H.E. NO. 2005-12

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

In the Matter of

WAYNE TOWNSHIP,

Respondent,

-and- Docket No. CI-2003-036

PBA LOCAL 136,

Respondent,

-and-

BARRY WEISER,

Charging Party.

Appearances:

For the Respondent, Wayne Township
John J. McKniff, of counsel

For the Respondent, PBA
Loccke & Correia, attorneys
(Michael A. Bukosky, of counsel)

For the Charging Party,
Fusco & Macaluso, P.A.
(Ciro Spina,III, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION ON RESPONDENTS' MOTIONS FOR SUMMARY JUDGMENT AND CHARGING PARTY'S CROSS- MOTION FOR SUMMARY JUDGMENT

On May 5, 2003, Barry Weiser (Charging Party) filed an unfair practice charge against his employer, the Township of Wayne (Township) and his majority representative, PBA Local No. 136 (PBA). Weiser alleges that the Township violated sections

5.4a(1) and (3) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), in late 2002, when it failed to provide Weiser with a copy of the collective negotiations agreement between the Township and PBA, and refused to cease deducting representation fees from Weiser's pay. Weiser alleges that the PBA violated section 5.4b(1)[2/] of the Act, when, between January 1983 and May 2003, it continued to collect representation fees from Weiser despite having denied him membership in the PBA in 1970.

On October 7, 2004, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On October 8, 2004, the PBA filed an Answer, denying the allegations and denying that it violated the Act, and requesting that the Complaint be dismissed. On October 6, 2004, the Township filed its Answer, also denying the allegations, denying that it violated the Act and requesting that the Complaint be dismissed.

1/ These sections prohibit public employers, their representatives or agents 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."

2/ This provision prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

On December 7, 2004, the PBA filed a Motion for Summary Judgment with the Commission, along with a supporting brief, attached exhibits and two certifications. On December 7, 2004, the Township filed a Motion for Summary Judgment, along with a supporting brief and certification. On December 8, 2004, the Charging Party filed a Cross Motion for Summary Judgment, a letter brief and attached exhibits, but without any certification or affidavit as to the exhibits.[3/] On December 10, 2004, the Motions were referred to me for decision. N.J.A.C. 19:14-4.8. On January 4, 2005, the PBA supplemented its brief on the Motions.

* * *

Summary judgment will be granted:

> . . .if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The

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3/ I cannot consider any factual allegations in Charging Party's brief, the facts contained in the attachments, or the fact of the attachments since no certifications or affidavits supporting those documents and assertions were submitted. See, Paramus Borough, P.E.R.C. No. 99-105, 22 NJPER 298 (¶30125 1999).

fact-finder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." "Material facts" are those which tend to establish the existence or non-existence of an element of the charge or of a defense that is derived from the controlling substantive law. See Lilly, Introduction to the Law of Evidence [West Publishing Co. 2d ed. (1978) at p. 18] and McCormick on Evidence [West Publishing Co. 2d ed. (1978) at p. 434]. In considering motions for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion and no credibility determinations may be made. A motion for summary judgment should be granted cautiously and the procedure may not be used as a substitute for a plenary trial. State of N.J. (OER), (Dept. of Personnel) and CWA, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd NJPER Supp.2d 244 (¶202 App. Div. 1990), certif. den. 122 N.J. 395 (1990); Mandel v. UBS/PaineWebber, Inc., 373 N.J. Super. 55 (App. Div. 2004); Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Where the party opposing the motion does not submit any affidavits or documentation contradicting the moving party's affidavits or documents, the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless it was raised in the movant's pleadings. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1974). See also, City of Atlantic City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986), aff'd. P.E.R.C. No. 86-121, 12 NJPER 376 (¶17145 1986); CWA, Local 1037, AFL-CIO, H.E. No. 86-10, 11 NJPER 621 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985). The Court in Judson held that:

> ...if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature...he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. [Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. at 75.]

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

The Township is a public employer within the meaning of the Act and is subject to its provisions. The PBA is a public employee organization within the meaning of the Act and is subject to its provisions. The PBA represents police officers

employed by the Township. Barry Weiser is employed by the Township as a police officer and is in the negotiations unit represented by the PBA. Weiser is not a member of the PBA's organization, and paid representation fees in lieu of dues until June 24, 2003.

In correspondence dated June 20, 2003, the PBA's attorneys notified the Township's business administrator that the Township must immediately cease collecting any representation fees from Weiser. The PBA also requested all payroll records that reflected fees deductions taken from Weiser from the period commencing six months before the filing of the unfair practice charge. The Township ceased payroll deductions for representation fees from Weiser's pay, commencing with the payroll period ending June 30, 2003.

At some time prior to December 4, 2004, the PBA's attorney directed that a copy of the collective negotiations agreement between the Township and PBA be mailed to Weiser's attorney.[4/] On July 28, 2004, the PBA advised Weiser's attorney that it had calculated the amount of representation fees which had been collected from Weiser from October 24, 2002 to June 24, 2003 (representing the period of six moths prior to the filing of the unfair practice charge and the date deductions ceased), and would

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4/ In an uncertified statement, Charging Party asserts that the agreement was received on July 26, 2003.

issue a check for that amount, which it calculated as $136.00. Thereafter, the PBA sent Weiser a check for that amount. Weiser has not cashed the check.

ANALYSIS

The issues raised in the charge are whether the Township violated section 5.4a(1) and (3) of the Act when it refused to cease deducting representation fees from Weiser, and failed to provide him with a copy of the collective agreement, and whether the PBA violated 5.4b(1) of the Act between September 2002 and June 24, 2003, when it refused to cease collecting representation fees from Weiser, and failed to provide him with the collective agreement.

Charging Party's Motion for Summary Judgment

Weiser alleges that the PBA violated 5.4b(1) when it continued to collect representation fees after it had illegally denied him membership in the PBA solely because of his membership in the FOP, a rival organization. N.J.S.A. 34:13A-5.3 provides:

> . . .[P]ublic 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...

An employee organization violates section 5.4b(1) of the Act when its action tends to interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by the Act, where the action lacks a legitimate and substantial

organizational justification. Cf. N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n. 1 (¶10285 1979). Employee organizations are free to create rules binding upon their members to accomplish organizational objectives. These rules, often in the form of constitutions and by-laws, are part of the contract between the organization and its membership. The Courts and the Commission have traditionally been reluctant to interfere with the internal affairs of private organizations. Calabrese v. Policemen's Benevolent Assn., Local No. 76, 157 N.J. Super. 139 (Law Div. 1978); City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982), app. dism. App. Div. Dkt. No. A-768-82T1 (7/22/83); Old Bridge Ed. Assn., P.E.R.C. No. 91-7, 16 NJPER 438 (¶21188 1990).

N.J.S.A. 34:13A-5.5 provides for the collection of representation fees in lieu of dues for employees who opt not to become members of the majority representative's organization via payroll deductions. N.J.S.A. 34:13A-5.6 specifies that one of the conditions which permit payroll deduction of representation fees is that "membership in the majority representative is available to all employees in the unit on an equal basis. . ." The standard that the Commission has adopted for testing the propriety of an employee organization's expulsion, or denial of membership, of a unit member is whether the employee organization's actions were arbitrary, capricious, or invidious.

See, N.J. State PBA (Franklin), P.E.R.C. No. 91-92, 17 NJPER 245 (¶22111 1991)(Commission grants State PBA's motion for summary judgement and dismisses an unfair practice charge filed by Franklin and 59 other FOP members who were expelled from the PBA for dual membership, where the charging parties presented no evidence that their expulsions were arbitrary, capricious or invidious.); FOP Lodge 12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶21049 1990); CWA Local 1037 (Schuster), P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); FMBA Local No. 35 (Carrigino), P.E.R.C. No. 83-144, 9 NJPER 336 (¶14149 1983).

In FOP Lodge 12 (Colasanti), the Commission held that a majority representative can lawfully expel members who work to displace it and collect representation fees after their expulsion. Conversely, in Bergen County and Bergen Cty. Sheriff's Dept. and PBA Local No. 134 and Neely, P.E.R.C. No. 88-9, 13 NJPER 645 (¶18243 1987), aff'd 227 N.J. Super. 1 (App. Div. 1988), recon. den. 3/15/88, certif. den. 111 N.J. 591 (1988)("Bergen County"), the Commission held that where a union excludes members solely because of their membership in a rival organization, and simultaneously accepts their representation fees, it violates section 5.4b(1) of the Act. The remedy includes an order that the union refund all or part of the illegally collected fees and cease those deductions.

In this case, Charging Party has filed a Cross Motion for Summary Judgment. However, there are disputed material facts that he was denied membership solely because of his FOP membership. Accordingly, Charging Party's Motion should be denied.

Respondent PBA's Motion for Summary Judgment

PBA also moves for summary judgment. PBA argues that since all relief that Weiser is entitled to has been provided, the case is moot. Weiser argues that the payment of money is not the only relief he seeks; he asserts he is also entitled to a finding of an unfair practice, and the posting of a cease and desist order. If Weiser prevailed in the charge, remedial action could include a finding of an unfair practice, the posting of a cease and desist order, and a refund of the fees deducted from six months before the charge was filed to the date the deductions ceased. N.J.S.A. 34:13A-5.4(c) prohibits the Commission from deciding disputes beyond the six-month statute of limitations. Weiser does not assert that he was prevented from filing his charge before May 5, 2003.

Past Commission decisions dealing with mootness suggest that a case will be found moot where "continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Ramapo Indian Hills Bd. of Ed., P.E.R.C.

No. 91-38, 16 NJPER 581, 582 (¶21255 1990). Other considerations are whether there remain open issues which have practical significance; whether there is a continuing chilling effect from the earlier conduct which has not been erased; whether, after a respondent's corrective action, a cease and desist order is necessary to prevent other adverse action against the same or other employees; and whether the offending conduct is likely to recur.[5/] None of these concerns are present here. This case deals with one employee's representation fee dispute, for which his union has ceased deducting the fee and the employer has ceased the payroll deduction. Moreover, the union has refunded his representation fees for the period October 24, 2002 through June 24, 2003. Continuing this litigation would not serve any practical effect, and there is sufficient likelihood that the conduct will not recur.

Cases under the jurisdiction of the Public Employment Relations Commission Appeals Board, while concerned with different legal rights, lend sufficiently analogous support to a finding of mootness. In Daly v. High Bridge Teachers' Ass'n and

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5/ See, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1 (1978) and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978); Neptune Tp. Bd. of Ed. and Neptune Tp. Ed. Ass'n, P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd 21 NJPER 24 (¶26014 App. Div. 1994); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 82-56, 8 NJPER 31 (¶13013 1981); Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1978).

Gay v. Pascack Valley Regional Ed. Ass'n and Mellert v. Brookdale Comm. Coll. Fac. Ass'n, A.B.D. No. 90-3, 15 NJPER 550 (¶20225 1989), aff'd 242 N.J. Super. 12 (App. Div. 1990), certif. den. 122 N.J. 356 (1990), the Appeals Board held that an offer by a union to pay petitioners an amount equivalent to their full representation fees plus interest for the period covered by the petition rendered the contested case moot and warranted dismissal, even though petitioners had refused to accept the refund offers. In Davis v. CWA Local 1081, ABD. No. 95-1, 21 NJPER 191 (¶26124 1994), the Appeals Board, relying on N.J.A.C. 19:17-4.5,[6/] dismissed an employee's challenge to representation fees from 1991-1992 and 1992-1993 as untimely, where the petition was not filed within six months of the start of payroll deductions for those dues years. And, in Wodzinski, et al. v. Woodbridge Tp. Ed. Ass'n, A.B.D. No. 88-5, 14 NJPER 381 (¶19149 1988), in a footnote, the Appeals Board noted that if all of Wodzinski's representation fees had already been refunded, his appeal would be moot, relying on Mallamud and Rutgers Coun. of AAUP Chapters, A.B.D. No. 86-9, 12 NJPER 324 (¶17127 1986), app.

6/ This section provides: A petition of appeal seeking review by the Appeal Board of a representation fee in lieu of dues charged by a majority representative pursuant to N.J.S.A. 34:13A-5.5 shall be filed within six months after payroll deductions to collect the petitioner's fee have commenced.

dism. as moot NJPER Supp. 2d 180 (¶157 App. Div. 1987). In Mallamud, the Court instructed:

> It is the policy of the courts of this state to refrain from advisory opinions, deciding moot cases and generally functioning in the abstract...[citations omitted]. The jurisdiction of the court may not be invoked in the absence of an actual or justiciable controversy...A controversy is justiciable when a litigant's concern with the subject matter evidences a sufficient stake and real adversariness. [NJ Supp. 2d at 181.]

Here, the PBA has refunded all of the representation fees the charging party is statutorily entitled to receive. Under these circumstances there is no additional relief to which he is entitled, except a finding of an unfair practice. A cease and desist order would not be warranted.

The PBA and Township have ceased representation fee deductions from Weiser from June 24, 2003 forward, and the PBA refunded all representation fees from October 24, 2002 through June 24, 2003, representing eight months of deductions. The charge was filed on May 5, 2003. The Act prevents our consideration of unfair practices earlier than six months prior to the filing date. N.J.S.A. 34:13A-5.4(c). No further relief is available to Weiser, even if, after a full hearing, he proved that the PBA was not entitled to collect representation fees.

The Alleged Refusal to Provide the Collective Negotiations Agreement

A union has an obligation to represent all members fairly and in good faith. This obligation does not necessarily include an obligation to supply a copy of the collective agreement to every unit member. For example, a delay in providing contracts to members is not a violation of the Act. See generally, New Jersey Sports & Expos. Auth., D.U.P. No. 98-23, 24 NJPER 42 (¶29025 1997) (charge alleging violation due to failure to provide contract to membership for almost one year dismissed because contract was being reviewed for errors) app. den. P.E.R.C. No. 98-117, 24 NJPER 208 (¶29097 1998) (appeal untimely). Cf. Carteret Education Association (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, (¶28177 1997) (Commission declined to find a violation on fact that agreement was not provided to employee until after the charge was filed); Sports Arena Employees Local 137 (Cooke), D.U.P. No. 98-23, 24 NJPER 42 (¶29025 1997), app. den., P.E.R.C. No. 98-117, 24 NJPER 208 (¶29097 1998)(Director dismissed charge that union failed to provide copy of contract where finalized copy was not available; appeal dismissed on timeliness grounds); Union Cty. Educational Services Comm'n. and Westlake Education Association(Kelly), D.U.P. No. 2000-13, 26 NJPER 160 (¶31062 2000). The allegation that the Township or PBA refused to provide Weiser a copy of the collective agreement, even if true, is not an unfair practice.

Even if it were, here, the PBA has provided the agreement to Weiser. Accordingly, this allegation also is moot. Therefore, based on the above, I recommend that the Complaint as to this allegation against both the Township and PBA be dismissed.

Township's Motion for Summary Judgment

N.J.S.A. 34:13A-5.5 a. provides:

> 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.

Public employers are obligated to negotiate provisions regarding the payroll deduction of representation or agency fees from employees who are not members of the majority representative's organization, and where agreement is reached, they are required to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the employees in the negotiations unit who are not members of the majority representative. They are obligated to continue deductions, and are not free to repudiate those contractual provisions. Here, it appears that the Township and PBA have an

agency fee contractual provision and, accordingly, the Township deducted fees from Weiser until June 24, 2003, when the PBA directed it to cease making deductions. The above statute does not entitle individual unit members to demand that public employers cease deductions.

In a case similar to this one, Bergen Cty, the Commission dismissed the charge against the County and Sheriff, finding that public employers should not become embroiled in disputes about whether representation fees may continue to be collected from expelled members of the majority representative. Employers are not responsible for insuring that union membership is available on an equal basis, and, therefore, are not liable in such disputes [13 NJPER at 646].7/ As a matter of law and based on the undisputed facts in this record, the Township has not violated the Act, and I recommend that the Township's Motion be granted as to this allegation.

7/ I distinguish those cases which suggest that employers are liable in that these cases deal with the adequacy of the union's demand and return system. Bacon and District 65, UAW, P.E.R.C. No. 87-72, 13 NJPER 57 (¶18025 1986), aff'd NJPER Supp. 2d 196 (¶173 App. Div. 1988), certif. den. 114 N.J. 308 (1988) (an employer violates the Act when it deducts representation fees before confirming that a union has an adequate demand and return system as required by N.J.S.A. 34:13A-5.5 and 5.6); Boonton Bd. of Ed. and Boonton Ed. Ass'n and NJEA, P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), aff'd as mod., sub nom., Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 106 S.Ct. 1388 (1986).

The Township's alleged failure to provide Weiser with a copy of the collective agreement, even if proven true, does not rise to the level of an unfair practice. Weiser has received a copy of the agreement. Charging Party has alleged no other facts which support its alleged violation of sections 5.4a(1) and (3). See, Bridgewater Tp., 95 N.J. 235 (1984). Nor has Charging Party alleged facts which support an independent 5.4a(1) violation. Somerset Hills Bd. of Ed., P.E.R.C. No. 2003-78, 29 NJPER 226 (¶69 2003); Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994). Accordingly, based on the above, I recommend that the Township is entitled to summary judgment on all of the allegations.

Based upon the undisputed facts previously found, I make the following:

CONCLUSIONS OF LAW

The Respondent Township of Wayne is entitled to summary judgment that it did not violate N.J.S.A. 34:13A-5.4a(1) or (3).

Weiser's allegation that PBA Local 136 violated N.J.S.A. 34:13A-5.4b(1) is moot in light of the PBA's having reimbursed all representation fees deducted from October 24, 2002 to June 24, 2003, the cessation of deductions his representation fees from June 24, 2003 forward, and his receipt of a copy of the collective negotiations agreement between the Township of Wayne and PBA Local 136. Accordingly, for the reasons set forth in

this decision, PBA Local 136's Motion for Summary Judgment regarding this issue is granted. Weiser's Cross-Motion for Summary Judgment is denied.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Respondent Township of Wayne's Motion for Summary Judgment be granted, that the Respondent PBA Local 136's Motion for Summary Judgment be granted, and the Complaint be dismissed in its entirety.

Elizabeth J. McGoldrick
Hearing Examiner

Dated: March 15, 2005
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 28, 2005.