

A.B.D. NO. 2007-1

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

In the Matter of

HENRY WIECZOREK, et al.

Petitioners,

OAL DKT. NO. PRB 6416-03
AGENCY DKT. NO. AB-2003-02

-and-

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1034,

Respondent.

Appearances:

For the Petitioner, Henry Wieczorek, pro se, on behalf
of himself and Petitioners listed in Appendix A

For the Respondent, Weissman & Mintz, attorneys (James
Cooney, Esq.)

DECISION

On February 2, 2006, a petition of appeal was filed with the Public Employment Relations Commission Appeal Board by Henry Wieczorek and 63 other Hunterdon County employees (petitioners). The petitioners are represented by, but are not members of, Local 1034 of the Communications Workers of America and its parent organization, the Communications Workers of America (Local 1034 and CWA, respectively), the majority representative of a unit of non-supervisory employees of Hunterdon County. The petition challenges the amount assessed as a representation fee in lieu of dues beginning on December 6, 2002. Specifically, the petition alleges that the representation fee is unfair and that it was

prematurely and unlawfully collected by payroll deductions in violation of administrative regulations defining a majority representative's obligations to non-member employees.

On March 10, 2003, the respondents filed an answer and on September 3, 2003, the case was transmitted to the Office of Administrative Law.

The case was held in abeyance pending the disposition of a related appeal from a decision of the Public Employment Relations Commission granting Local 1034 and CWA the right to collect representation fees in lieu of dues from non-members. Hunterdon Cty. and CWA Local 1034, P.E.R.C. No. 2003-24, 28 NJPER 433 (¶33159 2002), aff'd 369 N.J. Super. 572 (App. Div. 2004), certif. den. 182 N.J. 139 (2004).

On November 7, 2005, Administrative Law Judge Douglas H. Hurd held a hearing. The parties filed post-hearing briefs by April 13, 2006. On May 2, 2006, ALJ Hurd issued an Initial Decision recommending that the respondent be ordered to refund the representation fees collected from the petitioners during the period December 6, 2002 through April 13, 2006 together with interest.

On June 30, 2006, the respondent filed exceptions to the Initial Decision. On August 2, 2006 the petitioners filed a response. This case is now before the Appeal Board to accept, reject or modify the Initial Decision.

N.J.S.A. 52:14B-10(c) describes the parameters of an agency's review of an ALJ's initial decision:

In reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

In its first exception, Local 1034 asserts that it substantially complied with the requirements of N.J.A.C. 19:17-3.3 with respect to the dues year ending June 30, 2003. While conceding that no information about its expenditures was given to the petitioners prior to the start of fee collections on December 6, 2002, it asserts that doing so was not possible. Relying upon the testimony of CWA Agency Fee Administrator Helen Gibson, Local 1034 attributes the late issuance (on January 31, 2003) of its "Hudson notice"^{1/} to the delayed receipt of payroll information,

^{1/} The term "Hudson notice" is a shorthand for the annual notice to non-members who are assessed representation fees in lieu of dues by majority representative organizations. It comes from the U.S. Supreme Court decision in Chicago (continued...)

needed to calculate each non-member's representation fee, from Hunterdon County. It further asserts that the delayed issuance of the Hudson notice constitutes "harmless error," because the purpose of the notice is to give non-members adequate information to decide whether to challenge the fee, and all petitioners filed challenges as soon as fee deductions began, prior to receipt of Local 1034's Hudson notice.

ALJ Hurd held that Local 1034's non-compliance with the advance notice requirements of N.J.A.C. 19:17-3.3 rendered it ineligible to collect any fees from the petitioners during the period between December 6, 2002 and January 31, 2003.

We concur and add the following in response to Local 1034's arguments regarding its late receipt of payroll information from the County.

N.J.A.C. 19:17-3.3(a)(4) provides that the notice shall include:

The amount of the representation fee in lieu of dues, **or an explanation of the formula by which the representation fee is set** and the schedule by which the fee will be deducted from pay. [emphasis supplied]

This regulation does not require that the representation fee listed in the Hudson notice reflect the exact amount to be

1/ (...continued)
Teachers Union v. Hudson 475 U.S. 209 (1986) holding that a pre-collection notice to non-members paying service fees is constitutionally required.

charged to each non-member in the unit. The majority representative's percentage of chargeable expenditures is not affected by salaries of non-members in the unit. N.J.A.C. 19:17-3.3(a) (4) allows a majority representative to provide a notice showing the amount of the fee and/or the method used to calculate the fee. While CWA has apparently chosen to issue notices based upon the actual fee assessed to each affected employee, it is not required to do so. Thus, any late receipt of payroll information did not relieve Local 1034 from complying with the regulation. It could have satisfied N.J.A.C. 19:17-3.3(a) (4) by issuing a Hudson notice with an explanation of the formula or method it uses to calculate representation fees, rather than the exact amount of each non-member's fee.^{2/} And, it could have updated that information when precise salary data became available.

Local 1034 asserts that because it sent a copy of a demand and return system to non-members on November 19, 2002, it

^{2/} For example, if a majority representative set membership dues at 1 per cent (.01) of each employees' salary, than, assuming it was entitled to the maximum fee, it could advise non-members that the representation fee for the upcoming dues year would be .0085 per cent of an employee's annual salary. With these figures an employee earning \$50,000.00 would pay \$500.00 as a member and \$425.00 as a non-member. A letter dated November 19, 2002 from Local 1034's President to Hunterdon County employees listed both estimated representation fees and regular union dues for salaries beginning at 20,000.00 and going up to \$70,000.00 in \$5,000 increments.

substantially complied with its pre-collection obligations. It points out that the petitioners filed their objections immediately after fee collections began, rendering any defects in the notice "harmless error."

We reject this exception. The CWA demand and return system specifically provides that an adequate explanation of the basis of the representation fee (i.e. a Hudson notice) will be issued to non-members prior to fee collections. As the notice is an integral part of the demand and return system and did not issue until January 31, 2003, fee collections could not yet commence.^{3/} See Boonton Bd. of Ed. v. Kramer, 99 N.J. 523, 533 (1985), cert.

^{3/} This finding does not conflict with the granting of Local 1034's representation fee petition by the Public Employment Relations Commission. Local 1034 filed a copy of its demand and return system. Hunterdon Cty., 28 NJPER at 434. Until the petition was granted, the preparation of a Hudson notice showing expenses for this unit would have been premature and unnecessary.

den. 106 S. Ct. 1388 (1986).^{4/} Thus Local 1034 had no right to collect fees beginning December 6, 2002.^{5/}

ALJ Hurd disallowed Local 1034's collection of fees for the period after January 31, 2003 based upon his finding that the financial information in the Hudson notice was "stale" given N.J.A.C. 19:17-3.3(a)(1). That rule reads:

a) Prior to the commencement of payroll deductions of the representation fee in lieu of dues for any dues year, the majority representative shall provide all persons subject to the fee with a notice adequately explaining the basis of the fee, which shall include:

1. A statement, verified by an independent auditor or by some other suitable method, of the expenditures of the majority representative for its ***fiscal year ending within 12 months prior to the date the notice required by this section is served on all persons subject to the fee.*** The statement shall set forth the major categories of

^{4/} The cases the respondents cite are distinguishable. The events in Mallamud and Rutgers Coun. of AAUP Chapters, A.B.D. No. 86-9, 12 NJPER 324 (¶17127 1986), app. disp. as moot NJPER Supp.2d 180 (¶157 App. Div. 1987), occurred prior to Hudson. The mandate that a demand and return system be in place before any fees were collected was viewed as a change in the law and was applied prospectively. Mallmaud, 12 NJPER at 326. In Daly v. High Bridge Teachers' Ass'n, A.B.D. No. 90-3, 15 NJPER 548 (¶20225 1989), aff'd 242 N.J. Super. 12 (App. Div.), certif. den. 122 N.J. 356 (1990), a partially flawed Hudson notice was sent out prior to deductions.

^{5/} Where financial information needed for a Hudson notice is not available at the start of a dues year, some majority representatives collect no fees until the information has been prepared and the notice is sent out. Then payroll deductions are "doubled up" to collect the full fee by the end of the dues year. See discussion in Boonton, 99 N.J. at 531.

expenditures and shall also identify expenditures of the majority representative and its affiliates which are 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 benefits only available to members of the majority representative.
[emphasis supplied].^{6/}

The Hudson notice issued on January 31, 2003 showed expenditures by Local 1034 for a fiscal year ending on September

6/ Previously the same rule read:

a) Prior to the commencement of payroll deductions of the representation fee in lieu of dues for any dues year, the majority representative shall provide all persons subject to the fee with an adequate explanation of the basis of the fee, which shall include:

1. A statement, verified by an independent auditor or by some other suitable method of the expenditures of the majority representative for ***its most recently completed fiscal year***. The statement shall set forth the major categories of expenditures and shall also identify expenditures of the majority representative and its affiliates which are 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 benefits only available to members of the majority representative.

The change was made because:

The Appeal Board has received petitions in which non-members have complained that current representation fees have been calculated based on expenditures of the majority representative which were made more than two years prior to the current dues year. [30 NJR 1214(a)]

30, 2001, and by its parent organization, CWA, for a fiscal year ending on June 30, 2001. ALJ Hurd found that these statements did not satisfy the requirement of N.J.A.C. 19:17-3.3(a)(1) that the notice contain information about the majority representatives' expenditures for a fiscal year ending within 12 months prior to the date the Hudson notice is issued for a given dues year. We adopt ALJ Hurd's finding that the January 31, 2003 notice did not meet this requirement.

The respondent's exceptions focus on the January 31, 2003 statement. However the statement's function is to provide non-members with sufficient information to assess the adequacy of the fee in order to decide whether to challenge it. Once an objection is filed, the majority representative is obligated to demonstrate that it used the petitioner's fee only for activities that are germane to collective bargaining and contract administration. See Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1990). The majority representative bears the burden of proof in hearings on fee challenges. See N.J.S.A. 34:13A-5.6; N.J.A.C. 1:20-14.2.

ALJ Hurd held that the statement of expenditures issued by CWA on January 31, 2003 was not "suitably" verified. (Initial Decision at 10). He also found that the CWA and Local 1034 did not produce any testimony to substantiate their expenditures on

rent and the portion of publications concerning chargeable activities.

A timely, properly audited or verified statement that shows chargeable, non-chargeable and total outlays for each major expense category does not, in and of itself, satisfy a majority representative's burden of proof in a fee challenge hearing. Nor does the issuance of a flawed Hudson notice prevent the majority representative from proving, at a fee challenge hearing, that it properly calculated the representation fee. When non-members, after receiving a constitutionally adequate, pre-collection, Hudson notice, elect to file a petition with the Appeal Board, the majority representative still must produce documentary and testimonial evidence to support the figures in the Hudson notice. If the majority representative eschews that opportunity, then all or part of the representation fee must be refunded. See Paul L. Stracker v. Local 195 Intern. Fed. of Prof. and Tech. Engineers, AFL-CIO, A.B.D. No. 86-10, 12 NJPER 333 (¶17128 1986). But, where evidence is produced showing that the representation fee reflects the non-member's share of expenses that are germane to collective negotiations and contract administration, no further refunds will be ordered. See Phyllis Charney et al. v. East Windsor Reg. Supportive Staff Ass'n, A.B.D. No. 86-1, 11 NJPER 680, 682-687 (¶16235 1985).

Here Helen Gibson, the agency fee administrator for CWA International, could not, and did not, provide testimony showing that the figures listed in the Hudson notice displaying CWA's and Local 1034's chargeable and non-chargeable expenses were accurate.

Instead, the CWA focused on the non-members' objection to being assessed for costs incurred by CWA Local 1034's activities in other negotiations units. ALJ Hurd agreed with the CWA that such costs were chargeable, and we concur as well. However, the CWA's burden extended beyond establishing that it could include extra-unit costs in its representation fee. It had the additional obligation to substantiate to the petitioners and the administrative law judge, that, for example, it had actually incurred the amounts it listed as rental costs. ALJ Hurd found that neither of the CWA's witnesses provided such proofs. (Initial Decision at 6). Accordingly we conclude that the petitioners are entitled to a refund of the representation fee assessed for the dues year ending June 30, 2003 because the respondents did not satisfy their burden of proof that non-member fees were used for expenses germane to collective negotiations and contract administration.

ALJ Hurd further found that defects in Hudson notices covering additional fiscal years entitled the petitioners to a

remedy of a full refund of all fees assessed by Local 1034 up through the date of his initial decision.

While we agree that the representation fees assessed on the petitioners for the dues year ending June 30, 2003 must be refunded, we hold that the awarding of additional refunds for subsequent dues years was premature and is beyond the scope of this dispute. No petitions challenging the representation fees assessed for subsequent dues years have yet been filed or sent to the Office of Administrative Law as contested cases.^{7/}

The majority representative must annually revise its representation fee, issue a new Hudson notice and allow a new 30 day period for non-members to file objections. See N.J.A.C. 19:17-3.4(b). Normally, a non-member must file a new objection each dues year. See N.J.A.C. 19:17-4.5.

Here, both the petitioners and the respondents sensibly delayed the hearing on these petitions because of the pendency of Hunterdon County's appeal of the Public Employment Relations Commission's order authorizing the institution of an agency shop covering these employees. That challenge ended with the Supreme Court's October 6, 2004 order denying certification. 182 N.J. 139 (2004).

^{7/} Three additional dues years, running from July 1 through June 30, have started and ended since the petitioners commenced this litigation - 2003 to 2004, 2004 to 2005 and 2005 to 2006.

ALJ Hurd concluded that the petitioners were entitled to refunds for dues years beyond 2002-2003 because the Hudson notices for subsequent dues years contained stale financial data in violation of N.J.A.C. 19:17-3.3(a)(1). However, we do not adopt his recommendation that such flaws automatically require a rebate of all fees assessed during the dues year linked to that notice and any subsequent, similarly flawed notices.

Even if there is a defect in a Hudson notice, when a challenge is filed, a majority representative nonetheless has the opportunity to prove that the fee it has assessed for a particular dues year represents the non-members' pro-rata share of chargeable expenses. If we were to adopt ALJ Hurd's recommended remedy, we would be depriving Local 1034 of the opportunity to establish that it properly calculated representation fees for this unit for the 2003-2004, 2004-2005 and 2005-2006 dues years. We decline to do so.

At the same time, it would be unfair to deprive the petitioners of an opportunity to challenge these subsequent assessments based upon the passage of time needed for the completion of appellate proceedings in the related case and their belief, accepted by ALJ Hurd, that their initial objections would be deemed ongoing and sufficient to challenge all subsequent fees. Accordingly, we will allow the petitioners a period of approximately 30 days following receipt of this decision to file

petitions with the Appeal Board challenging the amounts they were assessed as representation fees in lieu of dues for the 2003-2004, 2004-2005 and 2005-2006 dues years.^{8/} We perceive no hardship or prejudice to the respondents in granting this extension as they will not be precluded from justifying the assessments if required to do so.

Finally we adopt ALJ Hurd's conclusion, unchallenged in the petitioners' response to the respondent's exceptions, that the Appeal Board lacks jurisdiction to determine whether the respondents engaged in unfair practices proscribed by N.J.S.A. 34:13A-5.4. For that reason we lack the authority to order, as requested by the petitioners, that future representation fee deductions be halted. Our remedial powers are limited to ordering refunds of fees already collected. See Boonton, 99 N.J. at 533.

ORDER

A. Respondents CWA and Local 1034 are hereby **ORDERED** to refund to Petitioners the representation fees in lieu of dues deducted from their salaries for the dues year beginning December 6, 2002 and ending June 30, 2003, together with interest.

^{8/} Assuming that Local 1034's current dues year began on July 1, 2006, the six month period following the start of deductions allowed by N.J.A.C. 19:17-4.5 for filing a petition challenging the 2006-2007 fee has not yet expired and need not be further extended.

B. The recommendation of Administrative Law Judge Douglas H. Hurd that the respondents refund to petitioners all representation fees in lieu of dues deducted from their salaries for the period commencing July 1, 2003 and ending April 13, 2006 is **NOT ADOPTED**.

C. The period of time within which the petitioners may file petitions with the Public Employment Relations Commission Appeal Board challenging the representation fees in lieu of dues deducted from their salaries for the 2003-2004, 2004-2005 and 2005-2006 dues years is hereby extended until October 31, 2006 or 30 days after receipt of this decision and order, whichever is later. Separate petitions must be filed for each dues year.

BY ORDER OF THE APPEAL BOARD

John F. Tesauro
Chairman

DATED: September 22, 2006

Trenton, New Jersey

APPENDIX A**Hunterdon County Employees - List of Petitioners**

Henry Wieczorek	Norm Wise
Debra J. Gilmartin	Karen Mitchell
Mary R. Gregory	Sue Dziamara
Marva M. Salvato	Caroline Armstrong
Bryan Stem	Greg Szwec
Gary Siebentrits	Gary Pohorely
Dennis L. Heil	Les Varga
Rhonda Kelly	Jennifer Kluber
Robert W. Ent, Jr.	Kevin B. Ohler
Kenneth W. Miller	Charles T. Richards, Jr.
Pamela C. Boon	Nancy Cramer
Carl T. Schottman	Lisa Backowski
Michael Jakubowsky	Ross W. Debele, Jr.
Adrian Prokofieuf	Raymond E. Rule, Jr.
Bruce Johnson	Margaret Banks
Jeff Baker	Sharon Longo
Paul Marconi	gregory S. Ent
Linda Zdepski	Joan M. Tigar
Robert L. Greene, Jr.	Patricia L. Burd
Joel Van Horn	Susanne Mirota
George Price, Jr.	William Turyonas
Michael J. Coleman	Thomas Mathews
Nadia Parkhouse	Doreen Ehasz
Margaret Cramer	Linda Weber
Linda M. Bush	Russell Norkevich
Michael Balboa	Dawn Faltings
Mark Ninnemann	Nadine Farr
Brian Stout	Lisa M. Long
Scott Bartok	Evelyn Arroyo
Dinah Rowbotham	Jennifer Fuhri
Ed Kopp	Ryan P. Ziemba
Robert Ent, Sr.	David Gilmartin