

P.E.R.C. NO. 2003-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON COUNTY,

Respondent,

-and-

Docket No. PD-2003-1

CWA LOCAL 1034,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission orders Hunterdon County to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the negotiations unit employees who are not members of CWA Local 1034, the majority representative. Local 1034 filed the first petition under a new law, L. 2002, c. 45, entitling majority representatives to have representation fees deducted from paychecks of non-members provided certain statutory conditions are met. The Commission concludes that those conditions have been met. The Commission also orders the County to post a Notice To Employees which explains the investigation process and informs employees that fees will now be deducted.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Gaetano M. De Sapio, attorney

For the Petitioner, John Loos, consultant

DECISION

On August 22, 2002, CWA Local 1034 filed the first petition under a new law, L. 2002, c.46, entitling majority representatives to have representation fees deducted from paychecks of non-members provided certain statutory conditions are met. Before this law amended N.J.S.A. 34:13A-5.5 and 5.6, public employers were required to negotiate over proposals to deduct representation fees, but a union could not obtain fees without the employer's agreement.

Section 2 of the new law states, in part:

If no agreement is reached, the majority representative may petition the commission to conduct an investigation. If the commission determines during the investigation that a majority of the employees in the negotiations unit are voluntary dues paying members of the majority representative and that the majority representative maintains a demand and return system as required by subsection c. of this

section and section 3 of P.L. 1979, c. 477 (C.34:13A-5.6), the commission shall order the public employer to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the employees in the negotiations unit who are not members of the majority representative.

This new law went into effect on August 1, 2002.

CWA seeks an investigation and deductions. It asserts that the parties have negotiated during their last round of negotiations and that the employer has refused to agree to deduct representation fees; those negotiations ended in an agreement in June 2002 that did not include a representation fee in lieu of dues. CWA contends that it has met the statutory conditions for fee deductions: a majority of unit employees are CWA dues-paying members and it maintains a demand and return system. N.J.S.A. 34:13A-5.5. CWA has submitted documents indicating that 216 of the 375 employees in the non-supervisory negotiations unit are dues-paying CWA members. CWA has also submitted a copy of its demand and return system.

On August 27, 2002, we asked the County to respond to CWA's request. In particular, we asked the County to specifically admit or deny CWA's claims that a majority of employees in the non-supervisors' unit are voluntary dues paying members and that CWA maintains the required demand and return system.

On September 12, 2002, the County responded. It states its belief that the new law is unconstitutional. It then argues that the statute requires that negotiations take place before

deductions are ordered; no negotiations have taken place since August 1, 2002; and the parties' negotiations conducted before the legislation's effective date do not satisfy the statutory prerequisite. The County further asserts that the parties' contract does not expire until December 31, 2002, and that the new law does not require it to reopen negotiations during the term of the current contract. It concludes that the Commission lacks jurisdiction to process this petition.

On September 23, 2002, we invited CWA to respond to the County's jurisdictional argument. On September 30, it did so. It notes that in 1979, the Legislature amended the PERC statute to include an employer's obligation to negotiate upon request concerning a proposal to deduct representation fees. It asserts that since that statute became effective, it has repeatedly requested the County to agree to a representation fee, most recently during reopener negotiations in 2001. In each round of negotiations, the County refused to include a representation fee provision in the contract. CWA argues that the recent amendment did not create a new obligation on the majority representative to attempt, once again, to negotiate a representation fee. It urges us to continue with our investigation pursuant to N.J.S.A. 34:13A-5.5.

On October 3, 2002, we gave the County until October 11 to respond to our earlier request to specifically admit or deny CWA's claims regarding the number of dues paying members and the

demand and return system. On October 10, the County filed its response. It states that it has no reason to question that more than fifty percent of unit members are CWA members or that CWA has a demand and return system. It also states, however, that there have been a number of requests to withdraw authorizations for dues deduction and membership might dip below fifty percent. The County urges us to independently determine whether more than fifty percent of negotiations unit employees currently wish to continue as union members.

As enacted in 1968, the Employer-Employee Relations Act empowered employee organizations selected by a majority of employees in a negotiations unit to serve as their exclusive representative in negotiations and grievance processing concerning their terms and conditions of employment. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). The statute also required that the majority representative "be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership." N.J.S.A. 34:13A-5.3. The power of exclusive representation is married to the duty of fair representation.

After passage of the Act, majority representatives responsible for representing non-member employees in contract negotiations and grievance processing sought to negotiate for contract provisions requiring non-members to contribute to the

costs of such representation. However, the Supreme Court held that such contract provisions violated the guarantee in N.J.S.A. 34:13A-5.3 that non-union employees could refrain from assisting unions. New Jersey Turnpike Employees' Union v. New Jersey Turnpike Authority, 64 N.J. 579 (1974), aff'g per curiam 123 N.J. Super. 461 (App. Div. 1973). Such provisions were illegal.

In 1979, the Legislature amended the Act to override Turnpike Authority and to authorize negotiations leading to agreements between public employers and majority representatives that would require non-members to pay a representation fee not exceeding 85% of regular membership dues, fees, and assessments. N.J.S.A. 34:13A-5.5 et seq. The 1979 law required public employers to negotiate over proposals to deduct representation fees from non-members' paychecks, but did not compel an employer to agree to a proposal. The Sponsors' Statement indicated that the 1979 legislation was intended to eliminate the "free ride" enjoyed by non-union members who received the benefit of services performed by the majority representative without sharing in the costs of representation. Sponsors' Statement, Assembly Bill No. 638.

The constitutionality of the 1979 law was upheld in state and federal courts. In re Boonton Bd. of Ed., 99 N.J. 523 (1985), cert. den. 475 U.S. 1072 (1986); Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), cert. den. 469 U.S. 1228 (1985); Robinson v.

New Jersey, 806 F.2d. 442 (3d Cir. 1986), cert. den. 481 U.S. 1070 (1987). The courts found that the 1979 legislation served a valid state interest in promoting labor relations stability by authorizing agreements to share representation costs equitably.^{1/}

The 1979 legislation thus converted an illegal subject of negotiations into a mandatory subject of negotiations. But the employer could still refuse to agree to a representation fee proposal and thus block a majority representative's receipt of representation fees. In 2002, the Legislature passed a new law that entitles a majority representative to receive representation fees even though no agreement has been reached, provided two conditions have been met. Those two conditions are 50% membership and having a demand and return system. Both the old law and the new law promote the equitable sharing of representation costs, but whereas the old law was focussed on requiring negotiations over that subject, the new law is focussed on a majority representative's entitlement to receive representation fees without an agreement.

We now turn to the jurisdictional issue framed by the parties. It is undisputed that during the contract reopener

^{1/} We do not have jurisdiction to determine the constitutionality of a statute that we are charged with implementing. We thus declined to consider the constitutionality of the 1979 legislation. Boonton Bd. of Ed., P.E.R.C. No. 84-3, 9 NJPER 472 (¶14199 1983). We likewise decline to consider the constitutionality of the new legislation.

negotiations just completed, CWA tried to secure a contractual right to have representation fees deducted and that the employer refused to agree. It is also undisputed that the reopener negotiations ended before the effective date of the new law. The question is whether a claimed entitlement to have representation fees deducted under the new law depends on a showing that negotiations occurred after that law's effective date rather than before. Based on our analysis of the legislative text, the legislative history and purpose, and labor relations policy and precedent, we answer this question in the negative.

We begin by examining the legislation itself. The focus of the statutory text, as we have noted, is on the new entitlement of majority representatives to have representation fees deducted, even absent an agreement, provided the two statutory conditions are satisfied. The new law did not change the preexisting negotiations obligation under the 1979 law, but it did link the negotiations duty under that law with the entitlement to deductions under the new law with this transitional phrase: "If no agreement is reached." That language evinces a legislative intent that there be negotiations and a lack of agreement before a majority representative petitions for an investigation, but it

does not specify a time-frame for negotiations or require that negotiations occur after the effective date of the statute.^{2/}

We next look to the statute's legislative history. L. 2002, c. 46 enacted Assembly Bill No. 2372. That bill was introduced on May 20, 2002. The bill's original Statement provided:

This bill permits a majority representative for a public employee bargaining unit to petition the New Jersey Public Employment Relations Commission ("commission") to conduct an investigation when no agreement can be reached between the majority representative and the public employer regarding the payment by all non-member employees in the bargaining unit of a representation fee in lieu of dues for services rendered by the majority representative. If petitioned, the bill requires the commission to determine whether a majority of the employees in the bargaining unit designated the majority representative and whether the majority representative maintains a demand and return system. If the commission determines that the conditions have been met, the bill requires the commission to order the public employer to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the non-member employees in the bargaining unit.

The bill was amended to replace the term "bargaining unit" with "negotiations unit" and to clarify that the majority

^{2/} We have considered whether the use of "is" in the contingent phrase, "[i]f no agreement is reached," requires that agreement not be reached after the effective date of the statute. We have concluded that the use of "is" is consistent with the tense throughout the entire statute and that it does not represent any legislative judgment on this issue.

representative shall represent a majority of the employees in the negotiations unit who are voluntary dues paying members. On June 20, 2002, the bill passed the Assembly 70-5-2 and the Senate 34-1. The Governor signed the bill into law on August 1 effective immediately. Nothing in the bill's legislative history suggests an intent that a new round of negotiations would have to be conducted after the effective date of the statute or that negotiations before the bill's effective date would not satisfy the bill's negotiations requirement. Like the text, the legislative history is focused not on the duty to negotiate, but on the entitlement to receive representation fees absent an agreement.

Next, we examine the labor relations implications of requiring additional negotiations after the parties have already negotiated but not reached an agreement to permit fees. We believe that requiring such negotiations would disserve the affirmative purposes of the new law without contributing to the overall collective negotiations process. The Legislature granted majority representatives the right (provided statutory conditions are met) to receive representation fees so that the cost of negotiating contracts and processing grievances would be equitably shared among all members. Accepting the County's position that the majority representative must wait until after the next round of successor contract negotiations would require the majority representative and its members to shoulder all the costs of

representing non-members. The legislative purpose would thus be defeated. And there would be little benefit to be had by delaying a claim under the new law until after a new round of negotiations. An employer that has already refused to agree to fee deductions in the last round of negotiations would have little reason to now agree. That is particularly so since an eligible majority representative would likely offer nothing in return for a negotiated agreement given the Legislature's decree that it no longer needs to reach an agreement to obtain fees. To require the parties to enter into negotiations when they have already negotiated over that issue and there is no basis to believe that they will reach agreement is not conducive to good labor relations.

Finally, we look at Wayne Bd. of Ed., P.E.R.C. No. 81-106, 7 NJPER 151 (¶12067 1981). Decided just after passage of the 1979 representation fee law that created the obligation to negotiate over representation fees, Wayne addressed the issue of whether majority representatives had to wait until after existing contracts expired to demand negotiations or whether they could do so immediately. We held that the employer had an obligation to negotiate mid-contract over representation fees. Noting that there was no legislative limitation as to the timing of negotiations, we held that mid-contract negotiations made sense given a statute that created a new negotiations duty and given the absence of any threat to labor stability. Wayne's holding supports rejecting the employer's position that a majority

representative cannot invoke the new law until after the current contract expires. And Wayne's labor relations analysis also supports accepting CWA's position that a majority representative can invoke the new law if the last round of negotiations did not produce an agreement. From a labor relations point of view, the key considerations are that this new law creates a right to have representation costs equitably shared rather than simply a right to negotiate and that there is no purpose to be served in requiring more negotiations at this point. In this case, the parties have already negotiated over representation fees in the last round of negotiations. We have no reason to expect that they would be any more likely to reach an agreement were we to require new negotiations over this subject.

For all these reasons, we reject the argument that the parties must engage in another round of negotiations over representation fees before we can exercise jurisdiction over this petition. Based on the evidence submitted, we also conclude that a majority of unit employees are voluntary dues paying members of CWA Local 1034 and that CWA maintains a demand and return system as required by N.J.S.A. 34:13A-5.5 and 5.6. We have no statutory basis or reason for conducting a separate investigation of employee wishes or trying to ascertain which employees might seek to join the union or resign from the union in the future. The statute specifies that deductions shall be ordered when a majority of unit members are voluntary dues paying members of the majority

representative and we cannot substitute another test, especially one triggering an inquiry without a logical end. The date that a petition is filed is the relevant time for ascertaining whether the membership requirement has been met. CWA has met that requirement on that date.

Accordingly, we order Hunterdon County to immediately institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the negotiations unit employees who are not members of majority representative. We also order the employer to post the attached Notice To Employees. This notice explains the investigation process and informs employees that fees will now be deducted from the wages or salaries of unit members who are not CWA members.

ORDER

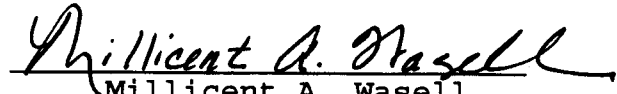
Hunterdon County is ordered to:

A. Immediately institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the negotiations unit employees who are not members of CWA Local 1034.

B. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

C. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Mastriani, McGlynn, Ricci and Sandman voted in favor of this decision. Commissioner Katz abstained from consideration. None opposed.

DATED: October 31, 2002
Trenton, New Jersey
ISSUED: November 1, 2002



NOTICE TO 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:

Pursuant to *N.J.S.A. 34:13A-5.5*, the Public Employment Relations Commission must order a public employer to institute a payroll deduction of a representation fee in lieu of dues from the wages or salaries of employees in a negotiations units who are not members of the majority representative if a majority representative petitions the Commission to conduct an investigation and the investigation shows that a majority of negotiations unit employees are voluntary dues paying members of the majority representative and that the majority representative maintains a demand and return system as required by *N.J.S.A. 34:13A-5.5(c)* and 5.6.

On August 22, 2002, CWA Local 1034 filed a Petition for Payroll Deduction Determination-Representation Fees. The Commission conducted an investigation and determined that a majority of employees in the non-supervisory unit are voluntary dues paying members of CWA Local 1034 and that Local 1034 maintains a demand and return system as required by *N.J.S.A. 34:13A-5.5(c)* and 5.6. Accordingly, the Commission has ordered the public employer to immediately institute a payroll deduction of a representation fee in lieu of dues from the wages or salaries of negotiations unit employees who are not members of CWA Local 1034.

PD-2003-1

Docket No.

County of Hunterdon

(Public Employer)

Date:

By:

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, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372