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State of New York Public Employment Relations Board Decisions from September 19, 1984

New York State Public Employment Relations Board

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Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

#2A-9/19/84

In the Matter of

TOWN OF CHILI,

Employer,

-and-

CASE NO. C-2788

FRANK MOBILIO, et al.,

Petitioner,

-and-

LOCAL 3179, AFSCME,

Intervenor.

FRANK MOBILIO, pro se

BOARD DECISION AND ORDER

The petition herein, which was filed by Frank Mobilio on his own behalf and on behalf of other employees of the Town of Chili, seeks to decertify Local 3179, AFSCME as the negotiating representative of a unit of employees of the Town. The petition does not seek certification of any other employee organization and is not filed on behalf of any such organization. Its purpose is only the decertification of the intervenor. It is supported by a sufficient showing of interest, but there is no declaration of the authenticity of the showing of interest as is required by §201.4(d) of our Rules of Procedure. The Director of Public Employment Practices and Representation (Director) therefore dismissed

the petition, and the matter comes to us on Mobilio's exceptions to the Director's decision.

We conclude that the Director's decision should be reversed because Rule 201.4(d) is ambiguous, and Mobilio might reasonably not have known that a declaration of authenticity was required herein. Rule 201.4(d) provides, inter alia, that the declaration must indicate "the name of the officer or agent executing the declaration, his position with the employee organization and a statement of his authority to execute the declaration on its behalf." This language might be read to indicate that a declaration of authenticity is required only where a petition is filed on behalf of an employee organization. Such an interpretation of the Rule would of course undermine its purpose, which is to prevent an abuse of our processes by whatever organization or individual that submits a showing of interest. Nevertheless, Mobilio might have been misled into thinking that the declaration of authenticity was inapplicable to his petition.[1/]

Accordingly, while we affirm the proposition that a declaration of authenticity is required of an individual petitioner as well as of an employee organization, we excuse Mobilio's failure to file a declaration simultaneously with his petition as required by §201.4(d) of our Rules of Procedure.

1/We shall consider a revision of our Rules of Procedure to make them more clear in this regard.

We therefore give Mobilio ten (10) working days from his receipt of this decision to submit a declaration of authenticity in conformity with §201.4(d) of our Rules.[2/]

NOW, THEREFORE, WE ORDER that, if the declaration of authenticity is timely submitted, the matter be remanded to the Director for further proceedings; if it is not timely submitted, the petition be dismissed.

DATED: September 18, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

2/Compare, Town of Amherst, 13 PERB ¶3074 (1980).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #2B-9/19/84

JEFFERSONVILLE-YOUNGSVILLE FACULTY ASSOCIATION,

CASE NO. D-0237

upon the Charge of Violation of §210.1 of the Civil Service Law

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BOARD DECISION AND ORDER

On July 9, 1984, Martin L. Barr, Counsel to this Board, filed a charge alleging that the Jeffersonville-Youngsville Faculty Association (respondent) had violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a 15-day strike against the Jeffersonville-Youngsville Central School District (District) between April 30 and May 18, 1984. The charge further alleged that as many as 55 teachers in a negotiating unit of 59 participated in the strike.

The respondent proposed to forego the filing of an answer, and to thereby admit the factual allegations of the charge, upon the undertanding that Counsel would recommend, and this Board would acept, a penalty of loss of the respondent's right to have dues and agency shop fees deducted

for a period of one year.[1/]

On the basis of the unanswered charge, we find that the respondent violated CSL §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one and will effectuate the policies of the Act.[2/]

NOW THEREFORE, WE ORDER that the deduction rights which are afforded the Jeffersonville-Youngsville Faculty Association under CSL §208 be suspended commencing on the first practicable date and continuing for a period of one year. Thereafter, no dues or agency shop fees shall be deducted on its behalf by the Jeffersonville-Youngsville Central School District until the respondent affirms that it no longer asserts the right to strike against any

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[1/] In the event that the District makes deductions on behalf of the respondent over a period of less than 12 months, the recommended penalty is intended to suspend the deduction of 100% of the annual dues and agency shop fees.

[2/] The District has filed an objection to the proposed settlement. We note only in response to that objection that the proposed settlement is entirely consistent with Board disposition in previous cases involving strikes of equal or greater duration. Eastchester Teachers Assn., 9 PERB ¶3077 (1976); Orchard Park Teachers Assn., 8 PERB ¶3089 (1975); Yorktown Congress of Teachers, 7 PERB ¶3001 (1974).

government, as required by the provisions of CSL §210.3(g).

DATED: September 19, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #2C-9/19/84

UNITED UNIVERSITY PROFESSIONS, INC.

Respondent,

-and- CASE NO. U-7449

THOMAS C. BARRY,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS, INC.

Respondent,

-and- CASE NO. U-7482

THOMAS C. BARRY,

Charging Party.

BERNARD F. ASHE, ESQ. (IVOR MOSKOWITZ, ESQ., of Counsel), for Respondent

THOMAS C. BARRY, pro se

BOARD DECISION AND ORDER

These matters came to us in June 1984 on the exceptions of Thomas C. Barry to decisions of the Director of Public Employment Practices and Representation (Director) dismissing his charges, both of which allege that the United University Professions, Inc. (UUP) violated the Taylor Law by using part of his agency shop fee payments in the support of activities of a political nature. The Director relied upon our prior approval of UUP's refund procedure which allows it to use

agency shop fee monies in support of political objectives so long as an objecting employee's money is refunded to him thereafter, UUP (Eson), 11 PERB ¶3074 (1981), and dismissed the charges.

Barry argued that, notwithstanding our decision in UUP (Eson), it is illegal for UUP to use his money for a political purpose even temporarily. In support of this proposition, he cited the decision of the U.S. Supreme Court in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, ___ U.S. ___, 17 PERB ¶7511 (1984), which holds, inter alia, that a "pure rebate approach is inadequate." Such a procedure is one that allows a union to collect agency shop fees and spend that money for all purposes including political and ideological causes, subject to a subsequent refund.

In the light of this language, it was necessary that we reexamine the correctness of our interpretation of §208.3 of the Taylor Law in UUP (Eson) as sanctioning UUP's refund procedure. We further examined what alternative procedures would satisfy the statute, if UUP (Eson) was not correct, and what should be done about UUP's current agency shop fee procedure. Accordingly, we consolidated the two cases and invited Barry and UUP to submit memoranda of law concerning these questions. Both have done so, UUP's addressing the merits of the charges and denying any violation of the Taylor

Law. UUP has also submitted a revised agency shop fee and refund procedure.

Having considered these memoranda,[1] we conclude that our decision in UUP (Eson) should be overruled. It sanctioned a pure rebate procedure such as was rejected by the U.S. Supreme Court in Ellis.[2] And as we said in UUP (Eson)[3]:

> the refund requirement was intended to limit the agency shop fee provision to the extent necessary to satisfy the prerequisite for constitutionality announced by the U.S. Supreme Court in Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

Following Abood, Ellis is the most recent examination of the question by the Supreme Court. It permits an agency shop fee where the union has adopted a procedure involving a precise advance reduction of the fee which assures that the union will not compel an objecting nonmember to lend it money that will be spent on political or ideologocial causes. Alternatively, an agency shop fee would be sanctioned where the union places the monies so collected in an interest-bearing escrow account and it makes an

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[1] We have also considered a memorandum amicus curiae from the Right to Work Legal Defense Foundation.

[2] See also Hudson v. Chicago Teachers Union, ___ F2d ___ (7th Circ., Sept. 6, 1984) which underscores the constitutional basis of the Ellis decision.

[3] Supra, at p. 3106.

appropriate refund from that account before taking possession of its share of the money. By its terms, §208.3 of the Taylor Law can only be satisfied by a refund procedure.[4/] Accordingly, as a refund procedure can be valid only if the agency shop fee is held in an escrow account, we understand §208.3 as sanctioning an agency shop fee only when such a procedure exists.

As we have noted, UUP has submitted a revised agency shop fee/refund procedure which, it asserts, satisfies Ellis.[5/] This revised procedure does not utilize an

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[4/]Section 208.3 of the Taylor Law permits an employee organization to receive an agency shop fee if it "has established and maintained a procedure providing for the refund to any employee demanding the return any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

[5/]The revised procedure provides in pertinent part:

> Thereafter the agency fee shall be reduced in accordance with such objections by the approximate proportion of the agency fees spent by the union for such purposes, based on the latest fiscal year for which there is a completed and available audit. After the end of the fiscal year, and after the audit of the books is completed, the union shall determine the approximate proportion of agency fees actually spent by the union for such purposes during the fiscal year. After such final rebate determination is made an adjustment, if necessary, will be made in the refund amount. Objectors will be required to refund to the union any excess they may have received.

escrow account and is a less than precise advance reduction system. Accordingly, for the reasons we have stated herein, we find it inadequate under §208.3 of the Taylor Law.

To satisfy both Ellis and the Taylor Law, we find that UUP must deposit 100% of all the agency shop fees of nonmembers who object to the use of their agency shop fees for political or ideological causes by demanding a refund, in an interest-bearing escrow account maintained in an institution regulated by the Banking Department of this State. This, of course, requires UUP to give all nonmembers an opportunity to make such a demand before it commingles their agency shop fees with its members' dues.

After making its calculation of the amount of the refund, with interest, and issuing payments to the nonmembers who had demanded it, UUP must wait until the time to appeal the amount of the refund has passed before it may take any money from the escrow account. Then, it may take the monies attributable to the nonmembers who had initially filed a demand but who have not appealed. The same practice shall be followed with respect to all the internal appellate steps. UUP may liquidate the escrow account upon the completion of its internal appellate steps so long as the final step involves a decision by a neutral, as contemplated by Abood. Absent such a final step, UUP may not take possession of the agency shop fee payments of those nonmembers who file a court claim until a judicial determination has been rendered.

Barry argues that the use of such a "neutral" should not be permitted as it is inherently unfair, the "neutral" being appointed by and beholden to UUP. This argument was considered by the U.S. District Court for the Northern District of Ohio, and rejected in Tierney v. City of Toledo, ___ F. Supp. ___ (Aug. 2, 1984). That Court said: "The fact that the procedure is an internal union procedure does not make it inherently unfair."[6/] We note that in Hudson v. The Chicago Teachers Local, ___ F2d ___ (7th Circ., Sept. 6, 1984), the 7th Circuit found an internal union review procedure inherently inadequate without the availability of "a prompt administrative hearing before the Board of Education or some other state or local agency . . ." The possible dispute between the federal courts is not material here because, as we said in PEF (Raterman), 15 PERB ¶3024 (1982), a nonmember need not exhaust the internal union review procedure before challenging a union determination in a plenary court action.

Addressing the question of remedy, Barry argues that inasmuch as UUP's refund procedure does not satisfy §208.3 of the Taylor Law as we must reinterpret it to satisfy Ellis, a remedial order should be issued requiring UUP to refund all agency shop fees collected by it from all nonmembers for the 1983-84 academic year. He further urges this Board to order

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[6/]Accord Leemhuis v. Public Employee Federation, 17 PERB ¶7518 (Sup. Ct., Sch. Co., Sept. 10, 1984).

UUP to cease and desist from collecting any further agency shop fees until it has adopted an acceptable refund procedure. We reject these positions.

UUP established its agency shop fee and refund procedure and maintained it in accordance with the standards prescribed by us in UUP (Eson). It could not reasonably be held to have anticipated the change in standards that we now determine are required by the Supreme Court's recent decision in Ellis. Accordingly, any remedial order that we issue herein should be prospective in its application. This approach is similar to the one we followed in UUP (Eson), supra. There too we permitted UUP to continue to collect agency shop fees provided that it would make appropriate changes in its refund procedure expeditiously. Further support for this approach may be found in recent federal court decisions, Champion v. State of California, ___ F2d ___, (9th Circ., June 30, 1984) and Robinson v. State of New Jersey, ___ F2d ___ (3d Circ., August 2, 1984). These courts denied injunctive relief for alleged violations of the Ellis standard. In vacating an injunction that had been granted by the District Court, the 3rd Circuit noted, with disapproval, that "the effect of the injunction relief has been to permit the free-rider problem which the Supreme Court addressed in Abood to manifest itself under the aegis of the injunction."

We also reject Barry's argument that the remedial order should apply to all nonmembers. He asserts that the mere

fact of nonmembership should be presumed to be a sufficient indication that the employee does not consent to UUP's expenditure of any part of his agency shop fee for political or ideological causes. We cannot make such a presumption. Moreover, §208.3 of the Taylor Law merely requires the refund of agency shop fee deductions to nonmembers who make a "demand", and it is only nonmembers entitled to a refund whose agency shop fees need be placed in escrow. This approach has been followed by the United States District Court in Tierney v. City of Toledo, supra. It also appears to satisfy constitutional requirements according to the 3rd Circuit, Robinson v. State of New Jersey, supra. That decision indicates that the obligation to place agency shop fees in escrow is "triggered by the filing of an objection letter with the union."

UUP has not yet made any refund for the agency shop fees that it collected for the 1983-84 academic year. Indeed, the requests for such refunds are due during this month of September 1984, UUP's procedure providing for a demand at the end of the academic year in which the fees were collected. We direct UUP to place the agency shop fees collected from Barry for 1983-84 in an interest-bearing escrow account immediately.[7/]

[7/]Compare UUP (Eson), 12 PERB ¶3117, affirmed UUP v. Newman, 80 AD2d 23 (3rd Dept., 1981), 14 PERB ¶7011. Mot Lv App Den 54 NY2d 611 (1981), 14 PERB ¶7026. There, as here, the remedy for UUP's misuse of agency shop fee monies was to make charging party whole and, with respect to other nonmembers, to require UUP to cease and desist from such misuse.

For the future, UUP must give nonmembers an opportunity to object to the use of their agency shop fees for political or ideological causes before commingling those fees with members' dues. Thus, current nonmembers should be given an immediate opportunity to object to such use of their 1984-85 agency shop fees by filing a demand for a refund. The procedure adopted by UUP to afford nonmembers this opportunity should utilize the same manner of notice to the employees as it shall require of them to notify it of their demand for a refund. For current nonmembers, this process should be completed by October 31, 1984. Persons who become members of the negotiating unit represented by UUP after the date of this order who do not join that organization should be given an opportunity to object to the use of their agency shop fees for political or ideological causes before any agency shop fees are deducted from them.

Starting November 7, 1984, 100% of all the agency shop fees collected from nonmembers who have demanded refunds should be deposited in an interest-bearing escrow account, the proceeds of which should be distributed in accordance with the procedure specified herein.

Barry argues that UUP's refund procedure has been inadequate not only in that it has permitted UUP to borrow money to be used for political or ideological expenditures from objecting nonmembers, but also in that there is no

adequate procedure to review UUP's determinations as to what expenses may be properly charged to objecting nonmembers. To the extent that Barry complains about the reliance upon internal UUP procedures, we have already rejected his argument.

Going beyond that, Barry argues that this Board must afford him and other objecting nonmembers a forum in which to challenge the internal determinations made by UUP as well as those made by the neutral it appoints. He recognizes that we have already rejected this argument in Hampton Bays, 14 PERB ¶3018 (1981) and he urges us to overrule that decision. There is nothing in Ellis that is inconsistent with our determination in Hampton Bays that such challenges should be made in a plenary court action. We are also not pursuaded by Hudson or anything else in Barry's arguments or those of the Right to Work Legal Defense Foundation, to overrule Hampton Bays.

NOW, THEREFORE, WE ORDER UUP to:

1. Place the 1983-84 agency fee payments of Barry in an interest-bearing escrow account, such funds to be maintained therein until there is a final determination of the amount of the refund, at which time UUP may make a distribution of the escrow account in

accordance with such final determination;

2. Submit to this Board, by October 26, 1984, a revised refund procedure that is consistent with this decision;

3. Cease and desist, on November 7, 1984, from commingling agency shop fee payments from any nonmember with members' dues unless it has established a refund procedure consistent with this decision which has been approved by this Board prior to such date.

In all other respects, we affirm the decision of the Director dismissing the charges.

DATED: September 19, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #2D-9/19/84

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Respondent,

-and- CASE NO. U-7323

ROSELLA McCREADY,

Charging Party.

ROSELLA McCREADY, pro se

BOARD DECISION AND ORDER

The charge herein was filed on February 15, 1984 by Rosella McCready, a paraprofessional employed by the Board of Education of the City School District of the City of New York (District). It alleges that the District improperly transferred her on September 7, 1983 from P.S. 131 to P.S. 119 in that she did not consent to the transfer and there were other paraprofessionals with less seniority than she who could have been given the assignment at P.S. 119. The charge also alleges that her union, United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) violated the duty of fair representation it owes her in that it refused to process her grievance complaining about the transfer, such refusal being improperly

motivated. McCready's papers show that the UFT chapter representative informed her on September 7 and September 8, 1983, and confirmed in writing on September 22, 1983, that the grievance was without merit in that the relevant collective bargaining agreement does not provide for seniority-based transfers.

The Director of Public Employment Practices and Representation (Director) dismissed the charge on the ground that it is not timely.[1/] The matter comes to us on McCready's exceptions to that decision. Acknowledging that the charge is not timely, she asks us to excuse its lateness on the ground that she did not know the identity of the agency to which she might complain at the time of the violation. Her exceptions are accompanied by copies of correspondence showing that she had attempted to complain to other governmental agencies; however, that correspondence also shows that on November 28, 1983, the National Labor Relations Board wrote to her and identified this Board as the entity probably having jurisdiction over her complaint.

1/Section 204.1(a)(1) of our Rules of Procedure provides:

> An original and four copies of a charge that any public employer or its agents, or any employee organization or its agents, has engaged in or is engaging in an improper practice may be filed with the Director within four months thereof by one or more public employees or any employee organization acting in their behalf, or by a public employer.

We affirm the decision of the Director. The State Supreme Court has held that we may not disregard our rules and accept a petition which is not timely. Cattaraugus County Chapter of CSEA v. PERB, 3 PERB ¶7005 (Sup. Ct., Renss. Co., 1970). If there be circumstances where we need not follow this ruling, it would not be in a case, such as this, where charging party was informed of the possible jurisdiction of this agency when she still had six weeks to file a timely charge.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: September 19, 1984
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

David C. Randles

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of #3A-9/19/84

VILLAGE OF TIVOLI,

Employer,

-and- CASE NO. C-2775

NEW YORK STATE FEDERATION OF POLICE, INC.,

Petitioner,

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the New York State Federation of Police, Inc. has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All police officers in the ranks of sergeant and patrolmen.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Federation of Police, Inc. and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: September 19, 1984
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member