

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF  
THE TOWN OF BOONTON,

Respondent,

-and-

Docket No. CI-82-21-123

JUDITH M. KRAMER,

Charging Party.

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BOONTON EDUCATION ASSOCIATION and  
NEW JERSEY EDUCATION ASSOCIATION,

Respondents,

-and-

Docket No. CI-82-22-124

JUDITH M. KRAMER,

Charging Party.

SYNOPSIS

The Commission, ruling upon complaints of unfair practices filed against the Boonton Board of Education, the Boonton Education Association and the New Jersey Education Association which were filed by a teacher who pays a representation fee in lieu of dues to the Associations, finds that the Associations violated the Act by collecting a representation fee during a period of time when the Associations did not have a statutory demand and return system in operation. The Commission finds that the Associations also violated the Act by sending ambiguous and potentially misleading letters to non-members concerning their membership options, by failing to give each non-member personal notice of the demand and return system established by the Association, and by discriminating between non-members and members regarding methods of payment of dues or representation fees in lieu of dues. The Associations were ordered to refund to the charging party the representation fee collected for the month of September 1981 together with interest, to notify personally each non-member of the demand and return system established by the Association and to post notices to employees.

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Appearances:

For the Boonton Board of Education,  
McKeon, Curtin, Hubner & McKeon, Esqs.  
(Andrew W. Wubbenhorst, Esq.)

For the Boonton Education Association and New Jersey  
Education Association, Ruhlman, Butrym & Friedman, P.A.  
(Cassel R. Ruhlman, Jr., Esq.)

For Judith M. Kramer, Nelson R. Kieff, Staff Attorney  
National Right to Work Legal Defense Foundation, Inc.,  
and Henry S. Kramer

DECISION AND ORDER

On November 30, 1981, Judith M. Kramer, a teacher,  
filed an unfair practice charge against the Board of Education  
of the Town of Boonton ("Boonton"),<sup>1/</sup> her employer, and an unfair

1/ The charge was initially filed against the Boonton Public  
Schools, but the caption was later amended to reflect the  
Board's position as Kramer's employer.

practice charge against the Boonton Education Association ("Association"), her majority representative, and the New Jersey Education Association ("NJEA"), an Association affiliate, with the Public Employment Relations Commission. Both charges challenged the legality and implementation of an agreement between the Board and the Association to deduct a representation fee from the paychecks of non-members of the Association such as Kramer.

The first charge specifically alleged that the Board violated subsections 5.4(a)(1) and (3)<sup>2/</sup> of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., and N.J.S.A. 52:14-15.9(e),<sup>3/</sup> when, on or about October 15, 1981, it put into effect an automatic dues checkoff provision without first securing her authorization or insuring that the Association had a demand and return system in place.<sup>4/</sup>

<sup>2/</sup> These subsections 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."

<sup>3/</sup> This subsection provides, in part: "Whenever any person holding employment, whose compensation is paid by... (any) board of education... in this State... shall indicate in writing to the proper disbursing officer his desire to have any deductions made from his compensation, for the purpose of paying the employee's dues to a bona fide employee organization, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request."

<sup>4/</sup> Kramer also attached a statement to this charge in which she asserted that she informed the superintendent on October 14, 1981 by letter that she objected to the deduction of a representation fee. A copy of that letter was also attached. There, she also asserted that the Association had refused to show her the contract provisions concerning representation fees, its demand and return system, and a written statement of how her representation fee would be used and how it was derived.

The second charge specifically alleged that the Association and the NJEA violated subsection 5.4(b)(1)<sup>5/</sup> of the Act and N.J.S.A. 52:14-15.9(e) when, since on or about October 15, 1981, they: (1) refused to tell or allow Kramer to see the provision of the collective negotiations agreement concerning representation fees, thus making it impossible to determine whether the Association had breached its duty of fair representation; (2) demanded, in a letter dated October 7, 1981, that she join the Association; (3) established an automatic dues checkoff procedure without first establishing a demand and return system or securing signed authorization cards; (4) refused to give advance information on the amount due; (5) refused to display a demand and return system until after the forced checkoff was in effect; and (6) established a non-uniform representation fee system which charges lower amounts to certain members than it does to certain non-members.<sup>6/</sup>

<sup>5/</sup> This subsection prohibits public 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."

<sup>6/</sup> Kramer also attached a statement to this charge in which she asserted that the Association's membership chairman told her that only members could elect a lump sum payment; an Association bargaining committee member told her she would get a copy of the contract in about three weeks; the Association's president told her that she could hire a lawyer if she did not want to join the Association as a full member or through payroll deductions; another Association bargaining committee member told her the demand and return system would be posted after the dues checkoff began and she could see the contract when it was typed; and an NJEA representative told her that non-members had to pay representation fees by checkoff and that he did not have to talk to her. Also mentioned was an October 22, 1981 letter from the Association which allegedly made it clear that all persons in the Association's unit were not paying dues on a uniform basis. Attached to this statement was

(continued)

On February 9, 1982, Kramer amended her charge against the Association and NJEA to add several allegations. The amendment asserted that the Association and NJEA violated the guarantees of freedom of speech and association contained in the United States and New Jersey Constitutions, as well as subsection 5.4(b)(1) of the Act, when they sought to enforce a representation fee system which allegedly was not limited to activities related to negotiations and contract administration, but allegedly extended to various partisan political, lobbying, and social activities.

On May 17, 1982, the Director of Unfair Practices issued an Order Consolidating Cases and a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Board, the Association, and the NJEA filed Answers denying all the Complaint's allegations except that the Board and Association had negotiated a provision permitting the deduction of a representation fee from the paychecks of non-members. The Board also alleged that it was the responsibility of the Association to establish and maintain a demand and return system pursuant to N.J.S.A. 34:13A-5.5. The Association and NJEA also alleged that the Association had adopted a demand and return system and that representation fees had been deducted and paid over to the Association in accordance with N.J.S.A. 34:13A-5.5 et seq.

6/ (continued)

an October 7, 1981 letter from the Association's president and chairperson giving Kramer the choices of joining the Association as (1) a cash member with full payment of dues by October 15, and (2) an automatic payroll deduction member with dues to be deducted in monthly installments. Finally, Kramer attached a letter dated October 15, 1981 to Kramer from the Association's president and membership chairperson informing her that they would forward her name as a non-member to the Board so that the Board would begin representation fee deductions.

On September 13, 1982, Commission Hearing Examiner Edmund G. Gerber conducted a hearing. At the outset, he quashed a subpoena duces tecum which would have required the Association and NJEA to produce all documents pertaining to the operation of the demand and return system, calculation of the representation fee, computation of the refundable amount, and claimed costs of collective negotiations, contract administration, and grievance processing for members of the Association's unit from July 1980 to July 1982. He ruled that the Appeal Board established pursuant to N.J.S.A. 34:13A-5.6 had jurisdiction over challenges to the amount of representation fees and that the subpoenaed documents were not relevant to an unfair practice proceeding before the Commission as opposed to a representation fee appeal proceeding before the Appeal Board.<sup>7/</sup> The parties then examined witnesses and presented exhibits. They waived oral argument, but filed post-hearing briefs.

On March 25, 1983, the Hearing Examiner issued his report and recommendations. H.E. No. 83-33, 9 NJPER 248 (¶14114 1983). He found that the Board, the Association, and the NJEA violated the Act when a representation fee was deducted for the month of September, 1981 although the Association's demand and return system was not in place until October. As a remedy, he recommended that the defendants be ordered to refund the sum of \$18.54 plus 12% interest per annum to Kramer and to post a notice of their violations and remedial actions. He recommended that

<sup>7/</sup> On September 29, 1982, Kramer filed a Motion for Leave to Appeal the Hearing Examiner's decision to quash the subpoena duces tecum with the Appellate Division of the Superior Court. Kramer did not ask the Commission to review this decision first. On October 21, 1982, the Court denied Kramer's motion.

the Commission dismiss all other aspects of the Complaint. In particular, he found that Kramer had failed to prove she was not able to see a copy of the demand and return system; that N.J.S.A. 52:14-15.9(e) did not give her a right to resist automatic dues deduction of a representation fee; that the October 7, 1981 Association letter offering Kramer two choices of membership was not coercive; that the Association's two-tiered dues structure for professional and non-professional employees did not discriminate against non-members and was in any event not challenged in Kramer's pleadings; that the Commission did not have jurisdiction to consider Kramer's argument that part of her representation fee was spent for impermissible purposes; and that the Commission could not rule the representation fee statute unconstitutional, but instead had to accept the validity of the statute.

On April 4, 1983, the Association and NJEA filed Exceptions. They except to the Hearing Examiner's conclusion that it was illegal to retroactively deduct a representation fee for September, 1981 since the demand and return system was not established until September 30, 1981. They assert instead that the retroactive deductions, commencing in February, 1982, were proper since they were made after the demand and return system was in place.

On April 7, 1983, Kramer filed Exceptions. She contends the Hearing Examiner erred in: (1) not describing the charge and amended charge against the Association and the NJEA more fully;<sup>8/</sup>

8/ Our description of the charge is more detailed.

(2) failing to consider the "uncontroverted fact" that failure to provide Kramer a copy of the contract made it impossible to determine if the Association had breached its duty of fair representation in other ways besides (allegedly) negotiating an unlawful representation fee provision and administering that provision in a discriminatory and arbitrary manner; (3) quashing the subpoena duces tecum, ruling the Commission lacked jurisdiction over Kramer's challenges to the use of her representation fee, stating that Kramer had not made constitutionally-based arguments at the hearing, refusing to recognize that the Appeal Board was allegedly not fully constituted, and refusing to declare the statute unconstitutional; (4) finding (no. 7) that Kramer knew before and after the October 7, 1981 letter that she did not have to join the Association and failing to appreciate the allegedly coercive nature of that letter; (5) finding (no. 5) that the Association adopted a demand and return system on September 30, 1981 and that therefore deductions for the month of October, 1981 and for subsequent months were proper, despite alleged constitutional defects in the demand and return system and the Appeal Board; (6) finding (no. 11) that the president of the Association was Marilyn Ward, not Tom Adams,<sup>9/</sup> and that the posting of the demand and return system on certain bulletin boards was sufficient to inform Kramer how and whether to apply for a refund; (7) finding (no. 16) that "all" members of the Association must also join the

<sup>9/</sup> Kramer is correct. Adams was president at the time of the relevant events, though Ward was president at the time of the hearing.



NJEA and the National Education Association ("NEA")<sup>10/</sup> and refusing to determine that the two-tiered dues structure violates the Act; (8) requiring Kramer to prove that she was not able to see a copy of the demand and return system rather than requiring the Association to prove it did provide actual notice; and (9) limiting Kramer's claim of disparate treatment in dues deduction to an alleged violation of N.J.S.A. 52:14-15.9(e).

On April 7, 1981, the Board notified the Commission that it accepted the Hearing Examiner's report and would follow his recommendations including posting a notice. It also stated that the Association, not the Board, should pay the money owed Kramer since the Association had already received her representation fee for September 1981.

Kramer requested oral argument. On April 25, 1983, the Chairman of the Commission granted this request and scheduled oral argument for the next Commission meeting on June 1. Kramer subsequently withdrew this request.

We have reviewed the record. We set forth the following facts as the background for our discussion of the legal issues.

<sup>10/</sup>In fact, supportive staff members of the Association must also join the Association and the NJEA, but need not join the Morris County Education Association ("MCEA") or the NEA. Professional employees who are members of the Association must also join all three of the Association's affiliates. See infra at pp. 10-11.

The Association is the majority representative of certain Board employees including teachers, custodians, bus drivers, and cafeteria workers. The Association and the Board have entered a collective negotiations agreement effective between July 1, 1981 and June 30, 1983. Article XV, entitled Agency Shop, provides:

A. Representation Fee

If a member of the bargaining unit (See Article IB) does not become a member of the Association during any membership year (i.e., from September 1 to the following August 31) which is covered in whole or in part by this Agreement, said employee shall be required to pay a representation fee in lieu of dues not to exceed eighty-five (85) percent of regular union dues, fees and assessments to the Association for that membership year. It is expressly understood that this Article becomes effective on July 1, 1981, and applies prospectively only.

B. Procedure

1. Notification: Prior to November 1 each year, the Association will submit to the Board a list of those employees who have neither become members of the Association for the then current membership year [nor] paid directly to the Association the full amount of the representation fee for that membership year. The Board will deduct from the salaries of such employees, in accordance with Paragraph 2 below, the full amount of the representation fee and promptly will transmit the amount so deducted to the Association.

2. Payroll Deduction Schedule: The Board will deduct the representation fee in equal installments, as nearly as possible, from the paychecks paid to each employee on the aforesaid list during the remainder of the membership year in question. The deductions will begin with the first paycheck paid:

a. 10 days after receipt of the aforesaid list by the Board; or

b. 30 days after the employee begins his or her employment in a bargaining unit position.

3. Termination: If an employee who is required to pay a representation fee terminates his/her employment with the Board before the Association has received the full amount of the representation fee to which it is entitled under this Article, the Board will deduct the unpaid portion of the fee from the last paycheck to said employee during the membership year in question. The procedure, as described in B.3. above, shall apply only if it is equally applied under the same circumstances to members of the Association for the purposes of dues collection.

4. Mechanics of Deduction and Transmission of Fees: Except as otherwise provided in this Article, the mechanics for the deduction of representation fees and the transmission of such fees to the Association will, as nearly as possible, be the same as those used for the deduction and transmission of regular membership dues to the Association.

5. Notification: The Association will notify the Board in writing of any changes in the list provided for in Paragraph 1 above. The Association will further notify the Board of the amount of the representation fee before July 1.

#### C. Indemnification

The Association shall indemnify and hold the employer harmless against any and all claims, demands, suits, and other forms of liability, including liability for reasonable counsel fees and other legal costs and expenses, that may arise out of, or by reason of any action taken or not taken by the employer in conformance with the provision.

The Board ratified this agreement on June 22, 1981. After the agreement had been typed and xeroxed, copies of it were distributed to all employees of the Board. Kramer found a copy on her desk on December 3, 1981.

All Association members have the same privileges to vote and run for office. Members who are professional employees must also join and pay dues to the NEA, NJEA, and MCEA. Members

who are supportive staff employees (for example, custodians, secretaries, aides, bus drivers, and cafeteria workers) must also join and pay dues to the NJEA, but not the NEA and the MCEA.

Supportive staff members pay lower NJEA dues than professional employees because their average earnings are lower and the NJEA believes it is equitable to adjust their dues accordingly. Aides, bus drivers, and cafeteria workers, a subcategory of the supportive staff employees, pay about one-third the local (Association) dues that teachers, custodians, and clerical employees pay because their average earnings are about one-third the average earnings of teachers and other supportive staff members, and the Association believes it is equitable to adjust their dues accordingly. Membership dues are either paid to the Association directly in cash or are deducted from paychecks after the Board receives an automatic payroll deduction form from the member and verification of the deduction from the Association.

On or about September 22, 1981, the Association posted a Notice of Rebate Procedure. This document stated:

Pursuant to the agreement negotiated with the Boonton Board of Education, the Boonton Education Association, as the majority representative, is assessing a representation fee against all non-members for the 1981-82 school year in the amount of \$190.40 for active professional and \$81.60 for active supportive, which is 85% of regular membership dues.

The amount of monies preliminarily determined to be expended for member only benefits and partisan political or ideological activities financed by regular association dues is \$0 per member. The amount of preliminary rebate is \$0.

As a non-member subject to the representation fee, you may request a rebate of monies over and above 15% of the association's expenditures on member only benefits and/or partisan political or ideological activities.

--In order to request a rebate a non-member must send a written request for the rebate to the Boonton Education Association by November 30, 1981. The request should include the following:

- 1) statement of non-member status;
- 2) non-member's name and address;
- 3) employment position;
- 4) request for rebate for additional expenditure for political activity and/or member only benefits.

It was posted on faculty lounge bulletin boards as well as on other bulletin boards in the main offices, cafeterias, and maintenance buildings. Kramer saw a copy of this document on the high school's main office bulletin board. The Association also forwarded a copy of the document to the Board with a notation that it had been posted in all schools, maintenance buildings, and Board offices.

On September 30, 1981, the Association had a meeting. The president of the negotiating team, Marilyn Ward, moved that the Association adopt a "Local Association Demand and Return System" in order to comply with N.J.S.A. 34:13A-5.5 et seq. and to permit non-members to challenge the representation fee. She also moved that the procedure be placed in the minutes and posted in all school buildings. These motions carried.

The Association's demand and return system provides for the following steps. Within 30 days after the beginning of each fiscal year in which a representation fee agreement will be in effect, the Association must determine whether a non-member will be entitled to a preliminary rebate of a portion of his representation fee. Based on the combined budgets of the Association and its affiliates for the upcoming year, the Association must grant a preliminary rebate of the amount, if any, by which expenditures for member-only benefits and political activity<sup>11/</sup> exceed the difference between regular membership dues for a particular category of membership (here professional employees) and the 85% representation fee. The Association must then post a notice indicating whether there will be a preliminary rebate,<sup>12/</sup> the amount of any such rebate, and the steps a non-member must take in order to request a rebate. The non-member may then file

11/ Political activity is defined as follows:

1. the support of a candidate for public office, a political party, or a political action committee;
2. the determination or publicizing of an organizational preference for a candidate for public office or a political party;
3. efforts to enact, defeat, repeal or amend legislation which is only incidentally related to the terms and conditions of employment of the employees represented by this Association as the majority representative but does not mean lobbying activities designated to foster policy goals in collective negotiations and contract administration or to secure for the employees represented by the Association advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations with the board of education; and
4. contributions to charitable, religious or ideological causes only incidentally related to the terms and conditions of employment of the employees represented by the Association.

12/ The September 22, 1981 notice anticipated this requirement. The notice stated there would be no preliminary rebate.

a written request for a rebate with the Association. Within 30 days after the end of the fiscal year, the Association must send to each non-member who requested a rebate a written communication indicating whether there will be a final rebate. The final rebate is calculated in the same manner as the preliminary rebate, but is based on an audit of the expenses actually incurred during that fiscal year. The notice of final rebate must contain a check for any final rebate, state the reasons for any difference between the preliminary and final rebates, and list the steps for a challenge to the absence or amount of a final rebate. The steps for challenging a final rebate are: (1) notifying the Association in writing of the challenge, (2) informal attempts to dispose of the challenge, (3) proceedings before a Regional Review Panel consisting of one representative each from the Association, the MCEA, the NJEA, and the NEA; the Association must carry the burden of demonstrating before this panel that no part of the unrebated representation fee was used for political activity or member-only benefits, and the non-member may submit written material and argue orally to the panel; and (4) an appeal to the three member Appeal Board established by N.J.S.A. 34:13A-5.6.

On or about October 1, 1981, the Association posted copies of its demand and return system in the same places as the rebate procedure notice and informed the Board of its adoption. Kramer testified that she did not see a copy of the demand and return system, and the Association and the Board did not give

her one personally. She scans the bulletin board in the main office of the high school, where she saw the rebate procedure notice. She does not read bulletin boards set aside for faculty because she objects to some of the material placed on them. The faculty bulletin boards are divided into sections; one section, for example, might contain Association materials while another section might contain general personnel information.

On or about October 7, 1981, the Association's president and membership chairperson sent Kramer a letter inviting her to join the Association and informing her that the Association had negotiated a fair share representation fee, totalling 85% of Association dues, to be deducted from the paychecks of all unit members who did not join the Association by October 15. The letter concluded:

We offer you the following choices:

1. that you join as a cash member with payment in full of the dues by October 15.
2. that you join as an automatic payroll deduction member with dues to be deducted in monthly installments.

Annoyed by this letter, Kramer spoke with the Association's president and told him she did not like being offered only two choices. He responded that she had a third choice -- hiring a lawyer. She replied she had a fourth choice -- not joining. He agreed.

At the president's suggestion, Kramer then spoke with the Association's membership chairman. Kramer asked how much



the fee would be; the chairman responded that the fee would be 85% of a teacher's membership dues or about \$190. The chairman said she would not give Kramer a written statement to that effect. Kramer asked to see the contractual authorization for the representation fee; the chairman responded that the contract was being typed. The chairman referred Kramer to a member of the negotiating team who could tell her the contractual language.

The negotiating team member told Kramer that although he could not quote the pertinent contractual language, it essentially incorporated the standards set forth in the representation fee statute. He offered to obtain a copy of the statute for Kramer; she declined and later obtained her own copy. He also offered to give Kramer a copy of the previous year's financial statements for the Association; she accepted.

Kramer then asked the chairman of the negotiating team about her representation fee and the demand and return system. According to Kramer, the chairman said the demand and return system would be posted by October 20<sup>13/</sup> and referred her to an NJEA field representative for assistance with "technical" questions concerning the content of the demand and return system, the automatic aspect of the deduction, and the exact language of the contract.

Kramer then called the NJEA representative. He told Kramer he was only talking to her as a favor to the president

13/ We credit the testimony of the chairman of the negotiations team that the demand and return system was posted on or about October 1, 1981, and do not believe Kramer's recollection is accurate with respect to this particular statement.

of the negotiating team and that he did not have to talk to a non-member. He encouraged her to join and said she had to decide by October 15. He also told her the Association had to file its demand and return system by October 20, she had to ask for any money back by December 1, and the Association had until September of the following year to send back any rebate. The representative also broke down where a teacher's membership dues went among the four organizations: (1) \$48 to NEA, (2) \$15 to NJEA, 3) \$21 to MCEA, and (4) the rest to the Association.<sup>14/</sup> When Kramer asked her if she could pay a representation fee directly, without an automatic dues checkoff, he said no because the NJEA and NEA had to have their money as a lump sum and could not be sure Kramer would pay it otherwise. He also said that only members could make advance lump sum payments.

On or about October 14, 1981, Kramer wrote a letter to the superintendent informing her that she did not authorize payment of a representation fee. The letter asserted that Kramer had not been allowed to see either the Association's demand and return system or the contractual provision authorizing a demand and return system. It also asserted that an automatic dues checkoff would violate N.J.S.A. 52:14-15.9(e).

On or about November 9, 1981, Kramer sent the Association's president a letter asserting her claim under the demand and return system for any amounts which the Association was not entitled to receive under N.J.S.A. 34:13A-5.6. On November 24, 1981, the president, in writing, acknowledged receipt of this

<sup>14/</sup> Kramer was not sure of the accuracy of her recollection of these numbers.

letter and informed Kramer that there would be no preliminary rebate and that the final rebate would be computed after the close of the fiscal year, with any rebate forwarded to her by September 30, 1982.

On January 28, 1982, the Board's Business Administrator and Secretary wrote to Kramer that effective with the February payroll, a representation fee would be automatically deducted from her paycheck. The fee would equal \$19.04 a month, a figure based on an automatic payroll deduction representation fee report which the Association supplied the Board. The fee would be assessed retroactively to the start of the school year; thus, the February through June deductions would be doubled so as to cover the September through January deductions. Before writing this letter, the Business Administrator/Secretary satisfied himself, through communications with Association representatives in late September 1981, that the Association had established a demand and return system and had notified employees of its existence. Kramer testified that the Board never pushed her to become an Association member.

The deductions commenced February 1, 1982. Each doubled monthly deduction for the rest of the 1981-82 school year was for \$38.08.<sup>15/</sup> Kramer never consented to the deductions. Because of the higher dues charged teachers, Kramer's 85% representation fee exceeds

<sup>15/</sup> The Business Administrator and Secretary testified that each deduction was for \$37.08. He based his testimony, however, on his recollection of the amount set forth in the Association's automatic payroll deduction representation fee report. The figure in that report was, in fact, \$38.08. We accept the report's figure as the accurate one. Thus, we find that Kramer's representation fee payment for September, 1981 was \$19.04, not \$18.54 as the Hearing Examiner found.

the membership dues charged certain employees such as bus drivers or aides. At the time of the hearing, the Association was in the process of auditing its books for the 1981-82 school year and determining whether there would be any final rebate.

Our first and major task in this litigation is to determine what issues are properly before us, what issues should properly be raised before the Appeal Board, and what issues should properly be raised before the courts. A brief review of the history of agency shop in New Jersey, the present statutory framework governing representation fee deductions, and the status of current court litigation challenging this framework will assist in this task.

Prior to July 1, 1980, there was no specific statutory authorization in New Jersey for the collection of agency shop or representation fees from non-members of the majority representative.<sup>16/</sup> In New Jersey Turnpike Employees' Union, Local 194 v. New Jersey Turnpike Auth., 64 N.J. 579 (1974), affirming 123 N.J. Super. 461 (App. Div. 1973) ("Turnpike Authority"), the New Jersey Supreme Court held that a contractual clause providing for the mandatory payment of such fees violated the New Jersey Employer-Employee Relations Act in the absence of specific legislative authorization for such clauses. The Court specifically held that

<sup>16/</sup> We use the terms agency shop and representation fees here in a generic and interchangeable sense to mean fees paid to a majority representative by unit employees who are not and need not become members of the majority representative, but who are entitled to be represented fairly by the majority representative in employment matters.

contractual clauses requiring agency shop payments violated the rights of non-members under section 5.3<sup>17/</sup> to refrain from assisting any employee organization. Thus, before July 1, 1980, it was clear under the Turnpike Authority case that employers and unions agreeing to agency shop clauses violated section 5.3.<sup>18/</sup>

In 1977, the United States Supreme Court, in Abood v. Detroit Bd. of Ed., 431 U.S. 209, 95 LRRM 2411 (1977) ("Abood"), upheld the federal constitutionality of a Michigan statute authorizing public employers and majority representatives to negotiate agency shop arrangements whereby every employee represented by a union, even though not a union member, must pay to the union a service fee equal in amount to union dues; failure to make such payments could lead to discharge. The Supreme Court also held, however, that a majority representative could not constitutionally expend a non-member's agency shop fees over his objection for political or ideological purposes unrelated to collective negotiations, contract administration, or grievance adjustment.

Because an evidentiary record had not been developed, the Supreme Court remanded the case to the Michigan state courts

<sup>17/</sup> This subsection provides, in part: "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."

<sup>18/</sup> After the amendments to the Act which conferred unfair practice jurisdiction on this Commission effective January 20, 1975, but before July 1, 1980, it was clear as well that agency shop clauses violated subsections 5.4(a)(1) and (b)(1) which prohibit interference with the non-members' rights under section 5.3 to refrain from supporting any employee organizations.

for consideration of the difficult and hazy problems of determining whether particular expenditures are related or unrelated to collective negotiations, contract administration, or grievance adjustment. The Supreme Court also suggested that further Michigan state court proceedings might be deferred pending the parties' voluntary recourse to an internal demand and return system developed by the majority representative. That system allowed the employee to demand and receive from the majority representative any portion of his agency shop fee spent for "activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment;" an impartial board was empowered to review the majority representative's calculations.<sup>19/</sup>

Thus, as of 1977, it was clear under Abood that state statutes authorizing public employers and majority representatives to negotiate representation fees for services rendered in connection with contract negotiations, contract administration, or grievance processing could be constitutional. Nevertheless, agreements requiring the payment of representation fees were still illegal in New Jersey because of the proscription of section 5.3 of the Act, the Turnpike Authority case, and the absence of any affirmative statutory authorization.

<sup>19/</sup> The Supreme Court reserved judgment on the constitutional sufficiency of the demand and return system involved in that case.

In February, 1978, a bill authorizing negotiation over payment of representation fees for services rendered was introduced in the New Jersey Legislature (Assembly Bill No. 688). An accompanying sponsor's statement relied upon Abood. This bill, as originally drafted, would have given the Public Employment Relations Commission exclusive power to hear and decide all issues arising in a challenge to any representation fee. The bill was then, however, revised to substitute for the Commission recourse to a union's internal demand and return system, culminating in an appeal to a three member tripartite board, for challenges to the amount of representation fee refunds. An accompanying sponsor's statement relied upon Abood's suggestion of using an internal demand and return system, with an appeal to an impartial board, to determine whether any portion of the representation fees had been spent for political or ideological purposes not incidentally related to the terms and conditions of employment.

On February 27, 1980, Assembly Bill No. 688, with the revision described and various others, was enacted into law. It took effect on July 1, 1980 and is now codified as N.J.S.A. 34:13A-5.5 through 5.9. This statute supplies the authority for representation fee deductions which the Turnpike Authority case found lacking.

N.J.S.A. 34:13A-5.5 requires a public employer to negotiate, upon demand, with a majority representative concerning the subject of requiring the payment by all non-member employees

in the negotiations unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative. Any agreements reached must be in writing.

N.J.S.A. 34:13A-5.5(b) makes the amount of representation fee 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 members. In no event may the fee exceed 85% of the regular dues, fees, and assessments.<sup>20/</sup>

N.J.S.A. 34:13A-5.5(c) confers a right upon representation fee payers to demand and receive from the majority representative, under proceedings established and maintained pursuant to N.J.S.A. 34:13A-5.6, a return of any portion of their fees which were spent either: (1) "in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment" or (2) applied toward the cost of member-only benefits. The representation fee payers may not, however, recover any portion of their fees spent in support of lobbying activities: (1) "...designed to foster policy goals in collective negotiations and contract administration..." or (2) "to secure for the employees represented advantages

<sup>20/</sup> The Commission has held that while a public employer is not required to agree to a representation fee provision, if it does so, it cannot insist to the point of impasse upon negotiating the amount of the representation fee. In re Township of Hamilton, P.E.R.C. No. 82-121, 8 NJPER 370 (¶13169 1982); In re Woodbridge Township Bd. of Ed., P.E.R.C. No. 81-131, 7 NJPER 330 (¶12147 1981).



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 sets forth the mechanism for payment of representation fees, the conditions which must accompany payment of such fees, and the necessary components of a demand and return system to be used in representation fee challenges pursuant to N.J.S.A. 34:13A-5.5(c). Representation fees are paid by payroll deduction from the wages or salaries of the non-member employees. Two conditions must exist if deductions are to be allowed pursuant to a written contractual clause authorizing representation fee payments: (1) "membership in the majority representative [must be] available to all employees in the unit on an equal basis"<sup>21/</sup> and (2) "the representation fee in lieu of dues shall be available only to a majority representative which has established and maintained a demand and return system which provides pro rata returns as described in [N.J.S.A. 34:13A-5.5]." A majority representative's demand and return system must include a provision "...by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through fair and full proceedings placing the burden of proof on the majority representative." These proceedings, in turn, must provide for an appeal to a three member board, appointed by the Governor and confirmed by

<sup>21/</sup> The Commission interpreted this proviso in In re City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982), appeal pending App. Div. Docket No. A-768-82T1 ("Jersey City"), and concluded that a majority representative violated subsections 5.4(b)(1) and 5.6 of the Act when it collected representation fees from CETA supervisors who were disqualified, because of their temporary Civil Service status, from running for Association office.

the Senate. The board is composed of a strictly impartial chairman, a public employer representative, and a public employee organization representative.<sup>22/</sup>

The last sentence of N.J.S.A. 34:13A-5.6 provides that nothing in the representation fee statute shall be deemed to require any employee to become a member of the majority representative. N.J.S.A. 34:13A-5.7 then makes it an unfair practice under N.J.S.A. 34:13A-5.4(a)(1) or 5.4(b)(1), respectively, for either a public employer or a majority representative to "...discriminate 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...."<sup>23/</sup>

Federal constitutional attacks upon the New Jersey representation fee statute are now underway in the federal district court of New Jersey. In three opinions concerning the propriety

<sup>22/</sup> The Appeal Board, formally known as the Public Employment Relations Commission Appeal Board although it is a separate entity from the Commission, had all three members appointed and confirmed and was thus fully established as of January, 1982. Olsen v. New Jersey, Chan. Div. Docket No. C-4286-818 (July 12, 1982), appeal pending App. Div. Docket No. A-5282-81T3. The Chairman, however, resigned in February 1982, and a successor Chairman was not confirmed until June, 1983. The public employer representative recently died and has not yet been replaced. We do not agree with Kramer's assertion that the Appeal Board does not exist.

<sup>23/</sup> N.J.S.A. 34:13A-5.8 concerns certain aspects of when the representation fees shall be paid and is not material to this proceeding. N.J.S.A. 34:13A-5.9 authorizes this Commission to promulgate rules or regulations to effectuate the purposes of the representation fee legislation. The Commission has today adopted rules authorizing the Appeal Board to use the offices, equipment, and personnel of the Division of Public Employment Relations to process matters before it and to otherwise perform its functions pursuant to N.J.S.A. 34:13A-5.6. In addition, the Office of Administrative Law has proposed rules concerning its hearings in contested cases before the Appeal Board.

of preliminary injunctive relief<sup>24/</sup> against the deduction, transmission, or expenditure of the named plaintiffs' representation fees by the named defendant employers and unions, Judge Dickinson R. Debevoise has ruled that there are two constitutional defects in the representation fee statute: (1) the legislative authorization of using representation fees, over an employee's objection, for two different categories of lobbying is unconstitutional because Abood, he believes, only allows the use of representation fees to lobby for the approval or implementation of a collective negotiations agreement, and (2) the statutory demand and return system is unconstitutional because, he believes, it does not provide a speedy and practical way to recover those portions of the fee authorized to be taken or spent for impermissible purposes. Robinson v. New Jersey, 547 F.Supp. 1297, 112 LRRM 2308 (D.N.J. 1982), appeal pending, Third Circuit Docket Nos. 82-5698, 83-5707, 82-5750; Olsen v. CWA, \_\_\_ F.Supp. \_\_\_, 112 LRRM 3182 (D.N.J. 1983), appeal pending, Third Circuit Docket Nos. 83-5403, 83-5459; Robinson v. New Jersey, \_\_\_ F.Supp. \_\_\_, \_\_\_ LRRM \_\_\_ (D.N.J., June 15, 1983). After the first and second opinions, the Court preliminarily enjoined the named defendant unions from using any representation fees for lobbying purposes other than lobbying by the majority representative specifically to secure agency or legislative action required to implement the contract and preliminarily

<sup>24/</sup> Preliminary injunctive relief means relief issued pending the final resolution of the proceedings. It requires a showing that the plaintiff is likely to succeed on the merits of his claim, the plaintiff will suffer irreparable harm during those proceedings unless preliminary relief is granted, and there will be no countervailing harm to other interested persons or to the public interest if a preliminary injunction is granted.

enjoined the state and national affiliates of the named local unions from using the representation fees of named plaintiffs for any purposes other than placing the fees in escrow.<sup>25/</sup> After the third opinion, the Court preliminarily enjoined the named employer defendants from deducting and paying and the named union defendants from receiving representation fees on account of any plaintiff who files written notice with his employer and his majority representative that he objects to payment of such fees. The injunction as to any plaintiff is to remain in effect until the plaintiff withdraws his objection or until the statute is amended (1) so as to exclude from representation fees expenses for political, ideological, and lobbying activities (other than lobbying to secure approval or implementation of a collective negotiations agreement) and (2) so as to include a provision for a hearing before a state tribunal on the validity of any representation fee prior to payment of the fee to the union.

Litigation over the federal constitutionality of the New Jersey representation fee statute is continuing in the New Jersey district court. Proceedings and decisions on plaintiffs' requests for final declaratory and injunctive relief and for damages still remain to be completed.<sup>26/</sup> In addition, the district

<sup>25/</sup> After the first opinion, the named plaintiffs also sought to convert their suit into a class action. Judge Debevoise denied this request. Plaintiffs subsequently renewed their request which is still pending.

<sup>26/</sup> In particular, defendants have asserted that judicial surgery to effectuate the legislative intent to comply with Abood may be possible. See, USA Chamber of Commerce v. State, 89 N.J. 131, 151-154 (1982). For example, defendants have argued that it may be possible to excise one or both of the lobbying categories, if ultimately found objectionable, and to leave the rest of the statute intact.

court's interim relief rulings in the first and second opinions with respect to the constitutionality of the lobbying provisions have already been appealed to the Third Circuit Court of Appeals and an appeal with respect to the ruling in the third opinion on the constitutionality of the demand and return system provisions is possible in the near future to the same body. Thus, while there are certainly serious constitutional questions about the New Jersey representation fee statute at this moment, these questions have not been completely or finally answered yet.

This discussion of the history and nature of the representation fee statute and the ongoing federal court litigation shows that there are three bodies empowered to review various aspects of disputes concerning that statute: (1) this Commission, (2) the Appeal Board, and (3) the courts. Our task is to set the boundaries of this Commission's unfair practice jurisdiction. 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. We believe the courts have sole

jurisdiction to entertain constitutional challenges to the New Jersey representation fee statute until such time as that statute's constitutionality is finally and completely resolved.

We start our jurisdictional analysis by comparing our jurisdiction with that of the Appeal Board which the representation fee statute created. The essential distinction is that the Commission has unfair practice jurisdiction to consider allegations of structural defects in a demand and return system, but not to review the results of that proceeding.

N.J.S.A. 34:13A-5.7 explicitly incorporates the Commission's unfair practice jurisdiction under subsections 5.4(a)(1) and (b)(1) for the purpose of considering allegations of unauthorized discrimination between members and non-members with regard to payment of a representation fee. We also believe that N.J.S.A. 34:13A-5.6 implicitly incorporates the Commission's unfair practice jurisdiction under subsections 5.4(a)(1) and (b)(1) for the purpose of determining whether the statutory and structural conditions for deduction of representation fees are in place. The Turnpike Authority case held that section 5.3 of the Act is violated when a public employer and employee representative collect and expend representation fees in the absence of statutory authorization. N.J.S.A. 34:13A-5.5 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 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. We have already held in Jersey City that failure to comply with the first condition constitutes an unfair practice. We hold today that failure to comply with the second condition also constitutes an unfair practice.

As already noted, the first draft of the bill which was ultimately enacted as N.J.S.A. 34:13A-5.5 et seq. empowered the Commission to resolve all representation fee challenges. The bill was subsequently revised, however, to substitute an Appeal Board for the Commission as the proper body for reviewing the amount of any representation fee refund determination. It is thus the Appeal Board which has jurisdiction over such questions as the relationship of particular expenditures to terms and conditions of employment and the definition of member-only benefits. In re Township of Teaneck, D.U.P. No. 82-16, 8 NJPER 5 (¶13002 1981).

We find additional support for the basic distinction we draw between our jurisdiction to determine challenges concerning statutory and structural conditions and the Appeal

Board's jurisdiction to determine challenges concerning the amount of representation fee refunds from the experience and case law of the New York Public Employment Relations Board ("PERB") in interpreting the similar representation fee provision of the Taylor Act.<sup>27/</sup> In Hampton Bays Teachers Association, NYSUT, AFT, AFL-CIO and Sullivan, 14 PERB 3027 (¶3018 1981), PERB stated:

This case presents a question not previously considered by this Board. Do we have jurisdiction to consider a charge that alleges only that the amount of an agency shop fee refund is incorrect? The hearing officer answered this question in the affirmative. We disagree.

Heretofore, we have asserted jurisdiction over charges alleging that prescribed agency shop fee refund structural procedures have been inadequate to satisfy the requirements of §208.3(b) that an employee organization "establish and maintain" a refund procedure as a condition for receiving agency shop fees. In UUP and Eson, 11 PERB ¶3068 (1978), we ruled that a refund procedure was inadequate, on its face, because its appellate mechanism imposed an unreasonable cost upon an agency shop fee payer who might choose to invoke it. We also found it inadequate because it did not apply to funds transmitted by the employee organization to its state and national affiliates. Subsequently, in the same case, we ruled that the implementation of the refund procedure was faulty because the appellate steps were being processed too slowly. 12 PERB ¶3093 (1979), confirmed UUP v. Newman, 77 AD2d 709 (Third Dept., 1980) 13 PERB ¶7010, mot. for lv. to appeal den., 51 NY2d 707 (1982), 13 PERB ¶7016.

<sup>27/</sup> Section 208 of the Taylor Act, Civil Service Law, Article 14, authorizes the deduction of agency shop fees from the paychecks of non-members, provided the receiving employee organization "...has established and maintained a procedure providing for the refund to any employee demanding the return any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment. Nothing herein shall be deemed to require an employee to become a member of such employee organization."



We have also asserted jurisdiction to determine if an agency shop fee refund procedure was properly maintained, as required by the statute. This issue was raised by the charge that the employee organization did not provide the agency shop payer with sufficient information to make an intelligent choice whether or not to invoke the appellate steps. We did so in UUP and Barry, [13 PERB ¶3070] and in companion Case U-4372, herein before us.

We are now asked to go beyond the structural provisions of the refund mechanism and examine into the accuracy of its substantive final product. To determine whether this Board has the authority to make such inquiry, we must look at the express language of the agency shop fee provision and its relation to the basic rights granted to the employees by the statute. Section 208.3(b) provides that in order to be eligible for agency shop fee payments an employee organization must have "established and maintained" a refund procedure. We understand this language as referring to a process. The absence of such a process disqualifies an employee organization from receiving agency shop fee payments, and an employee organization which collects agency shop fee payments without such a process commits an improper practice subject to the jurisdiction of this Board. The requirement that the amount of the refund be correct is not stated in the Taylor Law but it is, of course, understood. The implication of this omission from the explicit provisions of the Taylor Law is that the improper practice jurisdiction of this Board may not be invoked to resolve disputes concerning the precise amount of the refund and a party aggrieved must look elsewhere for relief. We understand this to be the intent of the Legislature.  
Id. at 3031.

See also, United University Professors, Inc. and Barry, 15 PERB 4708 (¶4612 1982). Thus, in New York, which does not have an Appeal Board, challenges to the amount of a representation fee refund must be litigated through the courts.<sup>28/</sup>

<sup>28/</sup> In New Jersey, challenges to the amount of a representation fee may be litigated through the Appeal Board. It is not clear whether they must be litigated in that forum or whether representation fees may go directly to state or federal court without first resorting to the demand and return system or the Appeal Board. In the federal court litigation, defendant unions asserted that non-members have the right to proceed directly to court under Patsy v. Board of Regents, U.S.    , 102 S.Ct. 2557 (1982) in order to vindicate their rights against unconstitutional uses  
(continued)

While we are not prepared to adopt the entire body of PERB case law concerning representation fee disputes and will decide such disputes on a case-by-case basis, we commend that body of law as a polestar for determining what types of procedural protection are appropriate or required.

We now consider this Commission's jurisdiction to entertain constitutional attacks upon the representation fee statute. We hold that such attacks should be raised in federal or state court proceedings.

This Commission's essential function is statutory implementation and interpretation of the New Jersey Employer-Employee Relations Act, not constitutional adjudication. As the Hearing Examiner correctly stated, an administrative agency must accept the constitutionality of a statute it administers until such time as a qualified judicial body rules it unconstitutional and void. Johnson v. Robinson, 415 U.S. 361 (1974); Fischer v. Bedminster Tp., 5 N.J. 534 (1950); Baldwin Constr. Co. v. Essex Cty Bd. of Tax., 24 N.J. Super. 252 (Law Div. 1952), aff'd 27 N.J. Super 240 (App. Div. 1953).<sup>29/</sup> That moment has not arrived

<sup>28/</sup> (continued) of their money. Compare 45 U.S.C. §152 (Railway Labor Act authorizes union security provisions; non-members must go to court to challenge allegedly unconstitutional expenditures); International Assn. of Machinists v. Street, 367 U.S. 740 (1961); Railway Clerks v. Allen, 373 U.S. 113 (1963). Judge Debevoise did not resolve this mixed question of statutory interpretation and judicial jurisdiction nor do we.

<sup>29/</sup> We have considered constitutional arguments when determining whether a matter is within the scope of collective negotiations. See, e.g., In re Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 80-4, 5 NJPER 289 (¶10158 1979), aff'd 174 N.J. Super. 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981). Such determinations, however, do not require us to pass upon the constitutionality of the Act we administer, but rather upon whether the parties' proposals or actions are within the scope of the Act, given constitutional concerns. Similarly, while this Commission cannot resolve constitutional attacks on the representation fee statute, constitutional concerns might be relevant to interpreting the scope of the statutory and structural conditions to representation fee deductions. See, e.g., International Ass'n of Rail Machinists v. Street, supra.

in the federal litigation as of yet. Until such time, questions of constitutional law, rather than statutory unfair practice interpretation, must continue to be addressed to the courts.

We now apply these jurisdictional principles to the instant case in order to determine what claims are properly before us. Given the preceding discussion, we will not entertain Kramer's attacks questioning the constitutionality of the representation fee statute, the composition of the Appeal Board, the Association's demand and return system, and the Association's dues structure. Nor will we entertain any challenges concerning the amount of any representation fee refunds. We specifically hold that the Hearing Examiner properly quashed the subpoena duces tecum for the financial records of the Association and its affiliates since these records were being sought to demonstrate that portions of the representation fees were allegedly being used for improper and unconstitutional purposes,<sup>30/</sup> matters appropriately raised before the Appeal Board and the courts. We will, however, consider Kramer's contentions that the Association's demand and return system was non-existent or structurally defective, that the Association interfered with, restrained and coerced the

30/ The issuance of a Complaint on the amended charge was not improper since it was not until now that we had an opportunity to delineate the boundaries of this Commission's jurisdiction. Under N.J.A.C. 19:14-2.1, the Director of Unfair Practices ordinarily will issue a Complaint if the unfair practice charge's allegations (assuming their truth) might constitute a violation of the Act; the word "might" ordinarily requires issuance when arguable or novel questions of law are present. In re New Jersey Turnpike Auth., P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980). That was the situation here.

right of non-members not to join the Association, that the Association failed to give Kramer adequate notice of its rebate procedures and demand and return system, and that the dues deduction system was administered discriminatorily and improperly.

The Hearing Examiner found that the Act was violated when representation fees were taken from Kramer's paycheck, albeit retroactively, for the month of September, 1981 since the Association's demand and return system was not established until September 30, 1981. Based on a literal reading of the second condition set forth in N.J.S.A. 34:13A-5.6, we concur: no representation fees may be available to the majority representative unless that representative has already established a demand and return system.

The Hearing Examiner also determined, implicitly, that as of September 30, 1981, the Association had established a demand and return system and thus satisfied section 5.6's second requirement for deduction. We concur.

The demand and return system which the Association adopted at its September 30, 1981 meeting on its face satisfies N.J.S.A. 34:13A-5.6. It explicitly provides for the computation of a final rebate based on the applicable legislative standards within 30 days after the end of the pertinent fiscal year, review proceedings before a Regional Review Panel in which the Association must carry the burden of proof and in which the non-member and/or his or her representative has a full opportunity to participate, a decision by that panel within 30 days of the non-member's challenge, and an appeal to the statutorily created Appeal Board. We believe that the Legislature contemplated that such a system

on its face would constitute an acceptable demand and return system.<sup>31/</sup>

Kramer contends that the demand and return system was not in existence because she was unsuccessful in her attempts to use it. We disagree.

The record shows that in November, 1981, Kramer made a claim under the demand and return system for any amounts the Association improperly received; the Association notified Kramer it had received her claim and that although there would not be a preliminary rebate, she would receive any final rebate by September 30, 1982; and at the time of the hearing (September 13, 1982) the Association was still in the process of a financial audit to determine the amount, if any, of the final rebate. Under all these circumstances, we find that the Association had established and was in the process of maintaining its demand and return system, including consideration of Kramer's claim, at the time of the hearing.

The Hearing Examiner found that the Association did not interfere with, restrain or coerce Kramer or other non-member employees in the exercise of their right not to join the Association. Under all the circumstances of this case, we disagree.<sup>32/</sup>

<sup>31/</sup> A facially adequate system may, of course, be administered unfairly, too slowly, or discriminatorily and thus result in the finding of an unfair practice concerning the manner in which it is "maintained." See, e.g., United University Professors, Inc. and Barry, 16 PERB 3060 (¶3040 1983). We also note our disapproval of the provision in this case making posting the means of notifying non-members of their rights and the applicable procedures, see infra at pp. 38-39, but believe this defect can be corrected without invalidating the entire demand and return system.

<sup>32/</sup> We agree with the Hearing Examiner that there is no evidence (except to the extent deductions were made for September, 1981, without statutory authorization) that the Board interfered with such rights or "pushed" anyone to become a member. The Board has not excepted to the Hearing Examiner's finding of a violation against it with respect to the September, 1981 deduction and only objects to being required to reimburse Kramer.

The October 7, 1981 letter from the Association soliciting non-members to join was ambiguous and potentially misleading. That letter stated that all non-members who did not join the Association by October 15, 1981 would have representation fees in the amount of 85% of Association dues deducted from their paychecks. It then offered each non-member two choices: (1) joining the Association with payment in full of the dues by October 15 or (2) joining as an automatic payroll deduction member with monthly dues deductions. Without an additional statement clarifying that non-members had no obligation to join the Association, a non-member might have construed the letter to mean that he became a member after October 15 by commencement of automatic monthly payroll deductions from his paycheck; this construction would be an erroneous one, but not a wholly implausible one to a reader who did not study the letter and distinguish between "dues" and "fees" based on dues. In addition, the Association's conduct towards Kramer after this letter was objectionable. The president told Kramer that she could "hire a lawyer" if she did not like her two "choices," and only conceded that she did not have to join the Association after she reminded him of that fourth choice. The membership chairman refused to give Kramer a written statement concerning her dues. Finally, the NJEA representative told Kramer that he did not have to talk to a non-member about her representation fees.<sup>33/</sup> All these statements

<sup>33/</sup> It is not material that Kramer actually knew that she did not have to join the Association and indeed so told the Association president. The unfair practice occurred under N.J.S.A. 34:13A-5.6 and 5.4(b)(1) because the letter and subsequent events reasonably tended to interfere with the rights of non-members, such as Kramer, not to join the Association. In re Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13252 1982).

reflect an unacceptably grudging attitude towards the rights of non-members to refrain from joining the Association and to secure information concerning the representation fee system.<sup>34/</sup>

The Hearing Examiner declined to determine whether a failure to publicize a demand and return system violates the Act because Kramer did not prove that she was unable to see a copy of the demand and return system. We agree with Kramer 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.

In Public Employees Federation and Kahn, 15 PERB 3016 (¶3011 1982), PERB held that a majority representative violated the Taylor Law when it communicated its agency shop refund procedures to non-members by merely providing an outline of these procedures on the inside page of its newsletter. The Board specifically held that this means of communication was not likely to be read by persons who pay an agency shop fee. The Board instead required the majority representative to mail each non-member notice of its refund procedure. See also, United University Professors, Inc. v. Eson, 11 PERB 3113 (¶3074 1978); cf. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) (federal constitution requires that means of service of process be reasonably calculated to reach persons affected).

<sup>34/</sup> We disagree, however, with Kramer's contention that the Association's failure to provide her with a copy of the collective negotiations agreement before December 3, 1981 either independently violated the Association's duty of fair representation or otherwise evidenced coercion. The record shows that all unit members received a copy of the collective negotiations agreement, the delay in distribution of the agreement resulted from the necessity of having the agreement typed, and Association representatives fairly answered Kramer's questions about the pertinent contractual provisions.

We believe that majority representatives collecting representation fees have an affirmative obligation to inform non-members personally of the pertinent rights and procedures concerning representation fee challenges. 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. Accordingly, the Association violated N.J.S.A. 34:13A-5.6 and 5.4(b)(1) when it failed to notify Kramer and other non-members personally of their rights under the demand and return system and the procedures for obtaining a rebate.<sup>35/</sup>

<sup>35/</sup> We also agree with Kramer that the absence of personal notification was particularly objectionable under all the circumstances of this case since she was being asked to make a fast decision whether to join the Association in the face of incomplete information. We disagree, however, with Kramer's contention that the notice of rebate procedure was too generalized and lacked sufficient information concerning the purpose and amount of expenditures. The notice was sufficient to inform non-members how to trigger the rebate process. No further explanation was necessary concerning the preliminary rebate determination. Once, however, a final rebate determination is made, the majority representative may be under an obligation to provide the financial data on actual expenditures necessary to enable a non-member to determine whether to process further his claim. See, e.g., Public Employees Federation v. PERB, 16 PERB 7022 (¶7015 1983) (N.Y. Supreme Court, Appellate Division, Third Department, April 7, 1983).



We next consider Kramer's contention that the dues deduction system was administered discriminatorily and improperly. We disagree for the most part, but do find one violation.

N.J.S.A. 52:14-15.9(e) authorizes payroll deductions of union dues when a member of an employee organization gives written consent for such deductions. N.J.S.A. 34:13A-5.6 provides for an automatic payroll deduction of representation fees; there is no requirement that non-members give prior consent to the deduction of such fees. N.J.S.A. 34:13A-5.7 prohibits discrimination between non-members with regard to the payment of such fees other than as allowed by the Act. Under the circumstances of this case, we believe that the system for deducting representation fees generally did not improperly discriminate between members and non-members with regard to the payment of fees, but that one statement of an NJEA representative did violate the Act. The collective negotiations agreement specifically provides that the mechanics for the deduction and transmission of representation fees must, as nearly as possible, be the same as the mechanics used for the deduction and transmission of regular membership fees to the Association. The agreement further provides that the Association may only request automatic payroll deductions from the paychecks of those non-members who have not already paid the full amount of fees directly to the Association. If members of the Association do not pay their dues directly in cash to the Association, the Board deducts their dues from their paychecks upon a billing from the Association. There is no record evidence

to suggest that deductions of members' dues occur substantially later than deductions of representation fees. Thus, the representation fee deduction system generally appears to satisfy 5.7's injunction against discriminatory practices with regard to the payment of fees. We find, however, that the NJEA representative, contrary to the collective negotiations agreement, misrepresented to Kramer that she could not pay her representation fees in a lump sum advance and that only members had that privilege. We believe that this misrepresentation violated the NJEA's duty of fair representation towards non-members who paid representation fees which the NJEA received.

Kramer also contends that the Association's two-tiered dues structure violates the Act. We disagree. The dues structure does not discriminate between the rights of non-members and members with regard to the payment of dues and fees; instead, it merely distinguishes in setting dues and fees between the positions of professional employees and supportive staff employees based on their incomes. Non-member teachers such as Kramer are treated in precisely the same fashion as member teachers. We see nothing in the representation fee statute which prohibits majority representatives from adjusting membership dues in consideration of differences in employee income. See, e.g., Opinion of Counsel, 11 N.Y. PERB 5009 (¶5008 1978) (part-time employees may be assessed lower membership dues than full-time employees).<sup>36/</sup>

<sup>36/</sup> We disagree with the Hearing Examiner on this issue to the extent he found it was not raised in the pleadings. We do not believe, however, that the pleadings or the litigation at the hearing fairly placed in issue the validity of the Association's unified dues structure. Indeed, the original charge against the Association and the NJEA noted, without objection, their unified status.

ORDER

I. The Respondent Boonton Education Association is ordered to:

A. Cease and desist from:

1. collecting a representation fee in lieu of dues from the paychecks of non-members such as Judith Kramer during any month that a demand and return system is not in place;

2. interfering with, restraining and coercing non-members such as Judith Kramer in the exercise of their rights not to join the Association by sending non-members ambiguous and potentially misleading letters concerning Association membership and by responding to inquiries concerning the representation fee system in a grudging manner; and

3. failing to give personal notice to each non-member of the demand and return system which has been established and the procedures for obtaining a rebate.

B. Take the following affirmative action:

1. pay to Judith Kramer the sum of \$19.04 together with interest of 12% per annum to be computed commencing from the date of February 1, 1982;

2. notify personally each non-member of the demand and return system which has been established and the procedures for obtaining rebate;

3. post in all places where it normally posts notices to unit employees, and serve personally upon each non-member, 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 Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken by the Respondent Boonton Education Association to insure that such notices are not altered, defaced or covered by other materials;

4. notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Boonton Education Association has taken to comply herewith.

II. The Respondent New Jersey Education Association is ordered to:

A. Cease and desist from:

1. interfering with, restraining, and coercing non-members such as Judith Kramer in the exercise of their right not to join the Boonton Education Association by stating that non-members are not allowed to make advance lump sum payments of their representation fees rather than have their fees deducted;

B. Take the following affirmative action:

1. post in all places where the Boonton Education Association normally posts notices to unit employees, and serve personally upon each non-member, 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 the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by

the Respondent New Jersey Education Association to insure that such notices are not altered, defaced or covered by other materials;

4. notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent New Jersey Education Association has taken to comply herewith.

III. The Respondent Board of Education of the Town of Boonton is ordered to:

Cease and desist from deducting a representation fee in lieu of dues from the paychecks of non-members such as Judith Kramer during any month that the Boonton Education Association does not have a demand and return system in place.<sup>37/</sup>

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett and Suskin voted in favor of this decision. Commissioner Graves voted against the decision. Commissioners Hipp and Newbaker abstained.

Commissioner Suskin dissented from that part of the decision finding an unfair practice based on the Association's failure to send personal notices to every non-member.

Commissioner Butch dissented from that part of the remedy ordered by the Commission which directed the Association to refund, with interest, the fee paid by the Charging Party for the month of September 1981.

DATED: Trenton, New Jersey

July 15, 1983

ISSUED: July 18, 1983

<sup>37/</sup> Since it is undisputed that the Association has already received and presumably spent the money deducted from Kramer's paycheck, we believe the Association is liable for Kramer's recovery of that money.

# 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 OF THE COLLECTIVE  
NEGOTIATIONS UNIT THAT WE REPRESENT:

WE WILL NOT collect a representation fee in lieu of dues from the paychecks of non-members during any month that a demand and return system is not in place; we violated the New Jersey Employer-Employee Relations Act when we collected a representation fee from the paycheck of Judith Kramer for the month of September, 1981. We will pay Judith Kramer the sum of \$19.04 plus 12% interest per annum in order to remedy this violation.

WE WILL NOT interfere with, restrain or coerce non-members in the exercise of their right not to join the Boonton Education Association by sending non-members ambiguous and potentially misleading letters concerning Association membership and by responding to inquiries concerning the representation fee system in a grudging manner; we violated the New Jersey Employer-Employee Relations Act when we circulated an ambiguous and potentially misleading letter dated October 7, 1981 to non-members and when our representatives answered Judith Kramer's subsequent inquiries in a grudging manner.

WE WILL personally notify all non-members of their rights under the demand and return system we have established and the procedures for seeking a representation fee rebate under that system; we violated the New Jersey Employer-Employee Relations Act when we failed to notify personally non-members of such rights and procedures.

BOONTON EDUCATION ASSOCIATION

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,  
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

# 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 OF THE COLLECTIVE  
NEGOTIATIONS UNIT WHICH THE BOONTON EDUCATION  
ASSOCIATION REPRESENTS THAT:

WE WILL NOT interfere with, restrain, or coerce non-members of the Boonton Education Association in the exercise of their right not to join the Association by stating that non-members are not allowed to make advance lump sum payments of their representation fees rather than have their fees deducted; we violated the New Jersey Employer-Employee Relations Act when one of our field representatives incorrectly told Judith Kramer that non-members did not have the right to make advance lump sum payments of their representation fees.

NEW JERSEY EDUCATION ASSOCIATION

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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

BOARD OF EDUCATION OF THE  
TOWN OF BOONTON,

Respondent,

-and-

Docket No. CI-82-21-123

JUDITH M. KRAMER,

Charging Party.

---

BOONTON EDUCATION ASSOCIATION and  
NEW JERSEY EDUCATION ASSOCIATION,

Respondents,

-and-

Docket No. CI-82-22-124

JUDITH M. KRAMER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Board of Education of the Town of Boonton, the Boonton Education Association and the New Jersey Education Association committed an unfair practice when they caused a deduction in the salary of Judith Kramer for a representation fee for the month of September, 1981. Although the contract between the parties provided for an agency shop fee, a demand and return system was not created by the Boonton Education Association until October 1, 1981. For that one month, the parties did not have a right to impose said representation fee.

It was recommended that other allegations of the charge concerning the impropriety of the amount of the fee be dismissed for such allegations are not within the jurisdiction of the Commission but rather belong before the Appeals Board.

It was further recommended that the Commission dismiss those portions of the allegations which attack the constitutionality of the agency shop fee portion of the New Jersey Employer-Employee Relations Act. Questions of constitutionality of legislation do not properly belong before the agency administering said legislation but rather are questions for the appellate courts.

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.



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

In the Matter of

BOARD OF EDUCATION OF THE  
TOWN OF BOONTON,

Respondent,

-and-

Docket No. CI-82-21-123

JUDITH M. KRAMER,

Charging Party.

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BOONTON EDUCATION ASSOCIATION and  
NEW JERSEY EDUCATION ASSOCIATION,

Respondents,

-and-

Docket No. CI-82-22-124

JUDITH M. KRAMER,

Charging Party.

Appearances:

For the Boonton Public Schools  
McKeon, Curtin, Hubner & McKeon, Esqs.  
(Andrew M. Wubbenhorst, Esq.)

For the Boonton Education Association and New Jersey  
Education Association, Ruhlman, Butrym & Friedman, P.A.  
(Cassel R. Ruhlman, Jr., Esq.)

For Judith M. Kramer  
Nelson R. Kieff, Staff Attorney, National Right to Work  
Legal Defense Foundation, Inc., and Henry S. Kramer, Esq.

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

On November 30, 1981, Judith M. Kramer ("Kramer" or "Charging Party"), an individual, filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that her employer, the Board of Education of the Town of Boonton, engaged in unfair practices within the meaning of N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically §5.4(a)(1) and (3) by "putting

into effect an automatic dues checkoff provision without signed authorization cards, interfering with Charging Party's right to refrain from union activity or to deal with the union directly and in violation of N.J.S.A. 52:14-15.9E. It was further alleged that "Since on or about October 15, 1981, the Boonton Public Schools have imposed an agency shop situation without requiring the pre-establishment of a demand and return system before granting any such program."

Also on November 30, 1981, Kramer filed a charge with PERC alleging that the Boonton Education Association ("BEA") and the New Jersey Education Association ("NJEA") engaged in unfair practices within the meaning of the Act and specifically §5.4(b)(1) by breaching their duty of fair representation since October 15, 1981, by refusing Charging Party the right to see or be told the content of the collective bargaining agreement, by attempting to coerce and intimidate Kramer from exercising the right to refrain from union activity by demanding in a letter of October 7, 1981 that Kramer become a member of BEA and further that the BEA and NJEA have imposed a dues checkoff procedure without the prior establishment of a demand and return system as required by §5.6 of the Act and have attempted to intimidate and coerce her to pay such dues.

It was further alleged that the Respondent "imposed an automatic dues checkoff without individual signed cards in violation of N.J.S.A. 5.2:14-15.9 by refusing to give advance information the amount of dues; and by refusing to display a demand and

return system until after the forced checkoff was in effect."

Further, the BEA and NJEA established an agency fee system which charges lower amounts to certain members than it does to certain non-members, reflecting a dues system which is not uniform.

On February 9, 1982, the Charging Party filed an amendment to her charge alleging that the conduct of the NJEA and the BEA as previously alleged violated her rights under both the United States and New Jersey Constitutions.

It was additionally alleged that the nature of the agency fee and checkoff were unconstitutionally broad.

It appearing that these allegations if true might constitute unfair practices within the meaning of the Act, an Order Consolidating Cases and a Complaint and Notice of Hearing were issued on May 17, 1982.

A hearing was held on September 13, 1982, at which time all parties were given an opportunity to present evidence, examine and cross-examine witnesses and argue orally. All parties submitted briefs by November 19, 1982.

#### Findings of Fact

1. Judith Kramer is a teacher employed as a resource room person by the Board and is a member of a unit represented by the BEA.
2. Kramer is not a member of the BEA.
3. The Board and the BEA entered into a Collective Negotiations agreement effective from July 1, 1981 to June 30, 1983, which provides that if a member of the negotiations unit does not become a member of the Association during a year covered by the

contract said employee shall be required to pay a representation fee in lieu of dues not to exceed 85% of regular union dues, fees and assessments to the Association during that year. This provision became effective on July 1, 1981, and was to apply prospectively only.

4. This contract was ratified by the Board on June 22, 1981.

5. A "demand and return" system was adopted by the BEA on September 30, 1981. It provides that one who pays a representation fee in lieu of dues to the Association may request a rebate which is determined by the percentage of the combined budgets for the Association and its affiliate that is used for political activity <sup>1/</sup> and member only benefits. The difference between said percentage of regular membership dues fees and assessment of the Association and the representation fee shall constitute the rebate. <sup>2/</sup>

The system provides for a review procedure before a Review Panel of any claim that the rebate is insufficient. The burden of demonstrating that no part of the unrebated representation fee is used for political activities or member only benefits is on the Association and if the nonmember is not satisfied with the decision of the Review Panel, he or she may refer the matter to the Appeals Board created by §5.6 of the Act.

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<sup>1/</sup> The definition of political activity stated in the demand and return system uses the language of 2(c) of Ch. 477 (i.e. §5.5c).

<sup>2/</sup> This somewhat simplifies the actual procedure. The plan provides for a preliminary rebate which is based on allocated funds for political activity and members only benefits and a final rebate based on funds actually spent.

6. Kramer received a letter from Mary Jarema, the Membership Chairperson of the BEA. The letter dated October 7, 1981, invited Kramer to become a member in full standing of the Association and stated that "all bargaining unit members who do not join the Association will be subject to "a representation fee in lieu of dues." The letter concluded:

We need your moral as well as financial support. Your needs as an employee are the same as those of your colleagues. The effort to represent you is no different from that expended to represent anyone else. Thus, we are asking that you voluntarily join us and give us your support.

We offer you the following choices:

1. that you join as a cash member with payment in full of the dues by October 15.
2. that you join as an automatic payroll deduction member with dues to be deducted in monthly installments.

7. Every year since Kramer was first employed by the Board in 1977 she was asked by a member of the Association to join the Association and every year she would decline. Kramer knew before and after reading the letter quoted in paragraph 6 that she did not have to join the BEA.

8. Kramer was first informed of the representation fee in the letter of October 7 (quoted in paragraph 6).

9. On or about October 9, Kramer talked with Mary Jarema and asked about the representation fee. Kramer asked for a written statement of the dollar amount of this agency shop fee but Jarema refused. Kramer also asked to see the contract which gave the Association authorization for the fee. Jarema said it was being

typed and Kramer would get a copy when it was typed. Kramer was given a copy of the contract on December 3.

10. On October 14, 1981, Kramer sent a letter to the Superintendent of Schools Ruth Krawitz stating that Kramer does not authorize deductions from her paycheck for the purpose of paying the BEA a representation fee in lieu of dues since she had not seen a copy of the demand and return system or the contract. Kramer further claimed that the BEA does not have the right to institute an automatic dues deduction check without Kramer herself giving a written authorization.

11. The President of the BEA, Marilyn Ward, testified that after the demand and return system was adopted (see paragraph 5), copies of the system were posted on the bulletin board in the faculty room of the school where Kramer worked, on or about October 1, 1981. This bulletin board was used to post notices of Association matters as well as affirmative action and personal matters. This was not disputed by Kramer who testified that she never looks at the bulletin boards. Accordingly, I so find that copies of the demand and return system were posted on or about October 1, 1981.

12. Agency shop fees were deducted from Kramer's salary by the Board commencing February 1, 1982. The amount of the fees collected were double the monthly agency shop fee required under the contract. Such double fees continued for five months -- February through June. The fees were doubled to make up for the first five months of the school year -- September through January -- when no dues were deducted. These fees were taken from Kramer's salary

even though she did not sign any authorization card or otherwise agree.

13. From February to June 1982 the Board deducted \$37.08 a month from Kramer's salary.

Kramer's annual representation fee works out to be greater than the annual Association dues of some Board employees.

14. Kramer's agency shop fee was based upon the Association dues paid by teachers, custodians, maintenance and clerical employees.

15. Other employees of the Board -- aides, bus drivers and cafeteria workers -- pay significantly lower Association dues than those employees listed in paragraph 14. These employees pay less dues because they all have significantly lower earnings than the employees listed in paragraph 14.

16. The dues structure of the BEA requires that all members of the BEA join the Respondent NJEA and NEA and a portion of the dues money is forwarded to the NJEA and NEA. Similarly, a portion of the representation fee deducted from Kramer's salary was forwarded to the NEA and NJEA.

#### Analysis

Subsection 5.6 of the Act mandates that where a negotiated agreement provides for a representation fee, the majority representative (Association) shall be entitled to said fees provided that membership in the Association is available to all employees and that the Association "has established and maintained a demand and return system which provides pro rata returns" in accordance with 2(c) (i.e. §5.5(2)).

Here the BEA's demand and return system was not established until September 30, 1981, yet the dues for the month of September were taken, albeit retroactively, from her salary. By the terms of the Act no representation fee should have been deducted from Kramer's salary for the month of September.

Kramer failed to prove that she was not able to see a copy of the demand and return system. See paragraph 11. Accordingly, it is not necessary here to determine if a failure to publicize a demand and return system is violative of the act.

Kramer argues that pursuant to N.J.S.A. 52:14-15.9(e), she does not have to have dues deducted from her salary but, rather, can make her fee payment directly to the Association.

N.J.S.A. 5a:14-5.9(e) provides in part:

Whenever any person holding employment, whose compensation is paid by...(any) board of education ...in this State...shall indicate in writing to the proper disbursing officer his desire to have any deductions made from his compensation, for the purpose of paying the employee's dues to a bona fide employee organization, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request.

Kramer misconstrues the intent of the statute. It was enacted long before the enactment of §5.6 of the Act. The intent of the statute was to allow an employee who was voluntarily paying dues to an association, as a member thereof, to have said dues automatically deducted from his or her salary and forwarded to that association.



Subsection 5.6 of the Act expressly provides that representation fees, where otherwise appropriate, shall be taken by payroll deduction. Subsection 5.6 applies to a completely different class of employees than §52:14-5.9(e). The latter concerns association members, the former, nonmembers.

Kramer as a nonmember of any association has no rights under N.J.S.A. 52:14-5.9(e). <sup>3/</sup>

Contrary to Kramer's charge, the letter of October 15 (as quoted in Finding of Facts paragraph 6), is not coercive. It does not demand that Kramer become a member of the Association. As it states, "we are asking that you voluntarily join us and give us your support." The letter does not state that Kramer has two choices, join or not join. The letter states that the Association offers two choices of membership.

The Commission has adopted <sup>4/</sup> the NLRB standard of the expressing of views as stated in §8(c) of the NLRA. "The expressing of any views...shall not constitute...an unfair practice...if such expression contains no threat of reprisal or force of promise of benefit." See, City of Camden & Int'l Assn. of Firefighters Local 788,

<sup>3/</sup> PERC has primary jurisdiction to construe statutes outside its own Act in order to determine issues arising under its jurisdiction. Hunterdon Central H.S. Teachers Assn. and Hunterdon H.S. Bd. of Ed, 174 N.J. Super. 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981); Bd/Ed of Bernards Tp. and Bernards Tp. Ed/Assn., 79 N.J. 311 (1979).

<sup>4/</sup> The N.J. Supreme Court's reasoning in Galloway Tp. Bd/Ed v. Galloway Tp. Assn. of Educ'l Secys, 79 N.J. 1 (1978) was that the Act was based on the NLRA and accordingly, "the absence of specific phraseology in a statute may...be attributable to a legislative determination that more general language is sufficient to include a particular matter within the purview of the statute without further elaboration." At p. 15.

AFL-CIO, P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982).

There is no threat of reprisal or force or promise of benefit contained in the letter of October 15.

Kramer alleged that the lack of uniformity in the dues structure of the BEA constitutes an unfair practice. As seen in paragraphs 14 and 15, there are two different dues levels within the BEA based upon the salary level of the respective employees.

Kramer, in her proposed Findings of Fact which were submitted in lieu of a brief, argues that the demand and return system implemented by the BEA did not "comport" with the Act. However Kramer did not demonstrate how a graduated structure for all Association members' dues based on income constitutes discrimination against her as a nonmember. Further this issue was not raised in her pleadings. These arguments are not timely and will not be considered.

Kramer attempted to argue at the hearing and in her post-hearing submission that an indeterminate portion of Kramer's representation fee went to uses that were not within the guidelines of subsection 5.5 and, moreover, were unconstitutionally broad. As stated at the hearing <sup>5/</sup> questions concerning what portion of the assessed fees paid by Kramer went to uses not within the guidelines of §5.5, belong before the Appeal Board created by §5.6, this Commission has no jurisdiction to hear such matters.

Finally Kramer alleged that the enforcement of the representation fee and checkoff provision were violative of both the United States and New Jersey Constitutions as to freedom of speech

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<sup>5/</sup> At the hearing the undersigned quashed a subpoena of the records of NEA, NJEA and the BEA. The expressed purpose of that subpoena was to demonstrate that moneys deducted from Kramer's salary were being spent for purposes which are improper under the Act. The subpoena was quashed because the Commission lacked jurisdiction to hear such a matter, and the rationale for said decision was expressed on the record.

and association. However no argument was made either at the hearing or in post-hearing submissions by Kramer.

Given that it is the duty of an administrative body to accept a statute as constitutional until such time as it has been declared unconstitutional by a qualified judicial body, <sup>6/</sup> I have no alternative but to recommend that the Commission, to the degree that it has jurisdiction over Kramer's charges, dismiss those portions of the charge which claim the Act is unconstitutional. See Johnson v. Robinson, 415 U.S. 361, 368, 94 S.Ct. 1160, 1166, 39 L.Ed. 2d 389, 398; Hunterdon Central H.S. Bd/Ed v. Hunterdon Central H.S. Teachers Assn, supra; Fischer v. Bedminster Tp., 5 N.J. 534, 542 (1950); Baldwin Constr. Co v. Essex Cty. Bd. of Tax., 24 N.J. Super. 252, 279-272 (Law Div. 1952, aff'd 27 N.J. Super. 240 (App. Div. 1953), aff'd 16 N.J. 329 (1954); and cf. River Dell Ed/Assn v. River Dell Bd/Ed, 122 N.J. Super. 350 (Law Div. 1973).

Accordingly for the reasons expressed above it is hereby recommended that the Commission find that the Respondents, Town of Boonton Board of Education, Boonton Education Association and New Jersey Education Association caused a representation fee to be deducted from the salary of Judith Kramer for the month of September 1981 when contrary to the provision of the Act no demand and return system was in place which would enable Kramer to seek a refund of moneys paid to the BEA and NJEA which were used for purposes not approved by the Act.

<sup>6/</sup> In this regard the parties here are familiar with an action in Federal District Court, District of New Jersey, Joseph W. Atonadi et al. v. State of New Jersey et al., Civil Action No. 82-119, consolidated with Paul Robinson et al. v. State of New Jersey et al., Civil Action No. 82-119, in which the constitutional issues raised by Kramer are being litigated.

It is further recommended that all other charges be dismissed in their entirety.

Upon these findings it is recommended that the Commission Order:

1. That the Respondents Board of Education of the Town of Boonton, Boonton Education Association and New Jersey Education Association

A) Cease and desist from deducting a representation fee in lieu of dues from Judith Kramer's salary during any month that a demand and return system is not in place.

B) Pay to Judith Kramer the sum of \$18.54 as representation fees in lieu of dues improperly deducted from Judith Kramer's salary for the month of September 1981 and pay interest of 12% per annum on \$18.54 to be computed commencing from the date of February 1, 1982.

2. 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 the Respondents' authorized representatives, shall be maintained by them for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondents to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondents have taken to comply herewith.



---

Edmund G. Gerber  
Hearing Examiner

Dated: March 25, 1983  
Trenton, New Jersey

# 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 deduct a representation fee in lieu of dues from Judith Kramer's salary during any month that a demand and return system is not in place.

WE WILL pay Judith Kramer the sum of \$18.54 plus 12% interest per annum for the period of time in which dues were deducted from Judith Kramer's salary when a demand and return system was not in place.

BOARD OF EDUCATION OF THE TOWN OF BOONTON

BOONTON EDUCATION ASSOCIATION

NEW JERSEY EDUCATION ASSOCIATION

(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, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.