

SYNOPSIS

The Public Employment Relations Commission, in a joint order with the Public Employment Relations Commission Appeal Board, finds that three unfair practice charges and their corresponding Appeal Board petitions should be consolidated with one another for hearing; that the predominant interest in the conduct and outcome of the consolidated matter rests with the Public Employment Relations Commission with respect to all issues relating to the adequacy of the representation fee collection procedures and the appropriate remedy to correct any deficient collection procedures; that the Public Employment Relations Commission Appeal Board has sole jurisdiction over any issue relating to the amount of the representation fees; that the consolidated matter should be heard by an Administrative Law Judge; that the Public Employment Relations Commission shall first render a final decision on all issues within its predominant interest and then transmit the ALJ's initial decision, the Commission's final decision and the record to the Public Employment Commission Appeal Board pursuant to N.J.A.C. 1:1-17.8(b) and (c).

Appearances:

For the Charging Parties-Petitioners, **Hugh L. Reilly** (National Right to Work Legal Defense Foundation, Inc.) and **Jeffrey A. Mintz** (Mesirov, Gelman, Jaffe, Cramer & Jamieson, Esqs.)

For the Respondent, Communications Workers of America, AFL-CIO and Local 1032, CWA, **Michael T. Leibig, Esq.** and **Steven P. Weissman, Esq.**

For the Respondent, Rutgers Council, AAUP Chapters, **Paul Schachter, Esq.** (Reinhardt & Schachter, Esqs.)

William Anderson, Alan Olsen and Paul H. Robinson, et als. ("petitioners") are public employees who pay representation fees in lieu of dues to majority representative organizations pursuant to N.J.S.A. 34:13A-5.5 et seq. The petitioners were all named plaintiffs in lawsuits filed in the United States District Court which, along with another lawsuit involving organizations affiliated with the New Jersey Education Association, resulted in Robinson v. N.J., 547 F. Supp. 1297 (D.N.J. 1982); Olsen v. CWA, 559 F. Supp. 754 (D.N.J. 1983); supp. opin. 565 F. Supp. 942 (D.N.J. 1983), rev'd and rem'd 741 F.2d 598 (3d Cir. 1984), rehearing en banc den. 741 F.2d 598 (1984), cert. den. 469 U.S. 1228 (1985) ("Robinson I") and, following remand, Robinson v. N.J., 806 F.2d 442 (3d Cir. 1986), cert. den. 481 U.S. 1070 (1987) ("Robinson II"). The petitioners filed unfair practice charges with the Commission and petitions with the Appeal Board after the United States Supreme Court declined to review Robinson II.

Anderson, Olsen and the other employees joining in their respective filings are represented for purposes of collective

negotiations by the Communications Workers of America and its affiliate, Local 1032. Robinson and his co-filers are employed in a unit represented by the Rutgers Council of AAUP Chapters, an affiliate of the American Association of University Professors.

The unfair practice charges allege that CWA (CI-H-88-23 and CI-H-88-27) and Rutgers Council (CI-H-88-26) violated N.J.S.A. 34:13A-5.4(b)(1) and (5), N.J.S.A. 34:13A-5.5 and N.J.S.A. 34:13A-5.6. The Appeal Board filings are essentially identical to the charges. Both read in relevant part:

Petitioners object to:

A) the procedures employed to collect representation fees, which do not meet Chicago Teachers Union v. Hudson, 106 S.Ct. 1066 (1986) and Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 106 S. Ct. 1388 (1986).

B) the amount collected, which exceeds those collective bargaining costs allowed by Abood v. Detroit Board of Education, 431 U.S. 209 (1977) and Ellis/Fails v. BRAC, 466 U.S. 435 (1984).

On December 10, 1987 the unfair practice charges were amended to allege more specifically in paragraph A how the collection procedures violated Hudson and Boonton. The amendment also clarified paragraph B to allege that the improper pre-collection procedures identified in paragraph A allowed the respondents to "collect and expend petitioners' monies for non-bargaining purposes."

On April 19, 1988, the Commission's Director of Unfair Practices issued Complaints on each unfair practice charge.

On April 20, 1988, the Appeal Board transferred the petitions to the Office of Administrative Law ("OAL") for hearing. Petitioners moved to have the petitions and unfair practice charges consolidated and to have a predominant interest determination made pursuant to N.J.A.C. 1:1-17.1 et seq.

On August 30, 1989, Administrative Law Judge Joseph Lavery determined that the cases should be consolidated and that the Appeal Board has the predominant interest pursuant to N.J.A.C. 1:1-17.5. Neither party has excepted to Judge Lavery's ruling.^{1/} The Appeal Board and the Commission jointly requested an extension of the 45 day period to review the predominant interest determination in order to issue this joint order. We have reviewed the parties' submissions to Judge Lavery.

Judge Lavery's ruling outlines and accepts the petitioners' position. The respondents assert that these cases are concerned primarily with the adequacy of the procedures used to collect the representation fees and not with the amount of the fee. Robinson II identified the issue which the federal courts had abstained from deciding as "What set of procedures does [N.J.S.A. 34:13A-5.5 et seq.] require to be followed in the implementation of a collectively bargained agreement to collect representation fees from non-members?" 806 F.2d at 448. Thus they contend that the primary issue is within the unfair practice jurisdiction of the Commission.

^{1/} The rules of the OAL do not provide for additional submissions by the parties after an Administrative Law Judge has made a predominant interest ruling. See N.J.A.C. 1:1-17.7

Respondents concede that the Appeal Board may review the adequacy of fee collection procedures as a means of determining whether a refund is due. However, they note that in cases where questions about the amount of a representation fee have been settled or resolved, the Appeal Board loses jurisdiction to review the adequacy of the fee collection procedures. See Daly and NJEA, A.B.D. No. 90-3, 15 NJPER 548 (¶20225 1989), appeal pending App. Div. Dkt. No. ____; Wodzinski v. Woodbridge Tp. Ed. Ass'n, A.B.D. No. 88-5, 14 NJPER 381 (¶19149 1988).^{2/}

We disagree with the Administrative Law Judge's conclusions concerning the Commission's jurisdiction. In Boonton, the Commission explained why it had "unfair practice jurisdiction under N.J.S.A. 34:13A-5.4(a)(1) and (b)(1) to determine whether the statutory and structural conditions for deduction of the representation fees are in place..." 9 NJPER at 478. The Supreme Court did not question that explanation or limit the Commission's jurisdiction to consider and remedy alleged deficiencies in fee collection procedures. The Commission therefore reasserted jurisdiction in Bacon and District 65, UAW, P.E.R.C. No. 87-72, 13 NJPER 57, 60 (¶18025 1986). Bacon found that deficiencies in District 65's fee collection procedures constituted an unfair practice and ordered that the system be reconstructed to comply with

^{2/} In its first Daly opinion, Daly v. High Bridge Teachers Ass'n, A.B.D. No. 89-1, 14 NJPER 700 (¶19300 1988), the Appeal Board made a preliminary ruling on the adequacy of the Association's fee collection procedures. At that point, petitioner Daly was seeking a refund of representation fees through his Appeal Board petition. He had not filed an unfair practice charge.

Boonton and Hudson. The Appellate Division affirmed for the reasons stated in the Commission's decision and the Supreme Court denied certification. App. Div. Dkt. No. A-2994-86T8 (8/16/88), certif. den. 114 N.J. 308 (1988). The Commission therefore has jurisdiction over the first set of issues in the charges and petitions.

The Appeal Board has jurisdiction to consider the amount of the fees, that is the second set of issues in the charges and petitions. We will assume that it also has jurisdiction to consider the adequacy of the procedures when a representation fee payer couples those claims with a claim concerning the amount of the fees in a single filing and thereby seeks the most direct course for obtaining a refund. The Appeal Board's jurisdiction to consider fee collection procedures in such a case would be ancillary, i.e. a means to an end. By contrast, the Commission's jurisdiction to consider fee collection procedures is direct and primary, i.e. an end in itself.

Here the petitioners have voluntarily chosen to file in both agencies after lengthy litigation in federal court. Therefore, the Appeal Board's ancillary jurisdiction to consider collection procedures as part of a single challenge to a representation fee is not needed.

Applying the predominant interest standards listed in N.J.A.C. 1:1-17.5 we conclude:

The Commission has jurisdiction over the adequacy of the respondent's fee collection procedures and the Appeal Board has

ancillary jurisdiction over that issue. Jurisdiction is not mandatory for either agency. N.J.A.C. 1:1-17.5(a)(1). The Appeal Board has mandatory jurisdiction over the amount of the representation fee. The Commission does not have jurisdiction over that issue.

Based upon the pleadings, the parties' arguments and the procedural background including the federal court litigation, the predominant issue in these cases is the adequacy of the fee collection procedures. The resolution of that issue would substantially affect any remaining issues relating to the appropriateness of the fee.^{3/} N.J.A.C. 1:1-17.5(a)(2)

The issues extend beyond the parties' interests, but are of equal concern to the Commission and the Appeal Board. N.J.A.C. 1:1-17.5(a)(3).

If the petitioners are able to prove that the fee collection procedures are inadequate, the Commission has the power to order that the procedures be corrected. See Bacon. The Appeal Board does not have equivalent or direct remedial power. See Daly, A.B.D. No. 90-3. N.J.A.C. 1:1-17.5(a)(4).

Because the alleged inadequate fee collection procedures allegedly affects the amounts charged as representation fees, the common issue is not sufficiently severable from the remainder of the controversy, i.e. the appropriateness of the representation fee, so as to eliminate the possibility that there would be non-duplicative

^{3/} The amended unfair practice charges state that the alleged deficiencies in the collection procedures caused the respondents to assess improper fees.

factual and legal determinations if each agency were to separately hear the cases. N.J.A.C. 1:1-17.5(a)(5).

Having considered the record and the Administrative Law Judge's order, and having made an independent evaluation of the record, the Public Employment Relations Commission and the Public Employment Relations Commission Appeal Board make the following determination in the matter.

ORDER

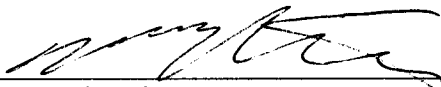
The Public Employment Relations Commission and the Public Employment Relations Commission Appeal Board ORDER that each unfair practice charge and its corresponding Appeal Board petition [Docket Nos. AB No. 88-8 and CI-H-88-23 (Anderson et al. and CWA); AB No. 88-9 and CI-H-88-27 (Olsen et al. and CWA); and AB No. 88-14 and CI-H-88-26 (Robinson et al. and Rutgers Council, AAUP)] be consolidated with one another for hearing; and it is

FURTHER ORDERED that the predominant interest in the conduct and outcome of the consolidated matter rests with the Public Employment Relations Commission with respect to all issues relating to the adequacy of the representation fee collection procedures and the appropriate remedy to correct any deficient collection procedures; and it is

FURTHER ORDERED that the Public Employment Relations Commission Appeal Board has sole jurisdiction over any issue relating to the amount of the representation fees, including whether the fees have been used for chargeable activities and whether the respondents have met the burden of proof established by N.J.S.A. 34:13A-5.6 and N.J.A.C. 1:20-3.2 in setting forth their expenditures; and it is

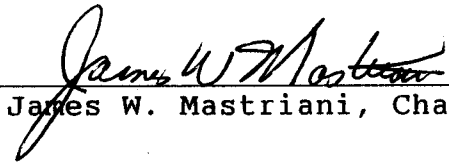
FURTHER ORDERED that pursuant to N.J.A.C. 1:1-17.6(d), these consolidated matters shall be heard by an Administrative Law Judge who, pursuant to N.J.A.C. 1:1-17.8(a), shall render an initial decision disposing of all issues in controversy which shall first be filed with the Public Employment Relations Commission; the Commission shall render a final decision on all issues within its predominant interest and then transmit the initial decision, its final decision and the record to the Public Employment Relations Commission Appeal Board in accordance with N.J.A.C. 1:1-17.8(b) and (c).

DECISION RENDERED BY THE PUBLIC
EMPLOYMENT RELATIONS COMMISSION
APPEAL BOARD ON NOVEMBER 21, 1989



William L. Noto, Chairman

DECISION RENDERED BY THE PUBLIC
EMPLOYMENT RELATIONS COMMISSION
ON NOVEMBER 20, 1989



James W. Mastriani, Chairman

PERC Chairman Mastriani, Commissioners Johnson, Wenzler, Ruggiero, Smith and Bertolino voted in favor of this decision. None opposed. Commissioner Reid abstained from consideration of this decision.

Appeal Board Chairman Noto and Board Members Dorf and Verhage voted in favor of this decision. None opposed.