWA would have benefited more. We find it difficult to believe (the Seventh Circuit's comments in Hudson, notwithstanding) that the union would have cut off its financial nose to spite its face. We find nothing in the record which counters CWA's assertion that it chose to sacrifice the higher rate for the ease of calculating rebates based upon a fixed interest rate. The statements made by CWA in the McGee affidavits concerning the difficulty of keeping track of each person's interest in a fluctuating rate account were not disputed by the petitioner who has asserted that CWA should have secured the highest interest rate available, apparently without regard to the accounting and liquidity pitfalls which might be associated with

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3/ An affidavit filed by the CWA asserts that Rees and other representation fee payers received too large a rebate from CWA-national because the fact that the representation fee is 85 per cent, rather than 100 per cent, of dues was not taken into account. CWA does not seek the return of the alleged overpayment.

such higher-interest accounts. Since there is no dispute concerning the propriety of the CWA's expenditures and its calculations of the principal amounts to be rebated to the petitioner from the CWA and its affiliated local, the only issue placed in dispute was the CWA's obligation to maximize the interest paid on the escrow account holding the rebates. As all factual matters concerning this issue were undisputed, the Admistrative Law Judge properly decided this legal issue in a summary manner and we agree with his determination that the CWA was under no duty to secure and pay out a higher rate of interest on rebates to representation fee payers. We thus affirm the Initial Decision of the ALJ.

ORDER

The petitioner's appeal for a modification in the interest paid on the rebated portion of the representation fee in lieu of dues paid to CWA between July, 1982 to December, 1983 is hereby dismissed.

BY ORDER OF THE APPEAL BOARD

Robert J. Pacca
Chairman

DATED: Trenton, New Jersey
January 28, 1986
ISSUED: January 28, 1986