A.B.D. No. 91-2

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

In the Matter of

WALTER BARAN, et al. OAL DOCKET NO. PRB 6888-89

Petitioners, AB DOCKET NO. AB-89-1

-and-

FOP LODGE NO. 59,

Respondent.

Paul L. Kleinbaum (Zazzali, Zazzali, Fagella & Nowak, attorneys) for petitioners

Stephen C. Richman (Markowitz & Richman, attorneys) for respondent

DECISION AND ORDER

On August 26, 1988, a petition of appeal was filed with the Public Employment Relations Commission Appeal Board by the New Jersey State PBA Local 165 (PBA) on behalf of several Middlesex County Sheriffs Officers and Investigators (Petitioners). On March 1, 1989, the petition was amended to have the caption reflect the names of the individual Petitioners. See "Appendix A". The petition seeks the return of representation fees in lieu of dues paid during 1988 by Petitioners to FOP Lodge No. 59 (FOP) which succeeded the PBA as the majority representative of Middlesex County Sheriffs Officers and Sheriffs Investigators.

The petition alleged the following: (1) no contract

existed between the FOP and the employer when the FOP began collecting representation fees; (2) the amounts collected exceeded the sums to which the FOP was entitled by law; (3) representation fees included payment for member-only benefits, and (4) a required audit of FOP expenditures was not made available to fee payers.

In October 1988, the Petitioners requested that the case be held in abeyance until FOP demand and return system proceedings were completed. On March 1, 1989, following the FOP's rejection of their rebate demands, the Petitioners asked that the case be resumed.

The FOP filed an Answer and the case was transmitted to the Office of Administrative Law for hearing. On July 19, 1990, Administrative Law Judge Arnold Samuels issued an "Initial Decision" which contained an order recommending that the petition be dismissed.

On July 30, 1990 the Petitioners filed exceptions to the Initial Decision. On August 6, 1990 the FOP filed a response. This case is now before the Appeal Board to accept, reject or modify the Initial Decision.

Judge Samuels' decision identifies three issues which were stipulated by the parties to be in dispute and which were listed in his January 10, 1990 prehearing order.

A. Whether a newly certified majority representative (F.O.P. Lodge No. 59) can collect the 1988 representation fee based on a calculation that includes anticipated 1988 expenditures, as well as the fee collected by the prior bargaining representative (P.B.A. Local 165) for the previous year.

B. Whether the respondent has a right to collect the agency fee at all without a newly negotiated and executed agreement

between it and the county.

C. Depending on a resolution of the above two issues, was the amount of the representative fee collected by respondent for 1988 correct? This issue needs to be determined if the answers to issues A and B are affirmative.

The parties also stipulated these facts.

1. Respondent is the current majority representative of a unit of Officers and Investigators employed by the Sheriff of Middlesex County. It is a party to a collective negotiations agreement ("Agreement") with the County (Exhibit A). The Agreement was executed on September 1, 1988 and covers the period from January 1, 1988 through December 31, 1989.

2. The F.O.P. was certified by P.E.R.C. as the majority representative on or about February 28, 1988. Prior to that date, P.B.A. Local 165 was the majority representative. The P.B.A. and the County were parties to a collective negotiations agreement which expired on December 31, 1987 ("P.B.A. Contract"). This agreement contained a representation fee provision. Pursuant to this provision, the P.B.A. assessed a bi-weekly dues deduction for members of $7.50.

3. F.O.P. Lodge 59 was incorporated in November 1987. It did not complete a full fiscal year of operation at the time it began collecting the representation fee.

4. Upon its certification as the exclusive representative, Lodge No. 59 expressly adopted the terms of the P.B.A. collective bargaining agreement but did not immediately collect agency fees. On or about April 15, 1988, the F.O.P. circulated a notice which advised employees in the unit that it intended to implement the agency fee provisions of the P.B.A. contract on May 21, 1988 (Exhibit B).

5. On or about May 30, 1988, the F.O.P. began

collecting the same representation fee which the P.B.A. collected, $6.37. This fee represented 85% of the F.O.P. dues. The fee was not based on the F.O.P.'s expenses for 1987. It was based on the P.B.A's representation fee and on an estimate of its own chargeable expenses.

6. Petitioners filed an appeal in accordance with the F.O.P.'s demand and return system. A copy of the appeal letter is attached as Exhibit C. All appeal letters were the same as Exhibit C.

7. The F.O.P. conducted a hearing on September 9, 1988. At the hearing, the F.O.P. provided a copy of the Lodge's actual expenditures and projected expenditures (Exhibit D (pages 2 and 3)). The F.O.P. notified petitioners by letter dated September 19, 1988, that their appeal was denied (Exhibit D).

Judge Samuels answered issues A and B in the affirmative, thus ruling in favor of the FOP. He also decided issue C holding that the Petitioners were not entitled to a rebate of representation fees.

The Petitioners' first exception asserts that the Initial Decision should not have addressed issue C; i.e. whether the 1988 representation fee assessed by the FOP was proper. The FOP does not dispute this assertion and it appears that neither party presented any argument to the ALJ on this issue. Since both parties' memoranda to Judge Samuels and the prehearing order indicate that a hearing would be needed to decide issue C if the FOP position on issues A and B were sustained, Judge Samuels erred in deciding this issue without an adequate record. His decision assumed that the burden was on the Petitioners to show that the FOP's statement was

inaccurate rather than on the FOP to justify its expenditures. See N.J.S.A. 34:13A-5.6; N.J.A.C. 1:20-3.2; and Daniel Alfieri v. CWA, A.B.D. No. 85-9, 11 NJPER 125 (¶16053 1985). The FOP's statement of expenditures and the amount it assessed as a 1988 representation fee are still in disupte.

Petitioners next except that the ALJ erred in concluding that the FOP could assess representation fees by "adopting" the representation fee article in the PBA's expired agreement with the employer. They assert that the FOP had no right to collect any representation fees in lieu of dues until September 1, 1988.

The existence of a valid agreement to collect representation fees would ordinarily be heard as an unfair practice charge by the Public Employment Relations Commission. Cf. West New York Police Supervisors Ass'n v. John Santa Maria, P.E.R.C. No. 89-60, 15 NJPER 21 (¶20007 1988), aff'd 235 N.J. Super. 123 (App. Div. 1989) and Cliffside Pk. Bd. of Ed., P.E.R.C. No. 87-61, 13 NJPER 2, at 3 (¶18001 1986). No such charge was apparently filed. But because this dispute also involves issues regarding the amount of the representation fee, we have jurisdiction to address all issues raised by the parties. See Wodzinski v. Woodbridge Tp. Ed. Ass'n, A.B.D. No. 88-5, 14 NJPER 381 (¶19149 1988).

Based upon the stipulated facts, we conclude that absent a written agreement with the employer, the FOP could not collect representation fees in lieu of dues by "adopting" the representation fee provision in the expired PBA contract.

Two statutes bear on this issue.

34:13A-5.5
Representation Fee In Lieu of Dues; Negotiation; Agreement; Amount; Pro rata Returns; Grounds; Proceedings

> 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 nonmember 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.

34:13A-5.8
Payment to Majority Representative

> 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 nonmember employees and during the period, if any, between successive agreements so providing...

N.J.S.A. 34:13A-5.5 requires a written agreement between a majority representative and the employer before representation fees can be collected from non-members.[1/] West New York Police Supervisors Ass'n, 235 N.J. Super. at 127. Section 5.8 prevents an employer from suspending representation fee deductions in order to

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1/ When introduced, the bill (A-688) that resulted in passage of the "agency shop law" (L. 1979, c. 477) provided that "no majority representative...or public employer...shall be denied from executing an [agency shop] agreement...." No explicit reference was made in that bill to a written agreement. Before passage the bill was amended to make agency shop mandatorily negotiable and to require a written agreement.

put economic pressure on the majority representative during negotiations. See Hamilton Tp., P.E.R.C. No. 82-121, 8 NJPER 370 (¶13169 1982) and Cf. Galloway Tp. Bd. of Ed., P.E.R.C. No. 76-32, 2 NJPER 186 (1976), rev'd 149 N.J. Super. 352 (App. Div. 1977), rev'd 78 N.J. 25 (1978). We do not believe it was intended to allow a new majority representative to collect representation fees without a contract after a hiatus in deductions caused by the ouster of the prior representative and the expiration of its agreement.

The PBA's ouster as the majority representative nullified the agency shop clause of the agreement, which had already expired. See Modine Manufacturing Co. 216 F. 2d. 326, 329 (6th Cir. 1954) and Milk Drivers, etc. Local 680 v. Cream-O-Land Dairy, 39 N.J. Super. 163, (App. Div. 1956). Modine holds that after employees change their majority representative, the union security provisions of the exisiting agreement become inoperative ["(the ousted union) could not insist on compensation, namely the membership dues, for the service which it could not continue to give."] Cream-O-Land considered an ousted union's demand to arbitrate five claims after contract expiration, three of which alleged breaches during the term of the agreement of provisions on wages, pension contributions and holiday compensation and two of which demanded adherence to union security provisions. 39 N.J Super. at 169. The Appellate Division (which cited Modine at 173) barred arbitration over the union security issues. Id. at 177. Thus the courts have distinguished between terms of an agreement which involve recognition of the majority representative and those setting the working conditions of employees. Those contract terms which depend on the right of the

contracting union to continue as the majority representative of employees in the unit are nullified when the majority representative is changed, regardless of whether the contract has expired.[2/]

Even though employee working conditions remained unchanged after the PBA contract expired, that circumstance resulted from the employer's statutory obligation not to unilaterally alter existing terms and conditions of employment so long as the employees had a majority representative; not because of the continued vitality of the PBA contract. That obligation applies irrespective as to how those terms and conditions of employment came into being. See N.J.S.A. 34:13A-5.3; N.J.S.A. 34:13A-21; and Galloway Tp. Bd. of Ed., 78 N.J. 1 (1978), in which no collective agreement had existed.

Modine and Cream-O-Land hold that union security provisions do not survive the ouster of a union either before or after termination of its contract with the employer. Here the exisiting agreement was no longer in effect. There was no representation fee clause which the FOP could assume after ousting the PBA. The FOP could have sought to negotiate its own agency shop agreement to take effect earlier than September 1, 1988, but the stipulated record

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2/ Only in cases where the new union is truly a successor to the former union could it claim the benefits of a union security clause in an unexpired agreement. See NLRB v. Hershey Chocolate Co., 297 F. 2d. 286 (3rd Cir. 1961).

contains no evidence that it did so.[3/] Its "adoption" of the expired agreement and the employer's apparent acquiesence in that action (by deducting representation fees) did not meet the Act's requirement of a written agreement. The FOP had no written agreement allowing it to collect representation fees in lieu of dues until the September 1, 1988 agreement took effect.[4/]

We next consider Petitioners' claim regarding the FOP's use of the amount of the PBA representation fee and its own estimates as a basis for calculating its 1988 representation fee. This issue must still be explored because the Petitioners are challenging the entire 1988 representation fee assessed by FOP. On this issue we concur with the ALJ' Initial Decision. We add the following comments. Although Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985) mandates that a majority representative base its fee on the prior year's expenditures, that case did not consider a newly organized negotiations unit or a change in majority representatives. The purpose of the mandate was to insure that the fees of nonmembers not be used, even temporarily, for impermissible purposes. There are other ways to reach that goal. Boonton so notes. 99 N.J. at 551. Placing representation fees in escrow during fee challenges is a

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3/ The FOP did apparently reach a separate, written agreement with the employer to limit voluntary payroll deductions of membership dues to the FOP as allowed by N.J.S.A. 52:14-15.9(e). See Exhibit B.

4/ We do not pass at this time on any issue involving the administration of that representation fee agreement other than that raised in issue A. of the prehearing order.

method approved in Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435 (1984) and Chicago Teachers Union v. Hudson, 475 U.S. 209 (1986). Thus we find that when a newly certified majority representative bases its representation fee on the prior experience of its predecessor, and/or its own estimate of chargeable expenses, it has not per se violated the statutory or the administrative regulations designed to give nonmembers sufficient notice of the basis of the fee. The adequacy of the safeguards used to protect the rights of representation fee payers is a separate issue which can be explored on remand.

In conclusion we hold that the FOP had no written agreement authorizing it to collect representation fees until the execution of its contract with the employer on September 1, 1990 and that Petitioners are entitled to a refund of all fees paid by them to the FOP during that period. We hold that the FOP could use its anticipated 1988 expenditures and the representation fee assessed by the PBA for the previous year as a basis for calculating its 1988 representation fee provided that adequate measures were taken to avoid using Petitioners' representation fees even temporarily for impermissible purposes. Finally we hold that the ALJ should not have dismissed Petitoners' challenge to the amount of the 1988 representation fee. We remand that issue to be determined in a hearing which allocates the burden of proof in accordance with N.J.S.A. 34:13A-5.6 and N.J.A.C. 1:20-3.2.

ORDER

The Initial Decision of the Office of Administrative Law is affirmed as to Issue A; reversed as to Issue B; and reversed and remanded as to issue C for the purpose of determining whether petitioners are entitled to a rebate of any representation fees paid to the FOP after September 1, 1988 for the remainder of the FOP's 1988 dues year.[5/]

BY ORDER OF THE APPEAL BOARD

WILLIAM L. NOTO
Chairman

Chairman Noto and Board Members Dorf and Verhage voted in favor of this decision.

DATED: TRENTON, NEW JERSEY
September 11, 1990
ISSUED: September 12, 1990

5/ Since the Petitioners are still challenging amounts paid by them after September 1, 1988 as 1988 representation fees, we will not order the refund of pre-September 1, 1988 representation fees until issue C has been resolved.

APPENDIX A

The petition was accompanied by letters signed by the following petitioners: Walter Baran, Victor Amato, Sidney Aumack, Teresa Baran, Michael Barbieri, Gregory Bennett, Gary Bernhard, Eileen Bocknack, Steven Bohn, Keith Buckley, Esther Clark, William Clark, Linda Consalvo, Ronnie Dalrymple, Salvatore DellaFave, William Galway, Raymond Geis, Christopher Giampietro, Anita Grealis, Robert Grover, Andrew Halkovich, Kevin Hastings, Robert Hospidor, Harry Hudson, Patricia Jackson, Robert Kelly, John Larson, Leon Lemanski, Frank Lewandowski, Kenneth Link, Steven Lucas, Harry Lutes, Mickey Mazzei, Tom McGotty, Dawn Meggison, Andy Montalvo, William Moriarty, James Mullen, Leonard Mundy, David Palmer, Mark Papi, Peter Pavlis, James Peslis, Robert Peterson, Thomas Pitoscia, Robert Quinn, Robert Rittenhouse, Thomas Rittenhouse, Raymond Sauter, James Scott, Robert Semler, Joseph Shuberda, Adam Stenukinis, Joseph K. Szarob, Steven Tacca, Ernest Thomasson, Richard Velez, Christopher Villano, Ivan Wood, Michael Yonone and John Yuhas.