

A.B.D. No. 86-10

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

OAL DKT #PRB-5349-85
AGENCY DKT #AB-85-9

PAUL L. STRACKER

Petitioner,

v.

**LOCAL 195, INTERNATIONAL FEDERATION
OF PROFESSIONAL AND TECHNICAL
ENGINEERS, AFL-CIO**

Respondent.

Paul L. Stracker, petitioner, pro se

Nancy I. Oxfeld, Esq. (Oxfeld, Cohen & Blunda, attorneys)
for respondent

DECISION AND ORDER

On March 27, 1985, Paul L. Stracker filed a petition of appeal with the Public Employment Relations Commission Appeal Board ("Appeal Board"). The Petitioner is an employee of the State of New Jersey, Department of Transportation and is represented for purposes of collective negotiations by Respondent, Local 195, ("Local 195") an affiliate of the International Federation of Professional and Technical Engineers, AFL-CIO ("IFPTE"). The petition alleges that the representation fee in lieu of dues collected from the Petitioner by Local 195, pursuant to N.J.S.A. 34:13A-5.5 et seq. was improper. On August 23, 1985, the case was transferred to the Office of Administrative Law ("OAL") pursuant to N.J.S.A. 52:14B-1 et seq. and

N.J.S.A. 52:14F-1 et seq. On November 12, 1985, the Respondent filed an Answer. The case was assigned to Administrative Law Judge Stephen G. Weiss who conducted a hearing on January 27, 1986.

On March 5, 1986, the Administrative Law Judge issued his Initial Decision recommending dismissal of the Petitioner's appeal. A copy of his report is appended to this Decision. He concluded that Local 195 proved that its expenditures of representation fees in lieu of dues for the fiscal year ending June 30, 1985 were for permissible purposes.

On March 20, and 31, 1986, the Petitioner filed timely exceptions pursuant to N.J.A.C. 1:1-16.4(a). A response to the exceptions has been filed by Local 195. Pursuant to N.J.S.A. 52:14B-10(c) the case is properly before us to affirm, reject or modify the Initial Decision.

The Petitioner's exceptions, which incorporate his post-hearing brief, raise several issues. He asserts that: (1) the portion of representation fees turned over by Local 195 to IFPTE should be refunded to non-members;^{1/} (2) fees paid by non-members should be segregated from dues paid by members; (3) a non-member's proportionate share of any surplus of funds in the union treasury at the end of a fiscal year should be returned; (4) paid time off for

^{1/} The Petitioner contends that there is no proof in the record of how IFPTE uses representation fees paid by non-members and also maintains that payment of a portion of his fee to IFPTE is a member-only benefit because the fee supports union activities in other states.

Local 195 officials to conduct union business is a member-only benefit, the cost of which should be refunded to non-members and (5) Local 195 has spent too much money on permissible activities. The Petitioner also cites the recent decision of the U.S. Supreme Court in Chicago Teachers Union v. Hudson, 54 U.S.L.W. 4231, ___ U.S. ___ (3/4/86), affirming 743 F. 2d 1187 (7th Cir. 1984) and asserts that Judge Weiss took too restrictive a view of the issues in his appeal.

Local 195's response incorporates its post-hearing brief and also discusses Hudson. Local 195 contends that its financial statement (Exhibit R-1) identifies expenditures with the specificity required by the recent decision, even with respect to the portion of the representation fees transferred to the IFPTE.

We have reviewed the Initial Decision in light of the Petitioner's exceptions, Respondent's reply and the entire record in this case. We adopt Judge Weiss' Findings of Fact Nos. 1 through 7. We do not adopt Finding Number 8 and we reject his conclusion that the Petitioner is not entitled to a rebate of any of his representation fee.

N.J.S.A. 34:13A-5.5(c) establishes the right of a non-member paying a representation fee in lieu of dues to receive:

...a return of any part of that fee paid by him which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of any other benefits available only to members of the majority representative. The pro rata share subject to refund shall not

reflect, however, the costs of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other terms and conditions of employment in addition to those secured through collective negotiations with the public employer.

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

...[T]he representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in [N.J.S.A. 34:13A-5.5](c). The demand and return system shall include a provision by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative.
(emphasis added)

When a non-member petitions the Appeal Board to review the amounts returned by the majority representative, the burden of proof remains on the union. See N.J.A.C. 1:20-3.2.

Our review of this record shows us that while there is sufficient, credible evidence to establish that Local 195 did not use more than 15 percent of the dues, representation fees and other revenue it collected and retained in Local 195 coffers on rebatable activities, there is insufficient proof as to how IFPTE used the money forwarded by Local 195. As set forth in Judge Weiss' Initial Decision, the transfer of \$288,593 in "per capita taxes" to IFPTE is the largest expense item in Local 195's budget. However Local 195 called no witnesses who were competent to testify how IFPTE spends

its funds.^{2/} Field Representative Leonard J. Cornwall, the only IFPTE official or employee who testified, said that he spent between 75 to 85 percent of his time serving Local 195. He testified about the activities of various officers and employees of Local 195, rather than those of IFPTE officials.

Cornwall acknowledged that IFPTE spends money on political lobbying (Tr. 69-21 to 23). However he repeatedly said, under cross-examination by the Petitioner, that he did not know how the "per capita taxes" were spent.

I'm not an expert on what the International does or how they do their accounting. I'm just a field representative. I have no knowledge of the administration of the national union.
Tr. 105-12 to 105-15

We agree with Judge Weiss that Cornwall was a credible witness and provided competent and undisputed testimony concerning the activities of Local 195. However, he was not competent to testify to IFPTE's use of the \$288,593 in per capita taxes paid to it by Local 195 during the fiscal year ending June 30, 1985. In Charney et al. v. East Windsor Regional Supportive Staff Association, A.B.D. No. 86-1, 11 NJPER 680 (¶16235 1985) we held that the amount the New Jersey Education Association spends on rebatable activities could not be automatically imputed to a local

^{2/} The Petitioner states in his exceptions that he tried to subpoena the International President of IFPTE to testify, but his request was rejected by Judge Weiss. Local 195 responds that the exchange did take place, but that Petitioner's request was not made on the record.

affiliate, which had a separate budget and identifiable items of revenue. While we agree with Judge Weiss that there is sufficient evidence to establish that Local 195 itself did not spend non-members' fees on impermissible activities, we cannot make a similar finding with respect to the \$288,593 transmitted to and presumably spent by IFPTE.^{3/}

We reject the Petitioner's suggestion that a local union may not transmit portions of representation fees to its national affiliates. Nevertheless, the majority representative has an obligation to show objecting non-members how its parent union is spending the representation fees. See e.g. Warner v. Board of Ed. of Gates-Chili CSD, 99 Misc. 2d. 251, _____ N.Y.S. 2d. _____ 12 PERB ¶7538 (N.Y. Supreme Ct., Monroe County 1979) (absent proof of expenditures by its affiliates, local union must refund a non-member the pro rata share of his fee which was given to affiliates). We disagree with Local 195 that Exhibit R-1, Local 195's financial statement, provides the necessary detail concerning IFPTE's activities. The passage of Hudson cited by IFPTE deals with a pre-collection notice rather than the quantum of proof a union needs to justify its fee before an impartial tribunal. We believe that in either situation more information is needed concerning IFPTE's

^{3/} The salary and expenses of Cornwall, an IFPTE field representative who spends three-fourths of his time working for Local 195, would probably be a chargeable item of expense for IFPTE, but the record contains neither Cornwall's salary nor the sources of revenue IFPTE uses to pay it.

activities than has been provided by Local 195.^{4/} Since Local 195 called no witnesses who were competent to testify about IFPTE's expenses, it has not met its burden of proof as to IFPTE's use of Petitioner's per capita taxes. We find Petitioner is due a rebate of the portion of his fee paid to IFPTE, together with interest payable in accordance with R. 4:42-11. Since per capita taxes constituted 42.29 percent of the union's expenses for the fiscal year in question, the same percentage of the Petitioner's fee should be refunded to him.

We find the Petitioner's remaining exceptions to be without merit. Some comments about the issues raised are in order.

While there is no absolute requirement that representation fees be segregated from other union funds, a union must be careful not to use the funds of objecting non-members, even temporarily, for rebatable activities. Thus it must either set its representation fees low enough to avoid that possibility or it must escrow a large

^{4/} The Public Employment Relations Commission has required that a majority representative personally notify each non-member of the amount of the fee and his rights to review the fee charged. See Kramer and Bd. of Ed. of Town of Boonton and Boonton Ed. Ass'n and NJEA, P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), affmd as mod., sub nom., Boonton Bd. of Ed. of the Town of Boonton v. Judith M. Kramer 99 N.J. 523 (1985), cert. denied ___ U.S. ___ (3/10/86). The recent decision in Hudson now requires that a union collecting a representation fee show all employees who pay representation fees in lieu of dues in advance of collection how their fees are spent so they can make an informed decision to file for a rebate. The notice required by Boonton will be the means of providing the financial information mandated in Hudson.

enough portion of those fees to insure that objecting non-members' representation fees in its possession will only be used for chargeable activities. See Boonton, supra, and Hudson, supra.

Local 195's balance of funds in its treasury increased during the fiscal year by approximately \$15,000. We hold that Petitioner is not entitled to a rebate of any portion of the year-end balance of funds. As an ongoing entity, Local 195 cannot be expected to exhaust its treasury every fiscal year. The money in the treasury has not yet been spent on any activity. Until the funds are expended it would be speculative to determine that objecting non-members are entitled to a proportionate refund of the surplus funds.

The Respondent's contract with the State provides paid days off for Local 195's officers and shop stewards to devote to union business. The time off allows the officials to administer the contract on behalf of all employees in the unit. See N.J.S.A. 34:13A-5.3 and In re IFPTE Local 195 v. State, 88 N.J. 393, 419 (1982). Petitioner also objects to the use of the paid time off to attend union conventions. However, that activity can be validly subsidized by representation fees in lieu of dues. See Ellis v. Brotherhood of Railway and Airline Clerks, ___ U.S. ___ 80 L. Ed. 2d 428, 442-443, 104 S. Ct. ___ (1984). We reject the notion that such paid leave is a member-only benefit.

Finally, we agree with the comments of Judge Weiss at page 7 of his report concerning Petitioner's allegation that Local 195

spent too much money on otherwise appropriate expenses. We reject this exception.

ORDER

The Petitioner's appeal for a return of his representation fee in lieu of dues paid during Local 195's fiscal year ending June 30, 1985 is granted in part and dismissed in part. Local 195 is hereby ORDERED to refund to Petitioner 42.29 percent of his representation fee for this period, together with interest payable from June 30, 1985 at the rates set forth in N.J. Court Rules, R. 4:42-11.^{5/}

BY ORDER OF THE APPEAL BOARD

Robert J. Pacca
Chairman

Chairman Pacca and Board Member Dorf voted in favor of this decision. Board Member Verhage took no part in consideration of this decision.

DATED: Trenton, New Jersey
April 15, 1986
ISSUED: April 15, 1986

^{5/} Petitioner's representation fee rose from \$3.19 per pay period to \$3.61 per pay period during May, 1985. Therefore we cannot tell from this record the exact principal amount due the Petitioner. It should be slightly more than \$35.08 (\$3.19 times 26 pay periods times 42.29 percent) plus interest.