

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN (BERGEN PINES
COUNTY HOSPITAL),

Petitioner,

Docket No. SN-8

-and-

COUNCIL 52, AFSCME, AFL-CIO,
Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by a public employer concerning a disputed provision contained in a collective negotiations agreement, the Commission rules that a "maintenance of membership" provision which either imposes continued employee organization membership payments during the contract term as a condition of continued employment, or which precludes an employee's ability to halt dues deductions during the contract term, constitutes an impermissible restriction on an employee's right to refrain from assisting an employee organization, guaranteed by section 5.3 of the Act. The Commission thus finds the disputed provision to relate to an illegal subject for negotiations, and declares the provision to be null, void, and unenforceable.

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Appearances:

For the Petitioner, Paul J. Giblin, Esq.

For the Respondent, Jesse Moskowitz, Esq.
(Mr. William E. Andersen, on the brief)

DECISION AND ORDER

On March 25, 1975 the petitioner, County of Bergen, filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission concerning a disputed provision contained in the current collective negotiations agreement between Bergen Pines County Hospital and the respondent, Council 52, AFSCME, AFL-CIO, covering the Hospital's approximately 1800 non-supervisory blue collar and craft employees.

The petitioner's brief (N.J.A.C. 19:13-3.3) was filed on June 23, 1975 which, although well out of time, was not objected to by the respondent and was accepted by the Executive Director on behalf of the Commission. With

^{1/} The petition refers to the public employer as "Bergen County." The Commission has amended the caption on its own motion simply in the interests of convenience and clarity.

the consent of the petitioner, the respondent was permitted an extension to file its brief (ibid.) on July 30, 1975. No further briefs have been filed, and neither party has requested an evidentiary hearing (N.J.A.C. 19:13-3.4) or oral argument before the Commission (N.J.A.C. 19:13-3.6). At the Commission's request, a copy of the entire agreement between the parties has been submitted.

Upon a review of the petition, the parties' briefs, and pertinent provisions of the parties' agreement, the Commission finds and determines as follows.

It is essential to note initially that the Commission's analysis and determination herein is based entirely upon the state of the substantive law prior to the 1974 amendments to the New Jersey Employer-Employee Relations Act, as contained in c. 123, P.L. 1974, effective January 20, 1975. The parties' agreement at issue herein has a term of July 1, 1974 to December 31, 1976, thus pre-dating the effective date of the Chapter 123 amendments. Section 6 of Chapter 123 amended N.J.S.A. 34:13A-8.1 to read as follows, in pertinent part:

Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its term heretofore entered into between any public employer and any employee organization, ***

With regard to the effect of the cited language upon the substantive law applicable to pre-amendment agreements, see Board of Education of the Township of Ocean, the County of Monmouth v. Township of Ocean Teachers' Association, et al., Docket No. A-3334-74 (App. Div., May 5, 1976), slip opinion at page 5.

The Commission is therefore not confronted with, and does not pass upon, the effect of the substantive amendments of Chapter 123 upon the issues presented herein.

The disputed contractual provision, constituting Article II, Section 1(f) of the parties' agreement, reads as follows:

Each employee who, on the effective date of this Agreement, is a member of the Union shall maintain his membership in the Union for the duration of this Agreement.

We have been asked by the petitioner to find that the parties could not have legally agreed to the foregoing provision, which the petitioner maintains is a union security device unsupported by, and violative of, the New Jersey Employer-Employee Relations Act. The respondent urges on the other hand that the disputed provision is neither inconsistent with, nor prohibited by, the Act or other pertinent legislation and should be found to be within the scope of collective negotiations. This dispute is properly before us for resolution, pursuant to our authority under Section 1(d) of Ch. 123, P.L. 1974, codified as N.J.S.A. 34:13A-5.4(d):

The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the Commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.

It is appropriate to set forth initially the constitutional and statutory provisions relevant to the instant dispute. Article I, par. 19 of the State Constitution of 1947 provides in pertinent part:

Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

The aforesaid provision was legislatively implemented in 1968 by the passage of Ch. 303, P.L. 1968 which was further amended and supplemented by Ch. 123, P.L. 1974. This legislation, the New Jersey Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.), provides inter alia that public employees have the right to "form, join and assist any employee organization" and the equivalent right to "refrain from any such activity" (N.J.S.A. 34:13A-5.3). Additionally, the Act requires good faith negotiations between the public employer and the employees' majority representative with respect to "grievances and terms and conditions of employment", and the reduction to a signed writing of any agreement reached by the parties (ibid.).

Finally, the voluntary dues check-off has been specifically authorized in the public sector. Antedating the Employer-Employee Relations Act, the dues check-off was initially authorized legislatively by Ch. 310, P.L. 1967. Codified as N.J.S.A. 52:14-15.9a, the statute provides that when a public employee indicates to his employer in writing his desire to have his employee organization dues deducted from his compensation, the employer "shall make such deduction" and "shall transmit the sum so deducted to the employee organization designated by the employee." The employee may file a "notice of withdrawal" of his authorization. In its original form, the statute made such notice "effective to halt deductions" as of the

next succeeding January 1. Pursuant to a 1969 amendment (Ch. 233, P.L. 1969) the withdrawal notice is now effective as of the next succeeding January 1 or July 1.^{2/}

The disputed contract clause is not entirely clear as to the effect, if any, of non-compliance. While a "maintenance of membership" clause is a common union security device in jurisdictions, both public and private, where such devices are permissible, such a clause requires maintenance of union membership as a condition of employment, and accordingly failure to tender required membership dues will be grounds for discharge. The clause before us is silent, however, as to the consequences of withdrawal from the union during the term of the contract.

Even if the instant clause is not intended to impose continued membership payments as a condition of continued employment, it certainly has the effect of precluding an employee's ability to halt dues deductions at least during the contract term. The latter conclusion is based upon a reading of the clause in the context of the preceding subsections in the article:

Article II - Union Security

Section 1. Check off of Union Dues

- (a) All employees covered by this Agreement may tender their membership dues to the Union by voluntarily signing the authorization for Payroll Deduction of Union Dues Form provided by the Union.
- (b) The Hospital agrees to deduct dues in the amount certified by the Union.
- (c) Payroll deduction of Union dues shall become effective in the next full pay period following receipt of authorization by the Hospital.

^{2/} Another 1969 amendment (Ch. 43, P.L. 1969) is not relevant to the instant proceeding.

(d) The total of all such deductions together with a list of employees from whom dues have been deducted, shall be remitted to the designated Financial Officer of Council 52, AFSCME, AFL-CIO, One Foye Place, Jersey City, New Jersey 07306, monthly, by the 15th of the month following deduction.

(e) Any change in the amount of Union dues to be deducted must be certified by the Union in writing and be forwarded to the Hospital in advance of effective date.

(f) Each employee who, on the effective date of this Agreement, is a member of the Union shall maintain his membership in the Union for the duration of this Agreement.

Clearly if subsection (f) does not carry either or both of the consequences mentioned above, then it has no meaning at all. We will accordingly determine whether the clause is within the scope of collective negotiations given both potential consequences.^{3/}

The petitioner recognizes that the clause does not on its face necessarily amount to a typical maintenance of membership provision calling for discharge upon non-compliance. The petitioner argues that the clause in any event amounts to an invalid union security device since at a minimum it purports to freeze an employee's check-off authorization during the term of the contract, and therefore abridges the employee's right under the Act to refrain from assisting the union.^{4/}

The respondent argues that the petitioner is empowered to enter into a consensual contractual agreement so long as the terms are neither inconsistent

^{3/} Although the contract is silent as to the consequences of employee non-compliance, we note that it does contain a provision for binding arbitration, and it is thus possible that an arbitrator might be called upon to interpret and enforce the disputed clause.

^{4/} The petitioner does not specifically refer to the clause's apparent conflict with the dues check-off statute, N.J.S.A. 52:14-15.9e, relying instead on the "right to refrain" language of N.J.S.A. 34:13A-5.3.

with, nor prohibited by, the constitution or laws of New Jersey. The disputed contract clause is claimed to be neither inconsistent with, nor prohibited by, N.J.S.A. 34:13A-5.3 or N.J.S.A. 52:14-15.9e, and is therefore valid and enforceable.

As to N.J.S.A. 34:13A-5.3, the respondent distinguishes the instant clause from the agency shop clause invalidated in N.J. Turnpike Employees' Union v. N.J. Turnpike Authority, 64 N.J. 579 (1974), aff'g 123 N.J. Super. 461 (App. Div. 1973). Agency shop is a union security device requiring unit employees who are not members of the union to tender a service fee to the union representing their "fair share" of the cost of collective negotiations, processing of grievances, etc. as a condition of employment. The respondent argues that, while agency shop affects non-members, the instant clause only applies to employees who have voluntarily undertaken the obligations of union membership. Those aspects of agency shop found fatal in the Turnpike case are said to be absent here: (a) agency shop is tantamount to compulsory joinder, as most employees will join the union since they will be paying the equivalent of union dues in any event, and (b) for the few employees who remain non-members, agency shop imposes a "forced journey."

The respondent urges that the employees who have voluntarily become union members have also voluntarily agreed to remain members at least for the duration of the contract. It is argued that we may assume that these employees were privy to contract negotiations, participated in the ratification of the contract (which included the disputed clause), and knowingly elected not to withdraw their union membership prior to the execution of the contract. We are to infer from the foregoing that each employee affected by the disputed clause "understood and consented to" union membership for the duration of the

agreement. In the respondent's words: "To be bound by the terms of the maintenance of membership clause, employees must first have applied for membership, signed a card, signed a Payroll Deduction for Union Dues Form, negotiated the membership clause as well as the contract, and ratified the entire agreement, from each step of which they were free to withdraw."^{5/}

It is further argued that N.J.S.A. 52:14-15.9e itself freezes an employee's obligation to pay union dues, for withdrawal of check-off authorization does not halt deductions until a fixed date. If such a limited freeze is legitimate under the check-off law, the respondent wonders why it is not also permissible under a negotiated contract in the circumstances presented here. As the respondent puts it: "If N.J.S.A. 52:14-15.9e does not infringe the right of public employees to refrain from joining or assisting a union..., then neither does a contractual maintenance of membership clause."

In order to resolve the instant dispute, it is necessary to review several fundamental principles applicable to labor relations in both the public and private sectors. The instant dispute concerns (a) an employee's relationship with his employee organization, (b) an employee's relationship with his employer, and (c) the employer's relationship with the employee organization. At the heart of this matter is the manner in which the last relationship -- employer and union -- may legally deal with elements of the first two relationships.

^{5/} Although the disposition of the instant dispute does not turn on this point, we note that the disputed clause by its terms applies to employees who are members of the union "on the effective date" of the contract. According to Article XXIX, entitled "Term and Renewal", the agreement "shall be in full force and effect retroactive to July 1, 1974." The latter provision does not aid the respondent's arguments based upon an individual employee's ability to withdraw from the maintenance of membership obligation at any time prior to ratification and execution of the agreement.

The basic element in this case is an employee's membership obligations with respect to the organization that represents him in collective negotiations. Under the Act, the employee is not obligated to form, join or assist the organization, but if he chooses to become a member, he may do so. The membership rights and obligations as between the employee and the organization are usually set forth in the organization's constitution and by-laws, subject of course to applicable law. Clearly the organization's constitution and by-laws could not legally restrict the employee's right to refrain from joining or assisting the organization, explicitly protected in N.J.S.A. 34:13A-5.3.

The dues deduction device, authorized by N.J.S.A. 52:14-15.9e, plugs the employer into the employee's relationship with his organization with respect to dues. If the employee voluntarily desires his employer to serve as a conduit for the payment of union dues, the employer is mandated by the cited statute to perform this function. When the employee desires to cease the deductions, the employer is mandated to halt the deductions as of the next succeeding January 1 or July 1. Since the payment of dues is obviously a form of assistance to the employee organization, it is evident that to some extent the dues deduction statute restricts the employee's right to refrain from assisting the organization until the next succeeding January 1 or July 1.

The employer's relationship with the employee organization under the dues deduction mechanism is merely ministerial and vicarious. On the other hand, the collective negotiations relationship between employer and union is a comprehensive, substantive one, dealing with the grievances and the terms and conditions of employment of all unit employees, union members and non-members alike. Among other things, the employer and union are to negotiate in good

faith with respect to the foregoing matters, and are prohibited from interfering with, restraining or coercing unit employees in the exercise of the rights guaranteed to them by the Act. See N.J.S.A. 34:13A-5.3 and 5.4. It is clear that in carrying on their collective negotiations relationship, the employer and union may not restrict the employee's right under N.J.S.A. 34:13A-5.3 to refrain from joining or assisting the organization.

Union security devices, such as closed shop, union shop, maintenance of membership, and agency shop, are recognized as restricting the employee's right to refrain. Thus, where the right to refrain is guaranteed by law, such as in N.J.S.A. 34:13A-5.3, the employer and union are precluded from providing for such a device through their collective negotiations unless specifically authorized by a statutory proviso. There is no such proviso in the New Jersey Act.

Clearly, then, if the clause in question purports to restrict the individual employee's right to refrain, it is unsupported by statutory proviso and must fall. The only statutory provision of which we are aware that would permit a restriction of the right to refrain is the dues deduction law, previously discussed.^{6/} It could be argued, therefore, that a contractual clause paralleling the restrictions of the dues deduction statute would not impermissibly restrict the right to refrain. Faced with such a contract clause, we would no doubt so find. However, we cannot read the instant clause so narrowly.

The instant clause on its face mandates maintenance of membership during the contract term. If failure to maintain membership, by failure to tender

^{6/} The legislature recently considered a much broader proviso. 1975 Assembly Bill No. 524, passed by the General Assembly but defeated in the Senate, would have specifically legalized the negotiation of a mandatory deduction from non-members' salaries of a fee equal to union dues and assessments, i.e. an agency shop variant.

union dues or otherwise, will result in a sanction by virtue of this clause, the clause is impermissibly restrictive. The employer and the union may not, through the collective negotiations vehicle, impose a greater restriction on the individual's right to refrain, than would apply to the employee's relationship with the union (via constitution and by-laws) or the employee's voluntary dues deduction authorization pursuant to N.J.S.A. 52:14-15.9e.

The respondent's argument that affected employees have already had a chance to withdraw from the obligations imposed by the disputed clause, is compelling in terms of probabilities, but falls if it disallows just one individual to change his mind. The right to refrain is an individual right, and cannot be compromised by the majority absent explicit statutory provision to that effect.

ORDER

As the disputed matter constitutes an impermissible restriction on the right to refrain, it is hereby declared to be an illegal subject for collective negotiations, and the disputed clause of the parties' agreement is null, void, and unenforceable.

BY ORDER OF THE COMMISSION


Acting Chairman

DATED: Trenton, New Jersey
May 25, 1976

Issued: May 26, 1976