

A.B.D. No. 97-2

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

OAL DKT No. PRB-6260-96
APPEAL BD DKT No. AB-96-4

ANTHONY PILAWSKI

Petitioner,

v.

**COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1034,**

Respondent.

Appearances:

Anthony S. Pilawski, pro se

Carla M. Siegel, Esq. pro hac vice, for Respondent (Steven P. Weissman, New Jersey Attorney of Record)

DECISION AND ORDER

On November 8, 1995, Anthony Pilawski, a State of New Jersey employee, filed a petition with the Public Employment Relations Commission Appeal Board. The petitioner pays a representation fee in lieu of dues to the Communications Workers of America, a majority representative organization, and its affiliate, Local 1034. The petition sought review of the amounts assessed as representation fees in lieu of dues for the periods covering July 1, 1994 to June 30, 1995 and July 1, 1995 to June 30, 1996.

An Answer was filed by the CWA and on July 9, 1996, the case was transferred to the Office of Administrative Law for hearing and was assigned to Administrative Law Judge Joseph F. Fidler. N.J.S.A. 34:13A-5.6 and N.J.A.C. 1:20-14.2 require that the majority

representative bear the burden of proof in contested cases challenging representative fees in lieu of dues which are filed with the Appeal Board and transmitted for hearing to the Office of Administrative Law.

On May 15, 1997 Judge Fidler issued an "Initial Decision-Summary Decision" which has been served on the parties. The decision grants the CWA's motion for summary judgment, but also orders a refund of a portion of the fees paid by petitioner for the 1994-1995 and 1995-1996 dues years. Neither party has filed exceptions. The decision is now before the Appeal Board to adopt, reject or modify.

We address the petitioner's challenge to the timeliness of financial information CWA has provided to him.

CWA based its 1994-1995 representation fee on expenditures incurred during its 1992-1993 fiscal year. The 1995-1996 representation fee was calculated from 1993-1994 fiscal year expenditures. The petitioner's appeal specifically complains about the lateness of CWA's financial information, disputes the majority representative's assertion that such errors "were deminis and have been corrected," and also asserts that the representation fee he was assessed for the period from July 1, 1994 through June 30, 1995 should not have been based on 1992-1993 fiscal year expenditures. He also asserts that the fee assessed for the period between July 1, 1995 to June 30, 1996 should be measured by CWA's expenditures during the period July 1, 1994 through June 30, 1995.

The Initial Decision does not address CWA's expenditures during the fiscal year which began July 1, 1994 and ended on June 30, 1995. The Administrative Law Judge found those issues not relevant because CWA had not based either of the challenged years' representation fees on its expenditures for that year.^{1/}

Majority representatives which receive representation fees in lieu of dues must designate both a "fiscal year" and a "dues year."^{2/} The New Jersey Administrative Code (N.J.A.C.) provides:

19:17-3.1 Designation of fiscal year

(a) Every majority representative which collects a representation fee in lieu of dues shall establish a fiscal year system of accounting for the expenditures of such organization.

(b) The fiscal year may be the calendar year or any other 12 month period.

19:17-3.2 Designation of dues year

(a) Every majority representative which collects a representation fee in lieu of dues shall establish a dues year.

(b) The dues year may be the calendar year or any other 12 month period, except that the dues year may not commence prior to the start of the fiscal year.

^{1/} We take administrative notice that petitioner has filed a letter with the Appeal Board challenging the representation fee assessed by CWA for the 1996-1997 dues year, which CWA presumably assessed based on its expenditures for the fiscal year ending June 30, 1995. Docket No AB-97-1. That appeal is pending.

^{2/} Because the issues in this case require frequent reference to different fiscal years, we will the shorthand "FY" to refer to a July 1 to June 30 fiscal year. Thus the fiscal year which ended June 30, 1993 is FY93.

19:17-3.3 Annual notice to nonmembers; copy of demand and return system to public employer

(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 nonmembers of the majority representative.

Also relevant are N.J.A.C. 19:17-3.4, which governs the amount of the fee, and which provides at 19:17-3.4(a) (2) that the "amount shall be based upon the figures contained in the statement provided nonmembers prior to the start of the dues year in accordance with N.J.A.C. 19:17-3.3(a) (1)," and N.J.A.C. 19:17-4.1(a) stating that "Each nonmember shall be afforded a period of at least 30 days after the majority representative has provided the information described in N.J.A.C. 19:17-3.3(a)" within which to file a request for review of the amounts charged by a majority representative as a representation fee in lieu of dues.

The system used by CWA directs that financial

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information be given to nonmembers prior to the start of
the dues year (Exhibit

1 to CWA's Motion for Summary Judgment). The requirements of CWA's own system, coupled with those imposed by the regulations, mean that in order for CWA to begin collecting representation fees on the first day of the dues years which began July 1, 1994 and July 1, 1995, it would have had to provide employees, no later than June 1, 1994 and June 1, 1995, respectively, with financial information based upon its most recently completed fiscal years. On June 1, 1994, CWA's most recently completed fiscal year was FY93, which had ended 11 months earlier. Similarly on June 1, 1995, its most recently completed fiscal year was FY94. Documents introduced into evidence before the ALJ establish that audits of CWA expenditures for FY93 and FY94 were complete within six months of the end of those years. However, CWA has admitted that it did not provide information concerning its expenditures for FY93 and FY94 until after the start of the two dues years which are the subject of petitioner's appeal.^{3/}

The failure to provide the information prior to the start of the two challenged dues years had two legal consequences.

^{3/} We were unable to find in the record a specific date as to when the audits of the expenditures of Local 1034 were completed. We note that Local 1034 uses a fiscal year which runs from October 1 to September 30. A report of the audit of the expenditures by Local 1034 for its fiscal year which ended September 30, 1995, was sent to its executive committee on April 24, 1996. The information was not sent to the petitioner until July 30, 1996, again after the commencement of the 1996-1996 dues year, contrary to the CWA's rebate

system which promises such information before the
dues year commences (CWA Exhibit 9).

First, CWA representation fees should not have been deducted from the paychecks of any nonmembers until the financial information had been received and a 30-day window of opportunity to register an objection had been provided. See N.J.A.C. 19:17-3.3(a)(1); 19:17-4.1(a)(1). Cf. Boonton Bd. of Ed. v. Kramer, 99 N.J. 523, 533 (1985), cert. den. 475 U.S. 1072 (1986).

Second, as of July 1, 1994 and July 1, 1995, CWA's "most recently completed fiscal year(s)", were FY94 and FY95. Arguably, the effect of CWA's failure to provide timely financial information was to give the petitioner a right, grounded in these administrative regulations, to have the fees he paid during the 1994-1995 and 1995-1996 dues years, based on CWA expenditures during FY94 and FY95, respectively, rather than FY93 and FY94 which provided the figures actually used by CWA.

Petitioner's appeal directly disputes the timeliness of CWA's transmission of financial information to him. He also specifically asserts that the representation fees he is challenging (for the 1994-1995 and 1995-1996 dues years) should have been based on expenditures during the most recently completed fiscal years.

CWA's late transmission of financial information violated its own review procedures and literal terms of the administrative regulations. We must decide the import of these violations.

The adequacy of an advance reduction rebate system

is an issue which the Public Employment Relations Commission can address in unfair practice proceedings.

See Boonton Bd. of Ed. and Boonton

Ed. Ass'n and NJEA, P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983), aff'd as mod., sub nom., Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 475 U.S. 1072 (1986). The Commission has the remedial authority to direct that deficiencies in a rebate system be cured and/or that representation fees be refunded where an existing rebate system is non-existent or grossly inadequate. See Bacon and District 65, UAW, P.E.R.C. No. 87-72, 13 NJPER 57 (¶18025 1986), aff'd NJPER Supp.2d 196 (¶173 App. Div. 1988), certif. den. 114 N.J. 308 (1988); Camden PBA Lodge No. 35, P.E.R.C. No. 95-42, 21 NJPER 40 (¶26025 1994). We also have jurisdiction to review such systems, as we have held that the defects in a demand and return system can be advanced as a reason warranting the refund of a representation fee. See 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); Peter Wodzinski, Stephanie Robin Faught and Howard Salles v. Woodbridge Tp. Ed. Ass'n, A.B.D. No. 88-5, 14 NJPER 381 (¶19149 1988).

We disagree with the CWA's assertion and the findings in the Initial Decision labeling these violations as minor. The administrative regulations allow a majority representative considerable discretion in structuring a dues year and a fiscal

year.^{4/} Presumably CWA has designated its dues year and fiscal year in a manner which is calculated to give it sufficient time to verify and assemble the financial information it is obligated to give to nonmembers before collecting representation fees. This record shows that the report of the auditors who checked CWA's expenditures during FY93 was complete on November 23, 1993 (Exhibit 3 attached to CWA Motion for Summary Judgment). The next dues year did not start until July 1, 1994 and if the information had been transmitted to the petitioner on or before June 1, 1994, then CWA would have been in compliance with its own procedure and the administrative rules governing the administration of representation fee systems. Similarly, the auditor's report of CWA expenses for FY94, was complete on December 9, 1994 (CWA Exhibit 4). Again CWA did not provide the petitioner with information about those expenses until after the 1995-1996 dues year began on July 1, 1995.

CWA does not specifically explain why it failed to meet these deadlines. Nor does it indicate what steps it has taken to modify its practices to remedy what seems to be a recurring violation of its own procedures and pertinent regulations.

^{4/} Some majority representatives who delineate both their dues year and fiscal year with the same 12 month period (e.g. July 1 to June 30), meet the requirements of the regulations by delaying collection of agency fees until the mandated financial information has been compiled and transmitted to nonmembers. Under such systems,

representation fees are not collected for the first several months of the dues year. Collection is compressed into the months remaining after compliance with notice and objection periods. The legality of such systems has been upheld. See Boonton, 99 N.J. at 531.

We find that the representation fee assessed petitioner for the 1994-1995 dues year should have been based upon the majority representative's expenditures during FY94, not FY93. Similarly we conclude that the representation fee assessed petitioner for the 1995-1996 dues year, should have been based upon the majority representative's expenditures during FY95.

The rest of the Initial Decision reviews and rules upon the petitioner's challenges to CWA expenditures for FY93 and FY94. We concur with those determinations. Judge Fidler concluded that the petitioner was entitled to a rebate of \$.97 for expenditures made during FY93 and \$12.47 for FY94 plus interest. We will affirm that particular order, but we hold that the rebate only covers representation fees assessed for the period ending June 30, 1994. We will remand the case for consideration of petitioner's challenge to the CWA's FY95 expenditures, in connection with his request for a rebate of the representation fee assessed during CWA's 1995-1996 dues year.^{5/}

We do not order any further relief even though fee collections might have commenced prior to petitioner's receipt of information regarding how CWA calculated its fees. In Mallamud, the

^{5/} We note that in reviewing precedents concerning the chargeability of various CWA expenditures the ALJ should be guided by Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) and other public sector precedent applying that standard. Private sector

cases may be relevant, but the special considerations which apply to public sector representation fees must be considered.

petitioner sought a rebate because the majority representative had failed to provide him with financial information in advance of its collection of the fee. Because we found that the advance information requirement had been newly imposed by the Supreme Court's decision in Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986) and because petitioner's right to file an appeal was not affected by the majority representative's failure to provide information, we declined to order a refund of fees based on that deficiency. The obligations imposed by Hudson are not new anymore. Nonetheless we will not order any additional rebate of fees collected before the pertinent information was provided because the petitioner has not asserted that dues collection should have been suspended until the information was provided and because this petitioner, like that in Mallamud was able to pursue his rights despite the majority representative's delayed transmission of financial information.

We also note that the petitioner has filed a letter with us to initiate a challenge to the CWA's 1996-1997 representation fee, asserting the same grounds as he has pressed in the case now before us. This matter has not yet been transmitted to the Office of Administrative Law as the petitioner has not yet perfected his filing and an Answer has not yet been solicited from CWA. The exhibits attached to CWA's motion for summary judgment show that financial information which explains the basis for CWA's calculation of that fee was not

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transmitted to the petitioner until July 30,

1996, after the commencement of the dues year. We will allow the petitioner to add his pending claim to the issues which we are remanding to the Office of Administrative Law. However, because the matter is not yet ripe for transmission as a contested case, we will stay our remand order for 60 days so that the petitioner, if he desires, can perfect his appeal to the 1996-1997 representation fee and so that CWA can file an Answer, if necessary.

ORDER

A. That portion of the "Initial Decision-Summary Decision" which directs that CWA pay petitioner a rebate of \$13.44 plus 5 per cent interest and which otherwise dismisses his challenge to the representation fee in lieu of dues paid by him during the 1994-1995 CWA dues year is affirmed.

B. That portion of the "Initial Decision-Summary Decision" which dismisses petitioner's challenge to the representation fee in lieu of dues paid by him during the 1995-1996 CWA dues year is reversed and the matter is remanded to the Office of Administrative Law for further proceedings in accordance with this opinion.

C. The Appeal Board authorizes the transmission of petitioner's challenge to the representation fee in lieu of dues paid by him during the 1996-1997 CWA dues year, Appeal Board Docket No. AB-97-1 as a contested case; provided:

1. The petitioner, within 30 days of receipt of this decision, files with the

Public Employment Relations Commission
Appeal Board, a completed petition of
appeal based upon his letter dated August
12, 1996 which was received by the Appeal
Board on August 22, 1997 and

docketed as AB-97-1. The Appeal Board secretary will supply the petitioner with the necessary forms to perfect his appeal.

2. CWA and/or its affiliate, Local 1034, files, within 20 days after receipt of a petition of appeal, its Answer. Failure to file a timely Answer will not delay the further processing of AB-97-1.

D. The Appeal Board stays paragraph B of this order for 60 days from the date of issuance of this decision.

BY ORDER OF THE APPEAL

BOARD

WILLIAM L. NOTO
Chairman

DATED: June 17, 1997
Trenton, New Jersey
ISSUED: June 30, 1997