

A.B.D. NO. 2008-1

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

OAL DKT. NO. PRB 03761-07
AGENCY DKT. NO. AB-2006-005

MICHAEL JACOBS,

Petitioner,

-and-

TEAMSTERS LOCAL 97,

Respondent.

Appearances:

For the Petitioner, Michael Jacobs, pro se

For the Respondent, Mets & Schiro, attorneys
(Leonard C. Schiro)

DECISION

On April 26, 2006, Michael Jacobs ("Petitioner") filed a petition of appeal with the Public Employment Relations Commission Appeal Board ("Appeal Board"). The Petitioner is employed by the Teaneck Board of Education and is represented by, but is not a member of, Teamsters Local 97, ("Local 97") the majority representative organization. A representation fee in lieu of dues is deducted from his paycheck.^{1/} The petition asserts that the representation fee should be \$1.00 per paycheck and claims that Local 97: did not provide the required reports accounting for the uses made of dues and fees; uses fees for

^{1/} We decided a previous case between these same parties. See A.B.D. No. 2006-1, 32 NJPER 138 (¶63 2006).

expenses not connected with the Teaneck Board of Education negotiations unit; and spends Political Action Committee (PAC) money for inappropriate and unlawful purposes.

By letter dated June 5, 2006, Local 97's attorney responded asserting that Local 97 had complied with its legal obligations and does not maintain a PAC fund. It also objected to assertions and characterizations made by the petitioner. That letter crossed in the mail with a letter from the Appeal Board requesting that Local 97 submit an Answer.

On July 13, 2006 Local 97 submitted an Answer with exhibits and set forth several affirmative defenses. Thereafter, the case was transmitted to the Office of Administrative Law for hearing.

On December 18, 2007, Administrative Law Judge Caridad Rigo presided at an evidentiary hearing at which she heard testimony and admitted exhibits into evidence.

On April 9, 2008, ALJ Rigo filed her Initial Decision, previously served on all parties, with the Appeal Board. The Initial Decision recommends that the petition be dismissed.

On April 15, 2008, the petitioner filed Exceptions, supported by his post-hearing brief, urging that the Initial Decision be set aside. Local 97 has not filed a response to the Exceptions. On May 27, 2008 the Appeal Board applied for an extension of time to review the initial Decision. On May 30, 2008 Laura Sanders, Director and Chief Administrative Law Judge

of the Office of Administrative Law signed an order extending the time for the Appeal Board to issue a final decision until July 11, 2008. The case is now before the Appeal Board to adopt, modify or set aside the Initial Decision. The Exceptions:

(1) question whether the financial information that was the subject of testimony by witnesses for Local 97 is consistent with information provided by Local 97 to the Internal Revenue Service;

(2) fault the failure of Local 97 to identify exactly how many members it has;

(3) question whether a clothing "deduction" is an expense that is chargeable to non-members;

(4) challenge whether legal costs, incurred in representing an employee who was fired, allegedly because of a felony conviction, are chargeable to non-members; and

(5) dispute the reliability of the financial statements because Local 97 does not separate dues received from private and public sector employees.

In addition, the petitioner asserts that the proceedings were biased against him because of ex parte communications between ALJ Rigo and counsel for Local 97. These conversations, while regrettable, appear to have been about scheduling issues and not the merits of the case. Petitioner's exceptions state that the substance of the conversations were disclosed to him and that he agreed to proceed with the case. Under these circumstances we have no basis to conclude that the petitioner was prejudiced by these ex-parte communications.

We have reviewed the record, the Initial Decision and the petitioner's exceptions. We conclude that the Initial Decision should be modified and that the petition should be granted in part and dismissed in part.

The Initial Decision properly acknowledges that Local 97 has the burden of establishing that the representation fees assessed upon petitioner represented his pro-rata share of the costs incurred by Local 97 in the course of collective negotiations and contract administration. See N.J.S.A. 34:13A-5.6; Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991). With its Answer, Local 97 submitted a line-item statement, covering calendar year 2005, setting forth chargeable, non-chargeable and total expenditures for each category. The purpose of the statement is to provide information to non-members to advise them of the uses made by Local 97 of their representation fees so that they can decide whether to challenge the fee. See Chicago Teach. Union v. Hudson, 475 U.S. 292 (1986); Boonton Bd. of Ed., Town of Boonton v. Judith M. Kramer, 99 N.J. 523 (1985), cert. den. 106 S. Ct. 1388 (1986).^{2/}

However, once a challenge is filed, the majority representative bears the burden of establishing, through testimonial and documentary evidence, that the fee was properly

^{2/} A representation fee should be based upon the expenses incurred by a majority representative in the preceding year. Boonton 99 N.J. at 550; N.J.A.C. 19:17-17-3.3(a)(1).

calculated. See Paul L. Stracker v. Local 195 Intern. Fed. of Prof. and Tech. Engineers, AFL-CIO, A.B.D. No. 86-10, 12 NJPER 333, 334-335 (¶17128 1986). At the hearing, Local 97 introduced a statement, covering calendar year 2006, reflecting its allocation of expenses between chargeable and non-chargeable costs.^{3/} Local 97 Secretary Treasurer, Maria Perez, and Douglas Murray, a Certified Public Accountant, testified on behalf of Local 97. Their testimony addressed the amounts listed on the 2006 statement. The petitioner also testified. The issue before us is whether Local 97 has properly distinguished between chargeable and non-chargeable expenses and whether the record is sufficient to sustain Local 97's burden in a challenge to the representation fees collected from the petitioner.^{4/}

We dismiss petitioner's first and second exceptions. Our task is to determine whether Local 97 is using representation fees for expenses that are chargeable to non-members. We have no jurisdiction to review any documents Local 97 might be required

^{3/} That statement shows total expenses of \$4,225,693.00, of which \$406,721.00 are listed as non-chargeable. That calculation results in chargeable costs of \$90.38 per cent of Local 97's 2006 expenditures. Based on that figure the petitioner was assessed 85 per cent of normal dues, the maximum amount permitted by statute.

^{4/} The representation fees are being held in escrow by the Teaneck Board of Education pending the outcome of this case. We have removed the Board from the case caption as it is not a party except to the extent that it may have a role in implementing our order (T5-22 to T6-7).

to submit to government taxing authorities. Similarly, absent a significant fluctuation in its membership rolls, the precise number of employees represented by Local 97, who are dues-paying members, would not affect the amount of a representation fee or chargeable expenses. The Initial Decision puts that figure at between 10,000 and 10,500 spread among all the units, both public sector and private sector, represented by Local 97.

We grant petitioner's exception concerning the spending of \$2,892 for "Teamsters Clothing." Based upon Murray's testimony (T36-3 to T36-14) that item is a member-only benefit and is not chargeable to non-members. See N.J.S.A. 34:13A-5.5b.^{5/}

We reject the petitioner's fourth exception. He testified that Local 97 provided legal representation to a shop steward in the Teaneck Board of Education unit who was allegedly removed from his public sector job because he had a felony conviction (T47-2 to T47-15, Exhibit U-3).^{6/} Legal representation, usually in the context of the contractual grievance procedure, of an employee or union official accused of wrongdoing is one of the

^{5/} In contrast, Article XVIII "Safety" of the 2004-2007 contract between Local 97 and the Teaneck Board of Education (Exhibit J-1) provides a \$250.00 shoe allowance to all employees in the unit. The cost of negotiating and enforcing this benefit would be a chargeable expense.

^{6/} This proceeding may involve N.J.S.A. 34:13A-30(b) extending the ban contained in a federal law, that excludes persons convicted of certain offenses, from serving as an official or representative of a union representing public employees.

prime functions of a majority representative and is normally a chargeable expense. We have no basis to distinguish the costs of legal representation of a union official or unit employee, accused of violating a law.

Local 97's post-hearing brief cites our decisions as well as federal and state court cases to support its allocation between chargeable and non-chargeable expenses. We concur with Local 97's assertion that representation fees may support chargeable activities that take place in other collective negotiations units. Most unions that represent public employees have state and national affiliates or parent organizations that receive a portion of dues and fees assessed to members of a collective negotiations unit and in return provide assistance and support. And, those national unions may represent both private and public sector employees. See Lehnert, 500 U.S. at 524. In part, because of their right to strike, Local 97 charges private employees a higher percentage of their hourly pay rate as monthly dues, than those charged to public employees it represents (T40-12 to T42-2).

Local 97's statements of chargeable and non-chargeable expenses do not separately track dues and representation fees paid by public and private employees respectively. The petitioner asserts that those revenues have been impermissibly co-mingled. But, Local 97's witnesses testified that they had

the ability to separately identify the expenses incurred for each of the units it represents including the unit of Teaneck Board of Education. Local 97 introduced a document (Exhibit U-3) listing open and closed grievance, mediation and other cases involving that unit. Thus, we reject the petitioner's contention that no portion of his representation fees may be used for to support collective negotiations and contract administration in other bargaining units.

In Stracker, one of the cases cited by Local 97, we held that the uses made of the dues and representation fees that are transmitted to affiliated or parent unions, must be reflected in the expense breakdown provided to non-members, and if challenged, must be proven in a hearing.

The 2005 statement distributed by Local 97, attached to its answer, shows that it paid "per capita" taxes of \$1,047,714.00 to the International Brotherhood of Teamsters ("International"). That entire amount is listed as chargeable on the 2005 statement. However, the 2006 statement shows total per capita taxes of \$1,009,467.00 and designates \$161,919 of that amount as "non-chargeable." According to Murray, he receives a letter each year from the International listing the percentage of International expenses that are not chargeable to non-members.^{2/} He testified

^{2/} The letter is not part of the record.

that the percentage was 16.04 for 2006 and that figure was used to calculate the non-chargeable amount.

As Murray does not audit the expenses of the International, his testimony concerning the uses made of the per capita taxes is hearsay. A ruling based on hearsay in an administrative hearing must be supported by a residuum of legal and competent evidence. Cf. Negron v. N.J. Dep't of Corr., 220 N.J. Super. 425, 432 (App. Div. 1987). While the role of an agency head in reviewing the findings of fact of an Administrative law Judge is limited, findings that are not supported by sufficient, competent, and credible evidence need not be adopted. See N.J.S.A. 52:14B-10(c). The agency head must state with particularity its reasons for rejecting a finding. In re Hruska, 375 N.J. Super. 202, 207 (App Div 2005).^{8/}

The record contains no document or other competent evidence that would support Murray's testimony on the portion of per capita taxes that are non-chargeable. In addition, no testimony explained why the 2005 statement allocates the entire amount of per capita taxes to the chargeable column, even though Murray testified that the International annually advises him of their

^{8/} The Initial Decision does not specifically address per capita taxes. It generally accepts Murray's testimony even though he has no direct role in auditing the International's expenditures.

percentage of non-chargeable costs (T28-9 to T28-16).^{9/} We conclude that Local 97 has not met its burden of proof to show that per capita taxes were properly allocated between chargeable and non-chargeable categories. Thus, the per capita taxes shown on the 2006 statement are non-chargeable. See Stracker.

Accordingly, we hold that the amount of per capita taxes listed as chargeable on the 2006 statement (\$847,548.00) and the item "Teamsters Clothing" (\$2,892.00) must be moved to the non-chargeable column. That increases the non-chargeable costs to \$1,257,161.00. That amount, rounded off to the nearest full per cent, is 30 per cent of Local 97's total 2006 expenditures of \$4,225,693.00. Accordingly, the petitioner's representation fee for the period of time covered by the petition and the duration of this litigation is to be reduced to 70 per cent from 85 per cent.^{10/}

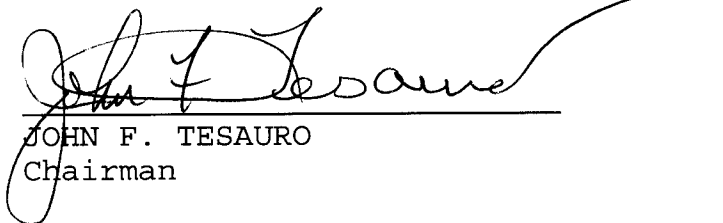
^{9/} To prove the chargeable portion of per capita taxes, testimony from someone providing services to the International, analogous to those Murray provides to Local 97, would have been direct and competent evidence.

^{10/} The Initial Decision estimated that as of December 18, 2007, \$1,700.00 in representation fees had been collected from the petitioner. Assuming that amount represents 85 per cent of normal dues, had petitioner been a member of Local 97 he would have paid \$2,000.00 over that same period of time. As petitioner should have been charged 70 per cent of normal dues, Local 97 is entitled to receive \$1,400.00 from petitioner in representation fees. Accordingly, the petitioner is entitled to a refund of \$300.00. As these funds are apparently being held by the Board, it may, in the absence of any appeal of this decision, disburse these amounts to Local 97 and the petitioner.

ORDER

The petitioner's representation fee for 2006 and 2007 shall be 70% of regular dues, fees, and assessments. A refund of \$300.00 shall be made to the petitioner.

BY ORDER OF THE APPEAL BOARD



JOHN F. TESAURO
Chairman

DATED: June 19, 2008
Trenton, New Jersey