P.E.R.C. NO. 87-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DISTRICT 65, UAW, AFL-CIO and
COUNTY OF CUMBERLAND, OFFICE
ON AGING,

Respondent,

-and- Docket No. CI-85-70-153

EMILY BACON, et al.,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission holds that District 65, UAW, AFL-CIO, violated the New Jersey Employer-Employee Relations Act because it had a defective demand-and-return system for resolving representation fee contests. The Commission orders District 65 to adopt a new demand-and-return system meeting the requirements of N.J.S.A. 34:13A-5.5, Boonton Bd. of Ed. and Kramer, 99 N.J. 523 (1985) and Chicago Teachers Union, Local No. 1 v. Hudson, __ U.S. __, 106 S.Ct. 1066 (1986) and to permit all non-members to use that system retroactive to April 12, 1984. The Commission dismisses as untimely the Complaint insofar as its allegations against District 65 and the County of Cumberland, Office on Aging concern events or omissions before April 12, 1984.

P.E.R.C. NO. 87-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DISTRICT 65, UAW, AFL-CIO and
COUNTY OF CUMBERLAND, OFFICE
ON AGING,

Respondents,

-and- Docket No. CI-85-70-153

EMILY BACON, et al.,

Charging Parties.

Appearances:

For the Respondents,
Ira Katz, Esq., for District 65
(James Coppess, Esq. and Ira Katz, Esq. on the brief in support of exceptions)
Ivan Sherman, Esq., for the County

For the Charging Parties,
John C. Scully, Esq.

DECISION AND ORDER

I. Procedural History

On October 12, 1984, 21 employees of the County of Cumberland ("County") filed an unfair practice charge against the County and District 65, UAW, ("District 65").[1/] The charge alleged that the County and District 65 violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

1/ One employee, Patricia Fleetwood, later withdrew her name as a charging party.

("Act"), specifically the Act's representation fee sections and subsections 5.3, 5.4(a)(1) and (3), and 5.4(b)(1).[2/] The charge alleged that from October 1980 through April 24, 1984 respondents illegally took representation fees without any demand-and-return system and that after April 24, 1984 respondents illegally took representation fees with an inadequate demand-and-return system. The charge further alleged that the County illegally deducted representation fees and transmitted them to District 65 without ascertaining that a demand-and-return system existed and despite knowing that District 65 used these fees for political and ideological purposes unrelated to its duties as

---

2/ N.J.S.A. 34:13A-5.3 states, in part:

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity;....

N.J.S.A. 34:13A-5.4 states, in part:

> (a) Public employers, their representatives or agents are prohibited from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.
>
> (b) Employee organizations, their representatives or agents are prohibited from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

The representation fee sections are quoted at pp. 8-10.

majority representative. The charge further alleged that District 65 failed to notify the charging parties of their right to a demand-and-return system before April 24, 1984 and failed to notify the charging parties of the uses of their fees and their right to an advanced reduction or rebated amount after April 24, 1984.

On June 5, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

The County filed an Answer admitting that it had deducted representation fees since January 1, 1981 pursuant to its collective negotiations agreement with District 65; from January 1981 to August 1983 it transmitted these fees to District 65 and thereafter it held these fees in escrow.[3/] It admitted that it did not know whether District 65 had established a demand-and-return system or notified non-members of such a system, but denied knowing that District 65 had used representation fees for political and ideological purposes unrelated to its duties as majority representative.

District 65 filed an Answer denying it had violated the Act. It asserted that the allegations concerning its actions or inactions before April 1984 were untimely under N.J.S.A. 34:13A-5.4(c)[4/] and that its demand-and-return system established

---

3/ It denied, however, that it had deducted representation fees from the paychecks of charging parties Carol Bain, Vickie Barker, Diane Clark, Carol Fisher and Elde Mitchell.

4/ This subsection provides, in part:

> [No] complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented

Footnote continued on next page

in April 1984 satisfied the Act's requirements.[5/]

The parties waived a hearing and stipulated facts. They submitted briefs and reply briefs. The charging parties and District 65 also submitted documents.

On October 17, 1985, District 65 filed a modified demand-and-return system. An affidavit of its Secretary-Treasurer stated that the 1985 representation fees of objecting employees would remain in escrow until refund determinations had been made while the 1985 representation fees of non-objecting employees, as well as the 1983 and 1984 representation fees of all employees, would be distributed to District 65.

On April 11, 1986, Hearing Examiner Stuart Reichman issued a report and recommended decision. H.E. No. 86-50, 12 NJPER ___ (¶_____ 1986) (copy attached). He concluded that the County violated the Act by not ascertaining whether District 65 had any demand-and-return system before it deducted representation fees, but

---

Footnote Continued From Previous Page

from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

5/ It also asserted that Vickie Barker and Elde Mitchell lacked standing to file this charge because they were union members and that other charging parties might also lack standing because they were not in the negotiations unit.

that the County was not required to insure the validity of the demand-and-return system or its distribution to representation fee payers. He concluded that District 65 violated the Act by receiving representation fees without a statutorily adequate demand-and-return system. He found that the system created in April 1984 was inadequate because it was a pure rebate system; it did not provide for fee reductions based on the previous year's budget; it was too complex and slow; it prohibited objections outside a one month period; and it failed to make adequate disclosure of District 65's expenditures related to collective negotiations. He found that a system created in September 1985 cured some of its predecessor's defects, but was still inadequate because it did not provide for fee reductions based on the previous year's budget; it prohibited objections outside a one month period; and it failed to make adequate disclosure of District 65's expenditures related to collective negotiations. To remedy these violations, the Hearing Examiner recommended requiring District 65 to refund to the charging parties all of their representation fees collected or held in escrow since April 12, 1984, together with interest, and requiring the County and District 65 to stop committing violations and to post notices of these violations and the remedial actions taken.

All parties received extensions of time and filed exceptions or cross-exceptions and supporting briefs.

The County asserts that the Hearing Examiner erred in finding that it violated the Act by deducting representation fees

without ascertaining whether a demand-and-return system existed; that the charging parties' allegations concerning deductions before April 1984 were time-barred; and that reductions based on the previous year's expenditures should not be applied to all non-members.

District 65 asserts that the Hearing Examiner erred in finding that the April 1984 and September 1985 demand-and-return systems were inadequate. It generally argues that it was not required to foresee changes in the constitutional law concerning representation fees. It specifically denies that the first system was illegal because it was a "pure rebate" system which was complex and slow; and that both systems were illegal because they did not provide for fee reductions based on the previous year's budgets, did not provide a time frame for deciding representation fee challenges, and limited objections to a one month time period. District 65 also excepted to the recommended reimbursement of all representation fees paid by the charging parties and asserted that relief should not be afforded union members Vickie Barker and Elde Mitchell or non-members other than the charging parties.

The charging parties assert that the Hearing Examiner erred in not finding that the County was obligated to determine the validity of District 65's demand-and-return system and to insure that fee payers received notice of this system and in not finding that the escrow arrangments in the September 1985 system were inadequate. They also request an order requiring the refund of all representation fees received since January 1, 1981.

II. Facts

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact and the parties' stipulations (pp. 5-7). We add these facts.

The parties' 1983-85 collective negotiations agreement authorized an arbitrator to determine whether that contract would have a representation fee provision. The County would continue to deduct representation fees pending that determination, but would hold the fees in escrow. If the arbitrator decided the contract would authorize representation fees, the escrowed funds would be released to District 65 and future fees would be deducted without escrow; if the arbitrator decided against a representation fee clause, the escrowed funds would be returned to the employees.

County records show that Elde Mitchell did not pay representation fees and that Vickie Barker may or may not have paid such fees. Barker paid union dues before she was terminated December 18, 1981, but was listed as a representation fee payer upon her rehiring on January 20, 1982. As of June 18, 1985, she was entered as paying 100% union dues.

III. Legal Framework

Before July 1, 1980, there was no statutory authorization in New Jersey for the collection of representation fees from non-members of the the majority representative. In New Jersey Turnpike Employees' Union, Local 194 v. New Jersey Turnpike Auth., 64 N.J. 579 (1974), aff'g 123 N.J. Super. 461 (App. Div. 1973), the

New Jersey Supreme Court held that, absent express legislative authorization, contractual clauses requiring agency shop payments violated the rights of non-members under section 5.3 to refrain from assisting any employee organization.

Effective July 1, 1980, the Legislature enacted a statute authorizing employers and majority representatives to negotiate contracts requiring representation fee payments. N.J.S.A. 34:13A-5.5 through 5.9. This statute supplies the authority for representation fees which Turnpike Authority found lacking. The relevant provisions follow.

N.J.S.A. 34:13A-5.5 states:

> a. 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.
>
> 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 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.

N.J.S.A. 34:13A-5.6 states, in part:

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 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). The demand and return system shall include a provision by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative. Such proceedings shall provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate.... Nothing herein shall be deemed to require any employee to become a member of the majority representative.

N.J.S.A. 34:13A-5.7 states:

> Any action engaged in by a public employer, its representatives or agents, or by an employee organization, its representatives or agents, which discriminates between non-members who pay the said representation fee and members with regard to the payment of such fee other than as allowed under this act, shall be treated as an unfair practice within the meaning of subsection 1(a) or subsection 1(b) of this act.

This statute's constitutionality was the subject of protracted litigation in federal and state courts. Meanwhile, representation fee cases in other jurisdictions developed new principles of constitutional law which expanded the rights of non-members and the responsibilities of majority representatives. We will trace these developments before determining whether the County and District 65 committed unfair practices under the facts of this case.

In Robinson v. New Jersey, 547 F.Supp. 1297 (D.N.J. 1982) and Olsen v. CWA, 565 F.Supp. 942 (D.N.J. 1983), Judge Debevoise declared New Jersey's representation fee statute unconstitutional. The Third Circuit Court of Appeals reversed and remanded the case to Judge Debevoise to determine whether the demand-and-return systems of the defendant unions were constitutional in operation. 741 F.2d 598 (3rd Cir. 1984). The United States Supreme Court denied certiorari, __ U.S. ___, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985). On remand, Judge Debevoise abstained in favor of having the Appeal Board analyze the unions' uses of representation fees and accompanying issues of state law. That determination is on appeal to the Third Circuit.

In Boonton Bd. of Ed. and Kramer, 99 N.J. 523 (1985), the New Jersey Supreme Court also upheld the statute's constitutionality. The United States Supreme Court again denied certiorari, __ U.S. __, 106 S.Ct. 1388, __ L.Ed ___ (1986). The statute's constitutionality is now clear, although particular demand-and-return systems may be unconstitutional in operation.

Boonton also decided several issues of statutory interpretation. The Supreme Court affirmed our rulings in Boonton Bd. of Ed., P.E.R.C. No. 84-3, 9 NJPER 472 (¶14198 1983). We issued our decision on July 18, 1983.

In Boonton, we set the limits of our jurisdiction. We determined that the courts have jurisdiction to entertain challenges to the statute's constitutionality; the Appeal Board has jurisdiction to review fee amounts and the fairness and fullness of representation fee proceedings; and this Commission has unfair practice jurisdiction to determine whether the statutory conditions for representation fee deductions have been met and whether prohibited discrimination has occurred with regard to the payment of a fee. The statutory conditions to representation fee deductions are: (1) membership in the majority representative is equally available to all unit employees; and (2) the majority representative has "established and maintained" a demand-and-return system which allows review of the fee amount through fair and full proceedings placing the burden of proof on the majority representative and ending in an appeal to the Appeal Board.

Deciding the issues within our jurisdiction, we found that the majority representative and the employer had illegally taken representation fees for one month before a demand-and-return system was established and that the majority representative violated its statutory obligation to inform non-members personally of their rights under the demand-and-return system later adopted and the procedures for obtaining a refund. We ordered the majority representative to refund the first month's representation fees, but did not order a refund of later fees. We also found that the majority representative was too grudging toward the rights of non-members to refrain from joining the Association and to secure information concerning the representation fee system and that it discriminatorily denied Kramer the option of paying her representation fees in a lump sum. We dismissed the Complaint's other allegations.

The New Jersey Supreme Court issued its decision in Boonton on June 25, 1985. It affirmed our rulings applying the representation fee statute, as well as our remedies, and added other statutory rulings in light of the constitutional issues. Thus, it construed section 5.5 to require that lobbying supported by non-member fees be relevant to the occupational interests of unit employees and construed "the statutorily-mandated demand-and-return system to require that the majority representative compute the annual representation fee on the basis of the union's actual expenditures during the previous year." Id. at 550. The present

year's fee must exclude that percentage of the prior year's budget attributable to impermissible expenditures. Beyond these requirements and the statutory requirement that the burden of proof be on the majority representative, the Court ruled that the demand-and-return system must provide "an uncomplicated, efficient, and readily accessible process for contesting the representation fee." Id. at 551. That system must not contain features inhibiting its use.

The United States Supreme Court has decided two other cases of significance in implementing the representation fee statute and balancing the rights of majority representatives to collect legitimate fees against the rights of non-members to safeguards concerning the unauthorized use of fees. In Ellis v. Railway Clerks, ___ U.S. _, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), decided April 25, 1984, the Supreme Court invalidated a pure rebate system because it forced non-members to loan the majority representative money for purposes to which the non-member objected; the Court required that unions adopt alternative systems such as advance reductions or interest-bearing escrow accounts for disputed fees. In Chicago Teachers Union, Local No. 1 v. Hudson, __ U.S. __, 106 S.Ct. 1066, __ L.Ed.2d __ (1986), decided March 4, 1986, the Court spelled out the process constitutionally due representation fee payers who object to having their fees spent for ideological or political purposes unrelated to collective negotiations or contract administration. A majority representative must provide each fee

payer with an adequate explanation of the fee's basis, a reasonably prompt opportunity to challenge the fee's amount before an impartial decision-maker and an escrow for the amount reasonably in dispute while challenges are pending.

Although the constitutionality of New Jersey's representation fee statute is settled, it must be construed consistently with Ellis and Hudson. Pursuant to section 5.9, regulations designed to implement the guarantees set forth in these cases and Boonton have been proposed, 18 N.J.R. 1521(a) (August 4, 1986) and will soon be reproposed with changes.

IV. Charging Parties' Claims Against the County

A. Before April 12, 1984

The Hearing Examiner found that the County committed an unfair practice by deducting representation fees without ascertaining whether District 65 had any demand-and-return system. While we found the public employer committed such a violation in Boonton, we lack power to make such a finding here since the charge was untimely insofar as it challenged deductions before April 12, 1984. After that date, there was a demand-and-return system in place, and there was no longer a basis for finding a violation.

B. The April 12, 1984 Demand-and-Return System

The Hearing Examiner determined (pp. 32-35) that the County had no obligation to insure the validity of the demand-and-return system or the majority representative's distribution of notices to employees concerning their rights and procedures under this system.

Under the circumstances of this case, we agree.[6/] We dismiss the Complaint against the County.

V. Charging Parties' Claims Against District 65

A. Before April 12, 1984

Boonton establishes that a majority representative commits an unfair practice when it receives representation fees before it has established a demand-and-return system. District 65 began receiving representation fees in October 1980, but did not create a demand-and-return system until April 12, 1984. The charging parties could have filed a charge during this 3 1/2 year period and prevailed, but did not file a charge until six months after District 65 created its first demand-and-return system. We agree with the Hearing Examiner (pp. 39-42) that the charge was therefore untimely insofar as it alleged violations occurring before the first demand-and-return system. We dismiss such allegations.

B. The April 12, 1984 Demand-and-Return System

The Hearing Examiner found that the April 12, 1984 demand-and-return system was defective in several respects under the current standards enunciated by the Commission and the courts. While we agree, we find only limited unfair practices because the

---

6/ We do not rule out holding an employer liable if a demand-and-return system is so patently illusory that in effect it is no system or if the employer condones a refusal to provide any notice.

legal requirements governing representation fee systems have changed greatly since April 1984. Failure to predict these changes was not an unfair practice.

Our opinion in Boonton requires majority representatives to notify each non-member personally of their rights and procedures under the demand-and-return system. District 65's demand-and-return system provides for an internal appeal to UAW's International Executive Board pursuant to Article 33 of the international's constitution. On this record, it does not appear that non-members were provided with copies of Article 33 so the personal notice required by Boonton was not fully effectuated.7/

The Supreme Court's opinion in Boonton requires majority representatives to base the current year's fee on the previous year's expenditures and to exclude that percentage of expenditures that the law prohibits the majority representative to charge non-members. The representation fee system here provided for a flat 85% fee rather than the Boonton calculation. This omission makes the demand-and-return system defective under current law, although at the time it adopted its first demand-and-return system District

---

7/ District 65 notified non-members of the first demand-and-return system 12 days after it was established. This minimal delay did not violate subsections 5.4(b)(1) and 5.6.

65 could not predict that the Supreme Court would impose this requirement.[8/]

The Hearing Examiner found that District 65's initial demand-and-return system was a "pure rebate" system illegal under Ellis, Boonton and Hudson. The system did, however, provide for the statutory 15% advance reduction found by Robinson to meet Ellis. While Boonton thereafter suggested and Hudson recently mandated escrow procedures, we do not believe that District 65 committed an unfair practice by failing to foresee this requirement.[9/]

The Hearing Examiner found that the demand-and-return system was too complex, inaccessible and slow. Our opinion in Boonton recognized that a union may commit an unfair practice if its demand-and-return system operates too slowly, and the Supreme Court's opinion in Boonton required that demand-and-return systems be "uncomplicated, efficient, and readily accessible." We agree with the Hearing Examiner that the initial demand-and-return system

---

8/ During the public hearing on the proposed representation fee regulations, a debate arose over a proposal interpreting Boonton to require that fee reductions based on the prior year's political and ideological expenditures be applied to all non-members instead of just objectors. We do not address that question in this case.

9/ The escrow provision in the 1983-85 collective negotiations agreement would not satisfy current escrow requirements. That escrow provision was only to be in effect until the arbitrator decided whether the contract would include a representation fee provision; it did not ensure that representation fees would be escrowed thereafter. Nevertheless, it had the practical effect of sheltering charging parties' representation fees from uses they might question.

did not meet these standards given such provisions as the restriction on filing challenges to a one month period in the year after the fees had been spent, the multiple levels of internal appeals, the technical and complicated nature of Article 33 which was not even provided to non-members, and the time restriction on when petitions could be filed with the Appeal Board. This system could have inhibited the filing of challenges. District 65 should have foreseen that some aspects of its system would be found statutorily objectionable under the case law then in existence.

The Hearing Examiner found that the demand-and-return system was inadequate under Hudson because it did not require disclosure to non-members of the union's expenditures related to collective negotiations. While this observation is correct, Hudson established a new procedural requirement which District 65 was not statutorily required to foresee. Mallamud v. Rutgers Council of American Association of University Professors Chapters, A.B.D. No. 80-9, 12 NJPER ___ (¶_____ 1986), appeal pending App. Div. Dkt. No. _____; United University Professors, Inc. and Barry, 17 NY PERB 3151 (¶3098 1984), order withdrawn on other grounds, 17 NY PERB 3157 (¶3101 1984), order reinstated in relevant pt., 18 NY PERB 3127 (¶3063 1985).10/

10/ We found a violation in Boonton when a majority representative was not responsive to requests for information, but no case before Hudson imposed an affirmative duty upon majority representatives to provide all fee payers with an audited, advance explanation of the basis of their fees.

In sum, we have found several defects in the initial demand-and-return system. Many of these defects, however, became clear only after that system's adoption, with the opinions of the New Jersey Supreme Court in Boonton and the United States Supreme Court in Hudson. We therefore limit our finding of unfair practices to the failure to notify fully non-members of their rights and the complex, burdensome and prolonged nature of that system.

VI. Remedy For the Unfair Practices Found Against District 65

The Hearing Examiner recommended an order requiring District 65 to refund to the charging parties all their fees collected or held in escrow since April 12, 1984, together with interest. District 65 argues that this recommendation goes too far since it orders greater monetary relief than might have been available had a valid demand-and-return system been in place and used to assess the charging parties' refund claims; and the charging parties argue that this recommendation does not go far enough since it does not require District 65 to refund the representation fees of non-members who were not charging parties. Under all the circumstances, we believe the proper remedy is to require District 65 to implement immediately a demand-and-return system which meets current requirements and to permit non-members an opportunity to

invoke this system, with a right to appeal to the Appeal Board, to contest representation fees collected since April 12, 1984.11/

We have reviewed the validity of the April 1984 demand-and-return system based on then existing requirements. While we have found defects in that system, these defects were not so sweeping or clear under the law then as to mean that in effect there was no demand-and-return system. Boonton, 9 NJPER at 483 n. 31. Instead, the essence of the violation is that certain aspects of the demand-and-return system and a lack of full notice of the system's procedures may have inhibited non-members from filing objections. That violation can be cured by removing the inhibitions and providing an opportunity to file objections anew for the years in question. We extend this relief to non-members as well as charging parties because of the inhibitory nature of the violation.12/

The Hearing Examiner found that the demand-and-return system established in September 1985 eliminated many of the problems

---

11/ We do not decide whether Mitchell, Borden or other employees have been union members for part or all of the time since that date. District 65 must permit any employee who was a non-member for any portion of this time to file an objection.

12/ In PBA Local 227 (Wilson), P.E.R.C. No. 86-25, 11 NJPER 559 (¶16194 1985), the majority representative failed to notify the charging party of his rights under its demand-and-return system, but apparently notified other non-members. Accordingly, our order required the majority representative to permit a late objection from the charging party, but not others.

in the first system, but was still defective in certain respects under current law. We agree that this system does not conform to the requirements of Boonton and Hudson for calculating fees based on the previous year's expenditures or for providing an audited, advance explanation of the basis of fees. We will thus require District 65 to implement a new system within 30 days.13/

ORDER

The Public Employment Relations Commission orders District 65, UAW, AFL-CIO to:

I. Cease and desist from:

A. Receiving representation fees without a valid demand-and-return system.

II. Take the following affirmative action:

A. Within 30 days adopt a new demand-and-return system meeting the requirements of N.J.S.A. 34:13A-5.5 et seq., Boonton Bd. of Ed. and Kramer and Chicago Teachers Union, Local No. 1 v. Hudson.

13/ The new system can, but need not permit non-members to participate in escrow arrangements. The lower court in Hudson required such participation, 743 F.2d 1187, 1197 (7th Cir. 1984), but the Supreme Court did not. District 65 will meet its obligations on this count if it informs non-members of these arrangments and maintains them properly and in good faith. Rees v. CWA, A.B.D. No. 85-4, 12 NJPER 143 (¶17055 1986). District 65 may also impose a time limit on objections if it is consistent with the proposed regulations and if it permits new hires to file mid-year challenges.

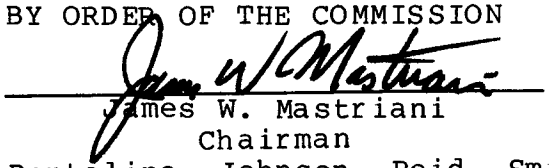
B. Within 10 days of the adoption of the new demand-and-return system inform all unit employees who have not been members of District 65 at any time since April 12, 1984 of the contents of this system and their right to demand appropriate refunds of representation fees collected from them since April 12, 1984.

C. 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.

D. Post in all places where District 65 normally posts notices to the employees it represents, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the District 65's authorized representative, shall be 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.

Notify the Chairman of the Commission within ten (10) days of the time it takes each step necessary to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
December 22, 1986
ISSUED: December 23, 1986

P.E.R.C. NO. 87-

APPENDIX "A"

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 EMPLOYEES REPRESENTED BY DISTRICT 65 UAW, AFL-CIO THAT:

WE WILL cease and desist from receiving representation fees without a valid demand-and-return system.

WE WILL within 30 days adopt a new demand-and-return system meeting the requirements of N.J.S.A. 34:13A-5.5 et seq., Boonton Bd. of Ed. and Kramer and Chicago Teachers Union, Local No. 1 v. Hudson.

WE WILL within 10 days of the adoption of the new demand-and-return system inform all unit employees who have not been members of District 65 at any time since April 12, 1984 of the contents of this system and their right to demand appropriate refunds of representation fees collected from them since April 12, 1984.

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.

Docket No. CI-85-70-153 DISTRICT 65, UAW, AFL-CIO

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.

H.E. NO. 86-50

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DISTRICT 65, UAW, AFL-CIO and
COUNTY OF CUMBERLAND, OFFICE
ON AGING,

Respondent,

-and- Docket No. CI-85-70-153

EMILY BACON, Et Al,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that Respondents County of Cumberland and District 65, U.A.W., AFL-CIO, violated §§5.4(a)(1) and 5.4(b)(1), respectively and §5.6 of the New Jersey Employer-Employee Relations Act by deducting representation fees from Charging Parties' wages prior to the establishment of a demand and return system. The Hearing Examiner found numerous deficiencies in District 65's initial demand and return system and the modified system it subsequently issued. Accordingly, since District 65 does not have a legally valid demand and return system, it is not entitled to collect representation fees from Charging Parties and must return, with interest, all fees collected from them since April 12, 1984. The Hearing Examiner found that Charging Parties were time barred from recovering representation fees collected since 1980.

The Hearing Examiner found that while the County of Cumberland is not responsible for determining the validity of the content of the demand and return system, it violated the Act by failing to properly ascertain whether a demand and return system existed prior to making representation fee deductions.

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.

H.E. NO. 86-50

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DISTRICT 65, UAW, AFL-CIO and
COUNTY OF CUMBERLAND, OFFICE
ON AGING,

Respondent,

-and- Docket No. CI-85-70-153

EMILY BACON, Et. Al,

Charging Party.

Appearances:

For the Respondent
Ira Katz, Esq., for the UAW
Ivan Sherman, Esq., for the County

For the Charging Party
John C. Scully, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 12, 1984, by Emily Bacon and numerous other employees employed by the County of Cumberland, Office on Aging ("Charging Parties") alleging that District 65, UAW ("District 65") and the County of Cumberland, Office on Aging ("County") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party alleged that the County violated §§5.3, 5.4(a)(1) and (3), and §§5.5 through 5.9,

inclusive. The Charging Parties allege that District 65 violated §5.3, 5.4(b)(1) and §5.5 through 5.9, inclusive.[1/]

1/ N.J.S.A. 34:13A-5.3 states, in part:

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity;....

N.J.S.A. 34:13A-5.4 states, in relevant part:

> (a) Public employers, their representatives or agents are prohibited from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.
>
> (b) Employee organizations, their representativs or agents are prohibited from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

N.J.S.A. 34:13A-5.5 states:

> a. 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.
>
> 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

Footnote Continued on Next Page

The Director of Unfair Practices issued a Complaint and Notice of Hearing on June 5, 1985. The County filed its Answer on

---

1/ Footnote Continued From Previous Page

> 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 rate 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.

N.J.S.A. 34:13A-5.6 states, in relevant part:

> 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 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). The demand and return system shall include a provision by which persons who pay a

Footnote Continued on Next Page

June 13, 1985, denying that it had committed any unfair practice. Having been granted an extension of time in which to file, District

---

1/ Footnote Continued From Previous Page

> representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative. Such proceedings shall provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate.... Nothing herein shall be deemed to require any employee to become a member of the majority representative.

N.J.S.A. 34:13A-5.7 states:

> Any action engaged in by a public employer, its representatives or agents, or by an employee organization, its representatives or agents, which discriminates between non-members who pay the said representation fee and members with regard to the payment of such fee other than as allowed under this act, shall be treated as an unfair practice within the meaning of subsection 1(a) or subsection 1(b) of this act.

N.J.S.A. 34:13A-5.8 states:

> Payment of the representation fee in lieu of dues shall be made to the majority representative during the term of the collective negotiation agreement affecting such non-member employees and during the period, if any, between successive agreement so providing, on or after, but in no case sooner than the thirtieth day following the beginning of an employee's employment in a position included in the appropriate negotiations unit, and the tenth day following reentry into the appropriate unit for employees who previously served in a position included in the appropriate unit who continued in the employ of the public employer in an excluded position and individuals being reemployed in such unit from a reemployment list. For the purposes of this section, individuals employed on a 10-month basis or who are reappointed from year to year shall be considered to be in continuous employment.

N.J.S.A. 34:13A-5.9 states:

> The commission may promulgate rules or regulations to effectuate the purposes of this act.

65 submitted its Answer on June 28, 1985, wherein it denied the commission of any unfair practices. The parties agreed that the relevant facts in this matter were not in dispute. Consequently, the parties entered into a stipulation of facts and no hearing was conducted. A briefing schedule was established. Charging Parties submitted a memorandum of law on August 24, 1985 and a reply brief on October 15, 1985. The County submitted a legal memorandum on September 23, 1985 and a reply letter brief on November 7, 1985. District 65 submitted a brief on October 2, 1985 and a reply brief on November 14, 1985. Charging Parties and District 65 submitted documents in support of their respective positions.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists, and after consideration of the briefs and reply briefs, this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

FINDINGS OF FACT

1. The County of Cumberland is a public employer within the meaning of the Act, and is subject to its provisions.

2. District 65, UAW, AFL-CIO, is a public employee representative within the meaning of the Act, and is subject to its provisions.

3. Emily Bacon and other employees employed by the County of Cumberland, Office on Aging, are public employees within the meaning of the Act, and are subject to its provisions.

4. The parties have entered into the following stipulation of facts:

> (a) The collective bargaining agreement between the County of Cumberland and District 65, UAW required all members of the bargaining unit, including the Charging Parties, to either join the union or pay an agency fee to the union equal to 85% of union dues commencing October, 1980 through December, 1982. The successor collective bargaining agreement covering a period of January 1, 1983 through December 31, 1985, requires the County of Cumberland to deduct and escrow agency fees, equal to 85% of union dues from non-union members of the bargaining unit. The 1983-1985 collective bargaining agreement made the final disposition of the agency fee money subject to arbitration between the County of Cumberland and District 65, UAW.
>
> (b) The official records of the County of Cumberland concerning the dates of when Charging Parties became employees of the County or terminated their employment are accurate.
>
> (c) By letter to the PERC dated April 12, 1984 District 65, UAW established a demand and return system. A copy of an explanation of the mechanics of that system is attached [to the brief] as Exhibit A. [omitted from decision]
>
> (d) The only notice the County and/or District 65, UAW gave of the agency fee deduction, the amount of the deduction or the demand and return system was through the dissemination of Exhibit A and through dissemination to some of the Charging Parties of copies of the 1980-1982 collective bargaining agreement between the County and District 65, UAW....2/

2/ In a letter dated November 6, 1985, the County stated that it agreed to the stipulation of facts with the exception of stipulation (b). The County states that "all...employees were and continue to be paid by check with a stub which sets forth deductions from gross pay. Stubs would...indicate a deduction for union dues and/or agency fee deductions."

(e) Prior to April 24, 1984 the County or District 65, UAW did not disseminate any information about the demand and return system.

ANALYSIS

Issue I: The District 65 Demand and Return System

N.J.S.A. 34:13A-5.6 states in relevant part that: ...a majority representative of public employees...shall be entitled to a representation fee in lieu of dues...; provided,...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....

Charging Parties assert numerous arguments in its claim that District 65's demand and return system is either non-existant or sufficiently flawed so as to render it invalid. Charging Parties argue that the establishment of a demand and return system by a majority representative is a prerequisite to the imposition of a representation fee. Charging Parties contend that in the absence of an established demand and return system, it is an unfair practice for the majority representative to seek the implementation of representation fee deductions. Charging Parties also take the position that the demand and return system adopted by District 65 passes neither statutory nor constitutional muster.[3/] Charging Parties argue that the demand and return system promulgated by

---

3/ The Commission has determined that the courts have jurisdiction to resolve constitutional challenges to the representation fee statute. In re Boonton Board of Education and Judith M. Kramer, P.E.R.C. No. 84-3, 9 NJPER 472, 478 (¶14199 1983). Accordingly, Charging Parties constitutional challenges are not addressed in this report.

District 65 in April, 1984, violates the standard set forth by the New Jersey Supreme Court in In re Board of Education of the Town of Boonton, 99 N.J. 523 (1985) (hereinafter "Boonton"). Charging Parties contend that District 65's demand and return system requires an 85% fee payment and fails to compute the annual fee charged to nonmember employees on the basis of the union's actual expenditures during the preceeding year as required by Boonton. Charging Parties assert that District 65's demand and return system amounts to a "pure rebate" system under which District 65 "has total discretion as to the use of nonmembers' funds until the refund is made...", Charging Parties Brief at 5-6, and which has been rejected by our Supreme Court in Boonton. Charging Parties also contest the adequacy of District 65's escrow arrangements. Charging Parties challenge the validity of District 65's demand and return system on the basis that it is overly complicated and, thereby, acts to inhibit nonmember employees' use of the system.

District 65 argues that the demand and return system effective April 12, 1984, is in substantial conformance with the dictates of Boonton. District 65 points out that "...although the demand and return system in place from April 12, 1984, did not on its face provide for the escrow of an objector's fee payments, that system was applied so as to provide an even more protective escrow arrangement." District 65 Brief at 7. "The current contract has required that [agency fees deducted since January 1, 1983]...be held by the employer in escrow." District 65 Brief at 2. Thus, District

65 concludes that in conformance with Boonton, its demand and return system, as applied, precludes the possibility that an objecting employee will be forced to grant an involuntary loan to the union. Accordingly, the demand and return system does not amount to a "pure rebate" system. District 65 also argues that its demand and return system properly requires agency fee payers to pay the full 85% of regular membership dues, fees and assessments, and it does not have to provide a mechanism for the deduction of a lesser percentage on the basis of the previous years allowable expenses. District 65 asserts that the statute, on its face, entitles it to collect the representation fee at 85%, and "[r]equiring an advance reduction would often unduly 'restrict the Union's ability to require every employee to contribute to the cost of collective bargaining activities.'" District 65 Brief at 12.

District 65 contends that the method by which objections are filed under its demand and return system is not overly complicated. District 65 argues that a fixed one month period (January) each year is long enough to allow any interested employees to file an objection. Further, limiting the objection period to January allows the union to assign staff which can devote special attention to representation fee objections and reduces the administrative burden on the union by allowing it to handle all objections at once. District 65 points out that by requiring the employee to send his/her objection by registered or certified mail to the union's secretary-treasurer and a copy to the union's

regional office, ensures that all objections are properly processed and avoids disputes with regard to whether a particular objection was filed.

The District 65 demand and return system established in April, 1984, reads as follows:

> Any non-member who pays a representation fee in lieu of dues shall have the right to object to the expenditure of a portion of the non-member's fee for activities or causes of a partisan political or ideological nature that are only incidentally related to terms and conditions of employment; or for benefits available only to members of the union. The approximate proportion of dues spent for such purposes shall be determined by the District 65 Executive Committee, subject to approval of said General Council. The non-member may perfect the objection by individually notifying the Secretary-Treasurer of the objection by registered or certified mail to 13 Astor Place, New York, NY; and by sending a copy to the union's regional office at 455 Green Street, Woodbridge, NJ; provided, however, that such objection shall be timely only during the month of January following the end of the fiscal year to which the non-member is objecting. The written objection must include the name and address of the non-member, the name of the non-member's employer, and the non-member's job title and department.
>
> Within a reasonable time after receipt of the objection, the Secretary-Treasurer shall send, to non-members who have made an objection, the refund to which the non-member is entitled, if any, along with an explanation of how that amount was determined. If an objecting non-member is dissatisfied with the approximate proportional allocation made by the District 65 Executive Committee, or the disposition of the objection by the Secretary-Treasurer, the non-member may appeal directly to the full General Council within 30 days of receiving notice of the disposition of the non-member's objection by sending the appeal to the Secretary-Treasurer by registered or certified mail.
>
> If an objecting non-member is dissatisfied with the disposition of the non-member's objection by the

> General Council, the non-member may appeal, within 30 days of receiving notice of the General Council's disposition of the non-member's objection, directly to the full International Executive Board of the UAW. All such appeals, and all subsequent internal union appeals, shall be governed by Article 33 of the Constitution of the International Union. The non-member must effect the appeal by sending the appeal in writing to the International Union President and by sending a copy of the appeal to the Secretary-Treasurer of District 65, UAW. The appeal should set forth that the non-member is objecting to the expenditure by District 65, UAW, of a portion of the non-member's fee for activities or causes of a partisan political or ideological nature that are only incidentally related to terms and conditions of employment; or for benefits available only to members of the union. The appeal should include any and all information available in support of the appeal.
>
> The decision of the International Executive Board shall be appealable to the Public Review Board or the Convention Appeals Committee at the option of the non-member. Regardless of which alternative the appellant decides to utilize, the appellant must take the appeal within thirty (30) days of notification of the International Executive Board's decision, (unless such time is extended by the International Union President, where, in the President's opinion, justice will be served by such an extension), by serving a notice of appeal upon and filing a written statement of the appellant's reasons for appeal with the International President.
>
> The non-member may appeal to the board appointed by the governor of New Jersey pursuant to NJSA 34:13A-5.6 within 30 days of receiving the determination of the Public Review board or the Convention Appeals Committee; or between the sixth and the eighth month after the filing of the non-member's objection with the Secretary-Treasurer of District 65, UAW.
>
> During this process, the union shall at all times have the burden of proving that its determination was correct.

Thus, under the demand and return system, in order for the appeal to be timely, the nonmember must file his/her objection only during the

month of January following the end of the fiscal year in which the nonmember objects to an expenditure. The nonmember objector then proceeds through a five step appeal process ending at the Appeal Board established pursuant to N.J.S.A. 34:13A-5.6 (hereinafter "Appeal Board"). Where an appeal reaches step 3 (the International Executive Board) or step 4 (the Public Review Board or the Convention Appeals Committee) the appeal is governed by Article 33 of the International Constitution. Since the objector is a nonmember, he/she is not likely to have a copy of the International's constitution. The procedure does not provide for a mechanism by which the objector would receive a copy of either the constitution or Article 33. Article 33 sets forth a lengthy and confusing recitation of procedural gymnastics. Notwithstanding the dictates of step 1 through 4 of the demand and return system, step 5 provides that an objector may proceed to the Appeal Board between the sixth and eighth month after the filing of an objection at step 1.4/

The facts in this case are similar to those in In re Board of Education of the Town of Boonton and Judith M. Kramer, P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), aff'd as modified 99 N.J. 523 (1985). In Boonton, the charging party (Kramer) raised numerous challenges to the institution of a representation fee negotiated

---

4/ It has not been determined whether a union's demand and return system may determine the timeliness of an Appeal Board filing.

between the Boonton Board of Education (hereinafter the "Board") and Boonton Education Association/NJEA (hereinafter "Association"). The following are the relevant facts in Boonton. The Board and the Association concluded negotiations for a successor agreement covering the period July 1, 1981 through June 30, 1983. That agreement provided for the deduction of a representation fee from nonmember employees' pay. Boonton, 9 NJPER at 474. On or about September 22, 1981, the Association posted a Notice of Rebate Procedures on various bulletin boards. On September 30, 1981, the Association adopted a "Local Association Demand and Return System." On or about October 1, 1981, the Association posted copies of its demand and return system in the same places it posted the Notice of Rebate Procedures. Id. at 475. Kramer did not personally receive a copy of the demand and return system from the Association. Id. at 480.

In Boonton, the Commission held that:

> ...the majority representative has an affirmative obligation to notify personally all non-members paying representation fees of their rights under a demand and return system and the procedures for invoking these rights. Id.

The Commission also held that:

> The statutory rights afforded by N.J.S.A. 34:13A-5.6 may be meaningless if an affected non-member never learns in the first place of those rights and the applicable procedures. The burden on the majority representative of personally notifying each non-member of such rights and procedures is minimal compared to the amount of representation fees paid by each non-member and is outweighed by the risk that non-members will not learn of their rights in the absence of personal notification. Id.

Thus, in Boonton, the Commission concluded that the Association violated subsections 5.4(b)(1) and 5.6 when it failed to personally notify employees of their rights under the demand and return system and the procedures for obtaining a rebate. Id.

In this case, the collective agreement between the County and District 65 provided for a representation fee equal to 85% of union dues to be deducted from nonmember employees' pay commencing October 1980. The agency fee was continued in the successor agreement covering the period of January 1, 1983 through December 31, 1985. District 65 established a demand and return system on April 12, 1984, but did not disseminate it to employees until April 24, 1984. Thus, while nonmember employees were having agency fees deducted from their wages since October 1980, they were not personally notified of the District 65 demand and return system until April 24, 1984. In accordance with the holding in Boonton, District 65's failure to personally notify nonmember employees of their rights under the demand and return system and the procedures for obtaining a rebate until after representation fees were deducted from employees' pay constitutes a violation of sections 5.4(b)(1) and 5.6 of the Act.

I will now discuss whether District 65's demand and return system "established" on April 12, 1984, is structurally sound under the current standards as enunciated by the Commission and the courts.

In Boonton, the Commission stated that:

> N.J.S.A. 34:13A-[5.6] authorizes the collection and expenditure of representation fees pursuant to a written agreement, but only provided certain conditions are met: (1) membership in the majority representative is available to all employees in the unit on an equal basis; and (2) the majority representative has established and maintained a demand and return system which allows a non-member to obtain a review of the amount of his representation fee through fair and full proceedings placing the burden of proof on the majority representative and culminating in an appeal to the tripartite Appeal Board. Id. at 478.

Failure to comply with either condition constitutes an unfair practice. Id.

The New Jersey Supreme Court struck down a demand and return system which incorporated a "pure rebate" system as part of the majority representative's rebate process. The Court defined a "pure rebate" system as one whereby "...the union would have total discretion as to the use of nonmember funds until the refund is made." Boonton, 99 N.J. at 550. Citing Ellis v. Railway Clerks, 466 U.S. 435, 104 S. Ct. 1883 (1984), the New Jersey Supreme Court said:

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employees is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance

> reduction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the Union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily. A rebate scheme reduces but does not eliminate the statutory violation. Boonton, 99 N.J. at 549, quoting Ellis, 466 U.S. at 444, 104 S. Ct. at 1890.

The design of District 65's demand and return system distributed in April 1984, amounts to a "pure rebate" system. District 65's demand and return system prohibits an objector from filing an objection until after the close of the fiscal year.[5/] The demand and return system contains no provision for placing the objector's representation fee in escrow. Accordingly, pursuant to the terms of its demand and return system, District 65 has unrestricted use of the objector's agency fees collected during the course of the year.

District 65 admits that the April 1984 demand and return system does not, on its face, provide for the escrow of objectors' representation fee payments. However, District 65 points out that, in fact, all representation fees paid by nonmembers have been held in escrow since January 1, 1983. District 65 contends that the demand and return system, as applied, complies with Boonton, since the fees collected were place in escrow, and it did not even temporarily use or have access to any representation fees collected

---

5/ District 65's demand and return system states that an objection shall only be filed "... during the month of January following the end of the fiscal year..." District 65 Demand and Return System, supra., para. 1.

from nonmembers. Consequently, District 65 asserts that there is no danger that objectors have been or will be required to contribute to causes or programs for which they have the right to withhold support. District 65 Brief pp. 7-9.

While all of the representation fees collected from nonmembers have been held in escrow since January 1, 1983, it is clear from District 65's brief and from Stipulation of Fact (a) that the escrow was established pursuant to the terms of the collective agreement between the County and District 65 rather than the demand and return system. In accordance with the agreement, Article 26, Checkoff, the disposition of the representation fees is subject to the outcome of an arbitration proceeding. There is no provision in the agreement, or elsewhere, for the escrow of fees collected from objectors if the arbitrator orders the funds released to District 65. The basic deficiencies contained in District 65's demand and return system are not cured merely by the fact that representation fees, almost fortuitiously, were held in escrow pursuant to a provision in the collective agreement. The demand and return system remains deficient since its basic design is that of a pure rebate system and, as such, does not pass muster under Boonton.

District 65's demand and return system is flawed in other respects as well. Charging Parties contend that the demand and return system is defective in that it provides only for the deduction of 85% of membership dues, fees and assessments. Charging Parties assert that the demand and return system must be struck down

because it does not provide for a reduction of the percentage of the representation fee deducted from a nonmember's pay based on the prior year's allowable expenditures.

District 65 argues that the statute, on its face, entitles the union to collect 85% of the regular membership dues, fees and assessments. District 65 also contends that the Appeal Board has exclusive jurisdiction over challenges to the propriety of union expenditures. Thus, the Commission has no authority to require a reduction in the 85% representation fee, since that would breach the jurisdictional boundary between the Commission and the Appeal Board. Additionally, citing In re Woodbridge Twp. Board of Education, P.E.R.C. No. 81-131, 7 NJPER 330 (¶12147 1981), District 65 takes the position that the Commission has held that a majority representative is entitled to collect the full 85% representation fee.

N.J.S.A. 34:13A-5.5(b) states the following:

> 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 benefiting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

The Boonton Court stated:

> In our view, the legislative intent requires that the annual representation fee charged to nonmembers be calculated in a manner designed to avoid the use of nonmembers' money for unauthorized purposes.

* * *

> ...[W]e construe the statutorily mandated demand-and-return system to require that the majority representative compute the annual representation fee charged to nonmembers on the basis of the union's actual expenditures during the prior year. In calculating the fee, the majority representative must take into account the ratio that prohibited expenditures have to total union expenditures in its previous year's budget. This will require the computation of the current year's representation fee for nonmembers to exclude that percentage of the union's prior year's budget attributable to expenses that the law prohibits the union to charge to nonmembers. Boonton, 99 N.J. at 550-551. (emphasis added).

The Court went on to explain in a footnote that:

> ...the maximum nonmember representation fee for the current year would be an amount equal to membership dues reduced by the percentage of impermissible expenditures in the prior year's budget. In no event may the nonmember fee exceed 85% of the dues charged to members. N.J.S.A. 34:13A-5.5(b). Id. at 551, n. 5.

Thus, in very clear terms, the Supreme Court held that in the succeeding year a majority representative cannot collect a representation fee which is greater than its allowable expenditures, even if that amount is less than 85% of regular membership dues, fees and assessments. Moreover, the statutory language in subsection 5.5(b) cited supra, states: "...in no event shall such [representation] fees exceed 85 percent...." (emphasis added); it does not say that the fee shall be 85% of dues, fees and assessments. Consequently, pursuant to the statute as construed by the New Jersey Supreme Court, in order to be structurally sound, a demand and return system must allow for the computation of the representation fee at a rate reflective of the preceding year's allowable expenditures; a rate which may be less than 85% of

membership dues, fees and assessments. District 65's demand and return system is structurally defective since it only provides for the collection of the representation fee at the rate of 85%.

Charging Parties take the position that any reduction from the 85% based on the preceding year's allowable expenditures must be applied to all nonmembers, not just objectors. I disagree for the following reasons.

The Boonton Court said that "... dissenting employees cannot constitutionally be compelled to bear the cost of political expenditures unrelated to collective bargaining." Id. at 543. The Court went on to state the following:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the constitution requires only that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss governmental employment. Id., quoting Abood v. Detroit Board of Education, 431 U.S. 209, 235-236 (1977).

In International Association of Machinists v. Street, 367 U.S. 740 (1961), the U.S. Supreme Court said that an objector's "grievance stems from the spending of their funds for purposes not authorized...in the face of their objection...." Id. at 771. The Court went on to indicate that:

> ...dissent is not to be presumed -- it must affirmatively be made known to the union by the dissenting employee. The union receiving money exacted from the employees under a union-shop

> agreement should not in fairness be subjected to sanctions in favor or an employee who makes no complaint of the use of his money for such activities. Id. at 744.

The Boonton and Machinists Courts stress the fact that a majority representative may expend money on ideological issues only incidentally related to terms and conditions of employment. However, such expenditures must not be made from funds collected from employees who inform their majority representative that they object to the expenditure of their money for matters unrelated to collective negotiations. Thus, there is no restriction on the manner in which money collected from nonmembers is legitimately expended. A restriction arises only after employees have informed the majority representative of their objection to having their money spent on matters unrelated to terms and conditions of employment. Abood, supra. Accord, Chicago Teachers Union v. Hudson, ___ U.S. __ , 54 USLW 4231 (1986). Accordingly, a demand and return system which requires a reduction of the percentage of the representation fee based on the prior year's allowable expenditures only for objectors, rather than all nonmembers, is structurally sound and valid.

District 65 contends that the question of whether it may collect representation fees at a rate other than 85% is outside the Commission's jurisdiction and properly belongs to the Appeal Board. The Commission's analysis of this issue was stated in Boonton and affirmed by the New Jersey Supreme Court. Boonton, 99 N.J. at 535. In its decision, the Commission said:

> We believe we have unfair practice jurisdiction under N.J.S.A. 34:13A-5.4(a)(1) and (b)(1) to determine whether the statutory and structural conditions for deduction of representation fees are in place and under N.J.S.A. 34:13A-5.7 and 5.4(a)(1) and (b)(1) to determine whether prohibited discrimination has occurred with regard to the payment of a representation fee. We believe the Appeal Board has jurisdiction to review the amount of any representation fee refund determination and the fairness and fullness of any particular representation fee proceeding leading to that refund determination. Boonton, 9 NJPER at 478.

As discussed previously in this report, the New Jersey Supreme Court has construed the statute to require the majority representative to establish a demand and return system that computes the annual representation fee charged to objectors on the basis of the union's actual allowable expenditures during the preceding year. This is a structural requirement and review of a demand and return system in order to determine if it complies with such requirement falls under the Commission's jurisdiction. The determination of whether a demand and return system complies with the requirement, merely involves a review of the system in order to ascertain whether the majority representative has established a mechanism to use the prior year's percentage. The determination of which expenses are appropriately payable by objectors falls within the Appeal Board's jurisdiction.

District 65 also argues that its entitlement to the full 85% of dues has been determined by the Commission in In re Woodbridge Twp. Board of Education, supra. One of the issues adjudicated in Woodbridge was whether the percentage amount of the

representation fee is mandatorily negotiable. After citing N.J.S.A. 34:13A-5.5(b), the Commission stated that:

> The application of the equation contained in the [statutory] language appears to mandate the amount of the agency shop fee that the majority representative is entitled to collect, if it can successfully negotiate for such a provision. Id. at 331.

District 65 misconstrues Woodbridge when it argues that the Commission held that the representation fee shall only equal 85% of dues, fees and assessments. Rather, Woodbridge stands for the proposition that the percentage of dues which a majority representative may collect as a representation fee has been pre-empted by the statutory equation set forth in N.J.S.A. 34:13A-5.5(b) and, as such, is non-negotiable. The statutory equasion allows for the collection of a fee not to exceed 85% of dues. Therefore, while the percentage is not negotiable, the actual allowable amount of fee collectable will vary on the basis of the operative factors in the equation. Thus, applying Boonton, the New Jersey Supreme Court has construed the statute to require that the calculation of the representation fee reflect only the allowable amount collected during the prior year; an amount which may be less than 85%.

District 65's demand and return system is defective because it is too complex. The Boonton Court stated:

> The demand-and-return system itself...must provide an uncomplicated, efficient, and readily accessible process for contesting the representation fee. Such process must contain no features or conditions that could in any manner inhibit or restrain a non-member employee from utilizing it. Boonton, 99 N.J. at 551-552.

A review of District 65's demand and return system, set forth above, demonstrates that the system is anything but uncomplicated, efficient and readily accessible. The system calls for 4 internal steps, the last 2 of which are governed by an extremely technical and complicated article (Article 33) of the union's constitution. While there is no evidence to indicate that District 65 intended Article 33 to inhibit an employees' access to or use of the demand and return system, the practical impact of the system distributed in April 1984 serves to discourage employees considering whether to proceed under it.

The demand and return system provides that an objector may not proceed to the Appeal Board until 6 to 8 months after the filing of an objection. Additionally, the system does not establish any time frame by which the union must respond to the objector at each step. In Chicago Teachers Union, supra, a recent U.S. Supreme Court decision, the Court struck down the Chicago Teachers Union's demand and return system because, inter alia, "...it did not provide for a reasonably prompt decision by an impartial decisionmaker."[6/] 54

6/ Under the facts of Chicago Teachers Union, the demand and return system did not provide for an impartial decisionmaker. The Chicago Teachers Union system ended in arbitration but the arbitrator was unilaterally selected by the union. Our Act and the District 65 demand and return system provide for an impartial decisionmaker; the Appeal Board. However, in order to pass muster under this particular portion of Chicago Teachers Union, a demand and return system must not only include an impartial decisionmaker, but also a reasonably prompt decision. District 65's demand and return system does not result in a reasonably prompt decision.

USLW at 4235. District 65's demand and return system cannot be considered reasonably prompt or efficient. Consequently, District 65's demand and return system is structurally defective in this regard.

Under District 65's demand and return system, nonmembers wishing to file objections may only do so during the month of January. The fiscal year runs from January through December 31. Thus, nonmembers must wait until January of the next fiscal year in order to file objections for the preceding year. This requirement must be struck down for two reasons. First, since District 65's demand and return system makes no provision for any sort of escrow account, holding objectors' money for the entire year, plus the time required for the demand and return system to run its course would, in effect, constitute an impermissible involuntary loan to the union. Boonton, 99 N.J. at 550.

Second, a limitation on the period in which a nonmember may file an objection prevents the demand and return system from being a "readily accessible process for contesting the representation fee." Id. at 551. Upon discovery that the union is expending or plans to expend money in support of ideological or political views unrelated to terms and conditions of employment, the nonmember should not be prevented from immediately making his/her objection known to the majority representative. See Abood, 431 U.S. at 244 (Stevens, J., concurring).

In Chicago Teachers Union, supra, the U.S. Supreme Court found the union's demand and return system inadequate because it failed to provide nonmembers with sufficient information about the basis on which the nonmember's representation fee was calculated. The Court pointed out that:

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of non-members as well as members - and for which non-members as well as members can fairly be charged a fee - the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting non-members. An acknowledgement that non-members would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%. 54 USLW at 4235.

District 65's demand and return system is similarly inadequate in that it also fails to make adequate disclosure of its expenditures related to collective negotiations. Thus, District 65's procedure requires nonmembers to object in order to receive information regarding the union's expenditures. This procedure has been rejected by the Chicago Teachers Union Court and, accordingly, is not acceptable here. District 65's demand and return system must incorporate a means by which nonmembers are personally informed of the nature of the expenditures which comprise the representation fee.

In its brief dated September 30, 1984, District 65 points out that it has modified the demand and return system it established in April 1984.7/

7/ District 65's modified demand and return system is set fort in its entirety below:

1. Objections to fee -- Any non-member who pays a representation fee in lieu of dues shall have the right to object to the expenditure of a portion of the non-member's fee for activities or causes of a partisan political or ideological nature that are only incidentally related to terms and conditions of employment; or for benefits available only to members of the union. The approximate proportion of dues spent for such purposes shall be determined by the District 65 Executive Committee, subject to approval of the General Council. The non-member may perfect the objection by individually notifying the Secretary-Treasurer of the objection by registered or certified mail to 13 Astor Place, New York, NY; and by sending a copy to the union's regional office at 455 Green Street, Woodbridge, NJ; provided, however, that such objection shall be timely only during the month of January of the fiscal year to which the non-member is objecting; also provided that non-members may file objections for fiscal year 1985 during the month of January, 1986. The written objection must included [sic] the name and address of the non-member, the name of the non-member's job title and department.

2. Escrow and portion of fee -- Upon receipt of the objection, 100% of the non-member's fee for the year in question will be kept in an escrow account with interest accruing until a return is paid to the non-member by the union and/or any proceeding challenging the amount so returned is completed.

3. Transmission of refund -- Within a reasonable time after the end of the fiscal year, the objection, the Secretary-Treasurer shall send, to non-members who have made an objection for that fiscal year, the refund to which the non-member is entitled, if any, along with an explanation of how that amount was determined.

4. Appeal of amount of refund to General Council -- If an objecting non-member is dissatisfied with the approximate proportional allocation made by the District 65 Executive Committee, or the disposition of the objection by the Secretary-Treasurer, the non-member may appeal directly to the full General Council within 30 days of receiving notice of the disposition of the non-member's

Footnote Continued on Next Page

The affidavit of Cleveland Robinson, Secretary Treasurer of District 65, executed on September 30, 1985, states that the modified demand and return system will be disseminated within 30 days from the date of execution of the affidavit. District 65 argues that its modified demand and return system, by design and as applied, cures any defect which may have existed in its earlier system. Consequently, District 65 asserts that since Charging Parties suffered no harm under the old system and the modified system complies with the Courts decision in Boonton, no unfair practice has occurred.

The modified demand and return system provides that representation fee payers file their objections only during the month of January of the fiscal year in which the nonmember is objecting. The modified system requires 100% of the fee collected from an objector to be placed in an interest bearing escrow account until any return due to the objector is paid and any proceedings concerning the adequacy of the return have been concluded. Lastly,

---

7/ Footnote Continued From Previous Page

objection by sending the appeal to the Secretary-Treasurer by registered or certified mail.

5. Appeal to PERC Appeal Board -- The non-member may appeal to the board appointed by the governor of New Jersey pursuant to NJSA 34:13A-5.6 within 30 days of receiving the determination of the General Council; or between the sixth and eighth month after the filing of the non-member's objection with the Secretary-Treasurer or District 665, UAW.

6. Burden of proof -- During this process, the union shall at all times have the burden of proving that its determination was correct.

the appeal procedure for challenging the propriety of the union's expenditures has been limited to only one step -- an appeal to District 65's General Council -- before proceeding to the Appeal Board.

When compared with the demand and return system established in April 1984, District 65's modified system sets forth certain important changes. The modified system is uncomplicated and it escrows 100% of the representation fee collected from an objector. 8/ These changes comply with the requirements of Boonton.

However, the modified demand and return system continues to contain a number of the same defects identified and discussed

---

8/ The Charging Parties argue that the escrow arrangements in District 65's modified demand and return system are inadequate because they are not participants in such arrangements. There is no evidence which indicates that District 65 cannot establish a proper escrow arrangement whereby objector's funds are held pending final disposition. The escrow agent is legally obligated "...to retain the money...until the performance of a condition or the happening of an event at which time the money ...[is] to be delivered in accordance with the terms of the [escrow] agreement." Colegrove v. Behrle, 63 N.J. Super 356, 365 (App. Div. 1960). The employees are protected under the union's obligation to disclose relevant information pertaining to the collection and use of the representation fee. Chicago Teachers Union, supra. Thus, it would be appropriate for the union to provide employees with information regarding the identity of escrow agent and details of the escrow arrangement. Inadequacies in the escrow arrangements may be addressed through the filing of an unfair practice charge contending that notwithstanding the facial adequacy, the system is being improperly administered and, therefore, not "maintained" pursuant to the Act's dictates. See, Boonton, 9 NJPER at 483, n. 31.

previously in this report. Specifically, the modified demand and return system makes no provision for the collection of a representation fee calculated on the basis of the previous year's allowable expenditures which may result in a collection rate of less than 85% of regular membership dues, fees and assessments.

The modified system limits nonmembers to filing objections only during a one month period. This limitation is contrary to the Boonton Court's pronouncement that the demand and return system provide a readily accessible process for contesting the representation fee. The filing limitation prevents a nonmember from filing objections after January in a circumstance where he/she discovers that the union has made or intends to make a contribution in support of a cause only incidentally related to terms and conditions of employment and to which he/she disagrees. Nor does the filing limitation take into account the hiring of additional employees during the course of the year. Under District 65's modified demand and return system new employees could be precluded from filing an objection for up to 11 months -- a situation which would result in forcing these employees to grant an involuntary loan to the union for purposes to which they object.

Finally, District 65's modified demand and return system is defective because it does not provide for the requisite disclosure of expenditures made for collective negotiations and contract administration.

Under subsection 5.6 of the Act, the collection of a representation fee is available to a majority representative if it has established and maintained a demand and return system. Since neither the April 12, 1984 demand and return system nor the modified system pass examination under the Act, I find that District 65 did not and does not have a valid demand and return system in effect. Accordingly, by collecting a representation fee without having first established a valid demand and return system, District 65 has violated sections 5.6 and 5.4(b)(1) of the Act.

Issue 2: Whether the County of Cumberland has violated the Act?

The Charging Parties argue that the County violated the Act when it deducted representation fees from nonmember employees' pay. Charging Parties allege that the County deducted representation fees without knowledge of the existence of a legally valid demand and return system. Charging Parties also contend that continuing to deduct representation fees from nonmembers' pay under a defective demand and return system constitutes an unfair practice. Charging Parties assert that the County has a statutorily imposed responsibility to deduct representation fees only when a valid demand and return system is in place.

The County takes the position that it has not committed an unfair practice. The County contends that an employer is not responsible for having to determine the nature and validity of the majority representatives demand and return system. The County

argues that the burden of ensuring an adequate demand and return system is on the majority representative and the employer may presume the adequacy of the system.

In the County's Answer to the Complaint, it stated the following:

> [The County] is without knowledge as to whether the demand and return system for non-member New Jersey representation fee payers existed prior to a deduction as required.
>
> County further is without knowledge as to whether Respondent Union gave proper notice of existence of a demand and return system at any time during the period covered by these charges.
>
> Respondent County of Cumberland denies having any knowledge that the Union used its monies deducted from the Charging Parties for political and ideological purposes as well as purposes not connected to the majority representative's duties. Respondent County of Cumberland verily believed that there was a demand and return system in existence as required by law and in accordance with law.

For the reasons stated below, I find that the County has not committed an unfair practice by failing to seek information regarding (1) the content of the demand and return system, and (2) the distribution of the system and notice to employees. However, the County has violated the Act by failing to inquire into whether District 65 had established a demand and return system prior to deducting representation fees from nonmembers' wages and by failing to view evidence of the existence of the system.

In In re Woodbridge Township Bd/Ed, supra. the Commission said that "...the Legislature intended that public employers not become embroiled in disputes between majority representatives and

the employees they represent as to the amounts to be paid as membership dues or representation fees in lieu of dues." 7 NJPER at 331. See also, In re Township of Hamilton, P.E.R.C. No. 82-121, 8 NJPER 370 (¶13169 1982). The Commission went on to state that in Red Bank H.S. Bd/Ed., 78 NJ 127, 142, 4 NJPER 364 (¶4167 1978) "...the Supreme Court noted that the Legislature has assigned P.E.R.C., not the employers, responsibility for preventing unlawful conduct by a majority representative against the employees it represents." Woodbridge Twp. B/E, 7 NJPER at 331, n. 3. Of course, with respect to issues involving the propriety of representation fee deductions, employees are further protected by their right to appeal to the neutral Appeal Board pursuant to §5.6 of the Act.

Applying Commission and Court precedent to this case, I find that the employer does not bear the responsibility to ensure the validity of the demand and return system. The demand and return system should be considered solely as a matter of internal union concern. Indeed, additional support for this concept is found in §5.6 of the Act where it states that "...the representation fee...shall be available only to a majority representative that has established and maintained a demand and return system...." (emphasis added). It is noteworthy that the statute does not provide for the employer to play any role in that process. Moreover, it were otherwise, the employer and the majority representative would find themselves having to negotiate a mutually acceptable demand and return system. For an employee organization representing employees

included in different units throughout the State and having a state-wide or national demand and return system, the burden of possibly having to negotiate changes in its demand and return system for each unit, and having to administer each of the systems, outweighs any benefit derived from conducting negotiations on the topic. Further, there is no assurance that the rights of nonmember employees will be protected to any greater degree by subjecting the demand and return system to negotiations. There is no indication that an employer is in any better position to identify defects in a demand and return system than is the union. Since I find the demand and return system to be solely a matter of internal union concern, the employer is not required to inquire into or approve the content and design of the system. Thus, the employer cannot be found to have violated the Act in the event the system is later found to be defective.9/

Likewise, the majority representative, not the employer, bears the responsibility for distributing the demand and return system to nonmembers employees. As previously discussed in this report, Boonton imposes the obligation on the majority

---

9/ In this finding, I am assuming good faith on the part of an employee organization to create a valid and viable demand and return system. I am not considering a circumstance where it becomes evident upon only a cursory review that the majority representative's demand and return system amounts to a sham or blatantly disregards employee rights. There is not even the slightest hint of the existence of such a circumstance in this case.

representative to personally serve upon each nonmember a copy of the demand and return system.

Section 5.6 of the Act authorizes the employer to collect through payroll deductions a representation fee, provided the majority representative has established and maintained a demand and return system. In its Answer, the County admits not knowing whether a demand and return system existed prior to deducting representation fees, not knowing whether the majority representative properly notified employees of the existence of a system, and not knowing whether representation fees collected by the majority representative were used for political and ideological purposes not connected to collective negotiations. However, the County asserts that it believed that there was a demand and return system in existence.[10/] While the County is not responsible for knowing whether the majority representative gave nonmembers proper notice of the system,[11/] nor the manner in which the union expends such funds, under the Act the County must know that a demand and return system exists before it may collect fees through payroll

---

10/ I accept the County's assertion that it believed District 65 had a demand return system in existence as true. No stipulation of fact bore on this question. Charging Parties did not show that the County did not, in fact, "believe" that a demand and return system existed at the time it deducted representation fees.

11/ This is not to say that the majority representative and the employer may not negotiate with regard to the procedures by which notice of the demand and return system will be made to nonmember employees.

deductions. This knowledges must derive from something more than a mere belief that a system exists. The employer must ascertain that the majority representative has established a demand and return system. The employer obtains this knowledge through direct observation of the Union's demand and return system. The County failed to take any affirmative steps to ascertain whether District 65 established a demand and return system. The County never observed District 65's demand and return system before it began making representation fee deductions from nonmember employees' pay. This omission by the County violates §§5.4(a)(1) and 5.6 of the Act.

Issue 3: Remedy

Charging Parties take the position that, in addition to cease and desist orders and the posting of notices, they are entitled to the return of all representation fees collected by the Respondents since the initiation of representation fee deductions in October 1980. Charging Parties argue that since they were not aware of District 65's demand and return system until it was disseminated on April 24, 1985, they also did not know that District 65 had not established a demand and return system prior to that date. Charging Parties contend that Respondents' failure to give proper notice that (1) a representation fee would be deducted, (2) that the Charging Parties had a right to challenge the fee and (3) that a demand and return system did not exist, prevented them from having any knowledge that an unfair practice was being committed until the April 24, 1984 dissemination of the demand and return system.

Charging Parties conclude that "[t]he actions of the Respondents by concealing from Charging Parties their rights under the statute prevented charging parties from filing a charge and the six month statute of limitation should be tolled until [April 24, 1984]." Charging Party brief at 12.

The County takes the position that it has no obligation to repay any fees deducted from nonmember employees' pay since, with the exception of any funds held in escrow, all money collected has been paid over to District 65 in accordance with the provisions of the collective agreement. The County expresses no position regarding whether the unfair practice charge is timely.

District 65 argues that the Commission's remedial authority in terms of a monetary award extends only so far as to make whole employees who suffer from the consequences of unfair practices. District 65 points out that a monetary remedy is "...designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act." Galloway Twp. Bd of Ed v. Galloway Twp. Assn. of Ed. Sect'y, 78 NJ 1, 11 (1978). District 65 argues that a monetary award which exceeds actual losses is punitive, not merely a "make-whole" remedy.

District 65 argues that the only harm which an employee may have suffered from an inadequate demand and return system is that the employee may have lacked access to a technically legal mechanism by which a refund of the returnable portion of the representation fee would be made. The lack of such mechanism is fully remedied by

the implementation of a demand and return system meeting all legal requirements. In any event, District 65 argues that it should be permitted to retain that portion of the representation fee spent on allowable activities. Therefore, the maximum harm suffered by any employee is equal to the amount of money refundable for objectionable activities. Any greater refund ordered by the Commission exceeds the amount needed to make employees whole and, thus, would be punitive and beyond the Commission's remedial authority. Moreover, the Commission cannot order a monetary remedy because it does not have the authority to determine the amount of objectionable expenditures, if any, since that falls within the jurisdiction of the Appeal Board.

District 65 also argues that the Charge filed in this matter is untimely with respect to any allegation which occurred more than six months prior to the date on which it was filed. District 65 contends that Charging Parties were not "prevented" from filing their charge, consequently, the six month period of limitation should not toll.

The Commission and the Courts have repeatedly held that in cases where the Act has been violated, aggrieved employees may properly be awarded back pay as a make-whole remedy. In re Galloway Twp Bd/Ed, supra. See also, In re Collingswood Bd/Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985); In re Ocean County Sheriff, H.E. No. 86-13, 11 NJPER 651 (¶16229 1985); In re Willingboro Bd/Ed., H.E. No. 86-8, 11 NJPER 597 (¶16213 1985), aff'd. P.E.R.C. No.

86-76, 12 NJPER 32 (¶17012 1985); In re State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Mantua Street and Roads Dept., P.E.R.C. No. 84-151, 10 NJPER 433 (¶15194 1984); In re Cherry Hill Bd/Ed, H.E. No. 84-50, 10 NJPER 216 (¶15111 1984), aff'd. P.E.R.C. No. 85-68, 11 NJPER 44 (¶16024 1984); In re Bergen County, P.E.R.C. No.84-2, 9 NJPER 451 (¶14196 1983); and In re Camden County, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). Since I have found that the Act has been violated, a back pay award making employees whole is appropriate.

District 65 argues that if it is found to have violated the Act, the back pay remedy should be limited to the return of only that portion of the representation fee collected from nonmember employees which constitute objectionable expenditures. However, District 65's proposed cure does not take into account the nature of the violation. The violation was caused by the collection of representation fees prior to the establishment of a legally valid demand and return system. District 65 has no right to collect any representation fees until it has established and disseminated a valid demand and return system. Accordingly, return to the status quo ante requires the return of all representation fees collected from Charging Parties during the time period cognizable under the Charge.

This brings me to a discussion of the timeliness of the charge.

Section 5.4(c) of the Act states that

> ...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer prevented.

Charging Parties cite Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978) for the proposition that the six month filing limitation may be tolled when a party is otherwise prevented from filing its unfair practice charge. In Kaczmarek, supra, the charging party initially filed a timely action with the New Jersey Superior Court. Subsequently, it was determined that the Superior Court lacked jurisdiction over the matter and dismissed the action. At this point, it was several months beyond the six month statute of limitation under the Act. The Supreme Court stated that in determining whether a charging party is "prevented" within the meaning of the Act from filing a timely charge, equitable considerations should be applied. The Supreme Court has indicated that in determining whether a charging party has been prevented from filing a charge, it is appropriate to "inquire into all relevant considerations bearing upon the fairness of imposing the statute of limitations." Id. at 340. The Court, following the U.S. Supreme Court in Burnett v. N.Y. Cent. R.R., 380 U.S. 424 (1965), found that employees may be "prevented" from filing a timely charge provided they did not "sleep on their rights." Kaczmarek, 77 N.J. at 340-341.

In this case, representation fee deductions began in October 1980 pursuant to the terms of the collective agreement. At

least some of the Charging Parties were notified that a representation fee deduction would be made, the amount of the deduction and the requirement of the existence of a demand and return system through dissemination of copies of the 1980-1982 agreement. All of the nonmember employees were notified of the representation fee deduction and amount of deduction through receipt of their pay stubs. Therefore, October 1980, the time when representation fees first were deducted prior to the establishment of a valid demand and return system, is the operative date to begin running the six month statute of limitation.[12/] Therefore, Charging Parties had six months to investigate the representation fee deduction, determine the proper parameters for its implementation and ascertain the proper manner by which it may be challenged. Nonetheless, Charging Parties waited until October 1984, to file their charge. This course of conduct hardly demonstrates the sort of diligence on the part of Charging Parties which statutes of limitation are intended to ensure. Id. at 341. Charging Parties must do more than merely raise the allegation that because they did not know that it was

---

12/ In a letter dated November 6, 1985, the County takes exception to Stipulation of Fact #4. The County points out that employees were and continue to be paid by check, attached to which is a stub setting forth deductions from gross pay. Thus, employees were apprised of a representation fee deduction when they reviewed their pay stubs. Neither Charging Parties nor District 65 contends that employees were not notified of the fee deduction by the check stub. Accordingly, it is reasonable to credit the County's statement that, from the outset, the stubs showed the representation fee deduction.

necessary to establish a demand and return system they were prevented from filing their charge in a timely manner. Accordingly, I find that Charging Parties' failure to have filed a charge within six months from the date that representation fees were first deducted (October 1980) shows that they slept on their rights, and, thus, were not "prevented" from filing their charge so as to toll the running of the statute of limitation.

However, I have found that District 65's current and previous demand and return systems are not legally valid. Consequently, continuing to deduct representation fees constitutes continuing violations of the Act. See, In re State of New Jersey (Kean College), H.E. No. 84-54, 10 NJPER 74 (¶16036 1985). As such, the charge, when filed, is timely. However, any remedy must be confined to the six month period prior to the filing of the charge. See, Local Lodge 1424 v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 45 LRRM 3212 (1960).

I make the following:

CONCLUSIONS OF LAW

(1) The County of Cumberland violated sections 5.6 and 5.4(a)(1) of the Act when it deducted representation fees from Charging Parties' wages without first having ascertained whether District 65 established a demand and return system.

(2) District 65, U.A.W., violated sections 5.6 and 5.4(b)(1) of the Act when it collected representation fees from Charging Parties wages prior to the establishment of a legally valid demand and return system.

(3) Charging Parties did not prove, by a preponderance of the evidence, that District 65 or the County violated the other sections of the Act as alleged in their charge. Consequently, I recommend that these aspects of the Complaint be dismissed.

RECOMMENDED ORDER

I recommend that the Commission ORDER the following:

A. Respondents County of Cumberland and District 65 U.A.W., cease and desist from:

1. Interfering with, restraining or coercing the Charging Parties in the exercise of the rights guaranteed to them by the Act by deducting representation fees prior to the establishment of a legally valid demand and return system.

2. Failing to comply with the requirements of §5.6 of the Act.

B. That Respondent County of Cumberland take the following affirmative action:

1. 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 be posted immediately upon receipt thereof and, after being signed by Respondent County's authorized representative, shall be 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.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the County has taken to comply with this Order.

C. That Respondent District 65, U.A.W., take the following affirmative action:

1. Refund to the Charging Parties[13/] all of their representation fees[14/] collected or held in escrow since April 12, 1984, together with simple interest computed at the rate of 12% per annum up to and including January 1, 1986, and at the simple interest rate of 9.5% per annum commencing January 2, 1986 until the date of payment.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "B." Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by Respondent District 65's authorized representative, shall be 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.

13/ In correspondence dated January 27, 1986, Counsel for the Charging Parties advised me and Respondents that Patricia Fleetwood wished to withdraw as party to the Charge. Ms. Fleetwoods request if hereby granted.

14/ The remedy I have fashioned applies only to the Charging Parties. The question of whether, under the circumstances presented in this case, the representation fees collected from all nonmember employees should be refunded is a policy question which I reserve for the Commission to resolve.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps District 65 has taken to comply with this Order.

Stuart Reichman
Hearing Examiner

DATED: April 11, 1986
Trenton, New Jersey

APPENDIX "A"

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 with, restrain or coerce the Charging Parties in the exercise of the rights guaranteed to them by the Act by deducting representation fees prior to the establishment of a legally valid demand and return system.

WE WILL forthwith comply with the requirements of N.J.S.A. 34:13A-5.6.

County of Cumberland
(Public Employer)

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 James Mastriani, Chairman, Public Employment Relations Commission, 495 West State Street, Trenton, New Jersey (609) 292-9832

APPENDIX "B"

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 with, restrain or coerce the Charging Parties in the exercise of the rights guaranteed to them by the Act by deducting representation fees prior to the establishment of a legally valid demand and return system.

WE WILL forthwith comply with the requirements of N.J.S.A. 34:13A-5.6.

WE WILL refund to the Charging Parties all of their representation fees collected or held in escrow since April 12, 1984, together with simple interest calculated at the rate of 12% per annum up to and including January 1, 1986, and at the simple interest rate of 9.5% per annum commencing January 2, 1986, until the date of payment.

District 65, U.A.W., AFL-CIO
(Public Employer)

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 James Mastriani, Chairman, Public Employment Relations Commission, 495 West State Street, Trenton, New Jersey (609) 292-9832