A.B.D. No. 89-1

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

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

JAMES K. DALY,

Petitioner,

v.

HIGH BRIDGE TEACHERS' ASSOCIATION

Respondent.

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

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

DECISION AND ORDER

On July 22, 1986, James K. Daly filed a petition of appeal with the Public Employment Relations Commission Appeal Board ("Appeal Board"). Daly pays a representation fee in lieu of dues to the High Bridge Teachers' Association ("HBTA") and its affiliates, the Hunterdon County Education Association ("HCEA"), the New Jersey Education Association ("NJEA") and the National Education Association ("NEA"). The petition alleges that portions of prior demand and return systems used by the Association are unconstitutional. The petition also objects to the amount of past and current representation fees.

On September 24, 1986 the Association filed an Answer. On February 25, 1987 we referred the case to the Office of

Administrative Law ("OAL") for hearing. The matter was assigned to Administrative Law Judge Joseph Lavery. This matter is now before us to review Judge Lavery's "Initial Decision-Summary Decision incorporating Partial Settlement" issued on August 30, 1988.[1/] The decision contains the procedural history. On September 15, 1988 Daly filed a motion for a remand of the decision and the Association filed exceptions. The Association filed a memorandum opposing remand and Daly filed a reply.

The decision rules upon a motion and cross-motion for summary judgment on this issue:

> Whether the "demand and return" systems established by respondent union comply with the prerequisites set forth in the United States Supreme Court decision, Chicago Teachers Union v. Hudson, 475 U.S. 209, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). If the demand and return system did not so comply, what is the legal import of that shortcoming in the circumstances of the present dispute?

The decision also incorporated a partial settlement which disposed of all challenges to representation fees assesed by the Association for years prior to 1986-1987. The settlement, executed March 31, 1988, allows petitioner to withdraw, without prejudice, his challenge to the 1986-1987 representation fee and bars the Association from reasserting any timeliness defenses in the event the claim is reasserted.

1/ The period for review has been extended by orders dated October 14, 1988 and October 26, 1988.

The ALJ's Initial Decision also addresses a number of procedural and substantive issues associated with the Association's demand and return system.

The Motion for Remand

On April 28, 1988 Daly filed a Praecipe with the OAL reasserting his challenge to the amount of the 1986-1987 representation fee. The motion for remand asserts that the initial decision is not "fully dispositive of all issues in the case" as stated in N.J.A.C. 1:1-18.1(b) because it does not address the propriety of the 1986-1987 representation fee. Daly contends that an initial decision should not have been issued which failed to address both the adequacy of the demand and return system and the propriety of the fee.

We disagree. N.J.A.C. 1:1-12.5(e) allows an Administrative Law Judge to issue a partial summary decision for review by an agency head as an intitial decision pursuant to N.J.A.C. 1:1-18.3(c)(12). Judge Lavery's decision is a partial summary decision on the adequacy of the demand and return system. We have jurisdiction to address that issue because it is coupled with a challenge to the propriety of a representation fee. See Wodzinski v. Woodbridge Tp. Ed. Ass'n, A.B.D. No. 88-5, 14 NJPER 381 (¶19149 1988). It does not matter that the two issues will be addressed separately. The parties stipulated the demand-and-return system would be considered first. We will remand the case to consider the propriety of the fee and any fee-related issues.

The Demand and Return System

Initially we agree that the burden of proof set forth in N.J.S.A. 34:13A-5.5 applies to issues which bear directly on the amount of the representation fee rather than the adequacy of the procedures used to collect that fee. Since we are deciding legal issues without a dispute as to any material fact, the allocation of the burden of proof does not affect our determination.

The ALJ found, with two exceptions, that the demand and return system was adequate on its face. He directed that the system be clarified to define two categories of fee payers, objecting and non-objecting, i.e. those who accept the Association's financial statement and allocation of expenses between chargeable and nonchargeable categories and those who do not. He also found that two of the three methods used by the Association to remedy an excessive fee were unlawful. With one exception we agree with and adopt the ALJ's conclusions concerning the adequacy of the demand and return system.

We disagree that the third option for rebating excess representation fees is unlawful.[2/] It has the same aim as an

---

2/ Under this system if it was determined, for example, that the fee should be reduced by $5 per pay period and 10 pay periods remained in that year, the following would occur: first, the Association would give a refund out of escrow to the fee payer, with interest, for fees which had already been collected; second, the Association would give $50 to the fee payer (10 pay periods times $5.00); and third, the employer would continue to deduct the original fee for the remainder of the year and remit the fees to the Association.

"advance reduction" system and could avoid the inconvenience and expense of having the public employer recalculate payroll deductions for the remainder of the dues year. The Association does not except to the ALJ's determination that the second listed option was invalid. We concur.

The notice distributed by the Association to explain the representation fee did not include a statement of HBTA's expenditures. Under the circumstances of this case the omission was "harmless error" because petitioner nevertheless filed an objection and recieved the information in the course of the challenge. See Mallamud v. Rutgers Council AAUP Chapters, A.B.D. No. 86-9, 12 NJPER 324 (¶17127 1986), app. dism'd as moot App. Div.Dkt. No. A-4715-85T6 (6/1/87).[3/]

The American Arbitration Association procedures are sufficient to ensure the independence of the impartial arbitrator. See Andrews v. Ed. Ass'n of Cheshire, et al., 653 F.Supp. 1373 (D.Conn. 1986), aff'd 829 F.2d 335 (2nd Cir. 1987). Morever, review before the Appeal Board is available to all fee payers. Robinson v. N.J., 806 F.2d 442, 123 LRRM 3193 (3rd Cir. 1986), cert. den. 95 L.Ed.2d 872 (1987) holds that the Appeal Board, despite its tripartite composition, is an impartial and unbiased panel. It satisfies the impartial tribunal requirement.

3/ However where the information is not given to the objecting fee payer, we may find that the majority representative has not met its burden of proof as to that affiliate's portion of the fee and order the entire amount refunded with interest. See Stracker v. Local 195, IFPTE, A.B.D. No. 86-10, 12 NJPER 333 (¶17128 1986).

The impartial arbitrator and the Appeal Board, rather than the auditor, should determine which expenses are chargeable to fee payers. See Andrews. We also find in accordance with Andrews, and contrary to Damiano v. Matish, 830 F. 2d. 1363, 1370 (6th Cir. 1987), that a 100 per cent escrow of fees does not violate an objector's rights.[4/]

Other issues raised by Daly concerning the "costs pool" and the appropriate method of defining chargeable and non-chargeable expenditures should be decided after a hearing on the validity of the 1986-1987 fee. It is also premature to accept or reject the Association's proposed evidentiary presumption that local and county education associations will always spend a lesser percentage on non-chargeable expenditures than do the NJEA and the NEA. That issue is not germane to the facial validity of a demand and return system. To be valid a demand and return system must notify fee payers how the fee was calculated and provide an opportunity to challenge the information provided. The evidentiary presumption is a device used to prove the figures in the notice when the opportunity to challenge is used.

In sum the Association's demand and return system is valid provided: (1) it is clarified to delineate two categories of fee payers and (2) modified to prohibit the Association's receipt of a

---

4/ In Damiano the fee collected was equivalent to union dues and the court concluded that it must necessarily contain nonchargeable expenses. That assumption cannot be made in New Jersey where the fee cannot exceed 85 percent of regular dues.

fee found to have been excessive unless the difference between the appropriate fee and the fee actually assessed is returned in advance. We remand the case for determination of the propriety of the 1986-1987 fee and all remaining issues not decided. We approve the settlement of Daly's challenges to representation fees for all years prior to 1986-1987.

ORDER

The Initial Decision-Summary Decision, Incorporating Partial Settlement of the Office of Administrative Law, as modified above, is adopted. The case is remanded to the Office of Administrative Law for further proceedings in accordance with this decision.

BY ORDER OF THE APPEAL BOARD

WILLIAM L. NOTO
Chairman

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

DATED: TRENTON, NEW JERSEY
November 18, 1988