

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

OAL DKT #PRB-7751-84  
AGENCY DKT #AB-84-8

**SEAN MICHAEL MCLERNON,**

Petitioner,

v.

**COMMUNICATIONS WORKERS  
OF AMERICA, AFL-CIO,**

Respondent.

No appearance by or on behalf of petitioner

**Michael T. Leibig**, Esq. (Zwerdling, Schlossberg, Leibig & Schlossberg, attorneys) and **Steven P. Weissman**, Esq. (Counsel, District One) for respondent

**ORDER OF REMAND**

On February 5, 1985, Administrative Law Judge Joseph Lavery entered an order dismissing a Petition of Appeal filed with the Public Employment Relations Commission Appeal Board (hereinafter Appeal Board) on account of the petitioner's failure to appear at the hearing convened by the Office of Administrative Law pursuant to N.J.A.C. 1:20-1.1 et. seq. The petitioner pays a representation fee in lieu of dues to the Communications Workers of America (hereinafter CWA), the majority representative organization of petitioner's collective negotiations unit. The petition alleges that the CWA is not entitled to the amounts it has assessed the petitioner.

N.J.S.A. 34:13A-5.6 and N.J.A.C. 1:20-3.2 provide, respectively, that the majority representative bears the burden of proof both in demand and return system proceedings and in cases within the jurisdiction of the Appeal Board.<sup>1/</sup> In order to commence a proceeding in CWA's demand and return system, an employee paying a representation fee in lieu of dues need only notify CWA that he or she desires a refund of the rebatable portion of the representation fee in lieu of dues, i.e. monies expended by CWA for member-only benefits or lobbying activities which are only incidentally related to the terms and conditions of employment, N.J.S.A. 34:13A-5.5. The employee requesting a rebate need not appear before the persons or bodies comprising the demand and return system in order to avail himself or herself of the procedure, because the burden is on the union to justify the amount of its fee.

N.J.S.A. 34:13A-5.6 created the Appeal Board to hear, inter alia, appeals from employees who pay a representation fee in lieu of dues to their majority representative organization. Such appeals are de novo proceedings with the burden of proof on the majority representative to establish that the fees assessed to non-member employees meet the requirements of the representation fee legislation. Given the similarities between proceedings before this

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<sup>1/</sup> Our discussion of demand and return system proceedings in this opinion is for illustration purposes only and does not represent an opinion as to whether use of a demand and return system is a prerequisite to an appeal to this Board in general or in this specific case, nor is it a ruling on the validity of any particular demand and return system.

Board and a majority representative's demand and return system, the obligations required of petitioners to the Appeal Board should not be greater than those necessary to pursue a demand and return system proceeding.

Employees paying representation fees to CWA did not forfeit a right to their rebates if they did not personally appear before CWA's Executive Board, the final step of CWA's demand and return system. Similarly, we hold that even if the petitioner does not appear at an OAL hearing and fails to exercise his right to cross-examine the majority representative's witnesses, or otherwise challenge the proofs put on by the union, he does not forfeit the right to require the majority representative to justify its assessments. The right of an employee to a rebate of funds expended by the union for partisan political and ideological purposes, unrelated to the terms and conditions of employment, is grounded upon the First Amendment to the U.S. Constitution. See Aboud v. Detroit Bd. of Ed., 431 U.S. 209, 95 LRRM 2411 (1977).

While we do not know why the petitioner failed to notify the O.A.L. of his inability to attend the scheduled hearing, we cannot agree that the ultimate sanction of dismissal is warranted where the law imposes no obligation whatsoever on the petitioner to go forward with any proofs. Since this is among the first of our cases being heard by the O.A.L., there is undoubtedly some confusion as to the obligations imposed by the representation fee statute.

So long as the petitioner is afforded the right to appear, be heard and challenge the presentation of proofs by the majority representative in accordance with the rules governing the conduct of contested cases generally, and our cases in particular, before the O.A.L., the requirements of due process have been met. However, where a petitioner chooses to forego such rights, the majority representative must still prove its assessments are correct and permitted by law unless the petitioner has affirmatively stated that he wishes to forego his right to appeal.

**ORDER**

The Initial Decision of the Administrative Law Judge is rejected and the matter is remanded to the Office of Administrative Law for hearing.

BY ORDER OF THE APPEAL BOARD

**Robert J. Pacca**  
Chairman

Chairman Pacca and Board Member Gerald L. Dorf voted in favor of this decision.

DATED: Trenton, New Jersey  
February 19, 1985

ISSUED: February 21, 1985