Cosentino v. L.237, IBT, CEU, 29 OCB 44 (BCB 1982) [Decision No. B-44-82 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

JERRY COSENTINO,

Petitioner,

-and-

CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

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DECISION NO. B-44-82

DOCKET NO. BCB-527-81

DECISION AND ORDER

A verified improper practice petition was filed by petitioner Jerry Cosentino on September 10, 1981, in which it was charged that respondent City Employees Union Local 23.7, International Brotherhood of Teamsters, (hereinafter "Local 237" or "the Union") has failed to establish a lawfully adequate agency fee refund procedure, as required by the Taylor Law,[1] §208.3(b), and has thereby interfered with, restrained, and coerced petitioner in the exercise of his rights under 51173-4.1 of the New York City Collective Bargaining Law (hereinafter "NYCCBL"), in violation of §1173-4.2(b)(1) of the NYCCBL.

[1] Civil Service Law, Article 14.

Local 237 filed its verified answer on September 21, 1981. The petitioner, by his attorney, submitted a verified reply on September 23, 1981.

Thereafter, at the direction of Board Chairman Anderson, the Trial Examiner designated by the office of Collective Bargaining wrote to the parties on March 15, 1982, to request the submission of written statements of position concerning certain issues raised by the pleadings. The petitioner's attorney submitted his statement on March 23, 1982, and the statement of Local 237's attorney, in the form of an affirmation, was received on May 7, 1982.[2]

Background

Petitioner Jerry Cosentino is an employee of the New York City Housing Authority in a bargaining unit for

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[2] The Trial Examiner's letter requested that all statements be filed by march 31, 1982. By letter dated May 10, 1982, petitioner's attorney has objected to consideration of Local 237's May 7 submission, since it was filed after the Trial Examiner's deadline and since no extension of time was requested.

This Board does not condone the respondent's unexplained failure to adhere to the Trial Examiner's deadline. However, in view of the importance of the issues raised in this proceeding, and since this is a case of first impression within our jurisdiction, we believe that we should determine this natter upon the fullest possible record. Accordingly, we have decided to consider the respondent's belated submission as Part of the record in this case.

which Local 237 is the certified collective bargaining representative. The petitioner is not a member of Local 237.

Pursuant to the authorization granted in §208.3(b) of the Taylor Law and §1173-4.2(a) of the NYCCBL, Local 237 and the public employer, the New York City Housing Authority, have included in their collective bargaining agreement an agency shop provision, which requires the deduction from the wages of non-members of an agency fee equal in amount to the union dues deducted from the wages of union members. These agency fees, together with union dues deducted by the employer, are forwarded to the union for its use.

Agency fees have been deducted from the petitioner salary continuously from September, 1977, to the present time. By letter dated July 6, 1981, petitioner requested that Local 237 refund "excess monies" deducted as agency fees, and furnish him with the following information:

> "a. A detailed breakdown [sic] of how the Agency Shop Fee I am paying is allocated to cover my share of the collective bargaining expenses [sic].
>
> b. An itemized, audited and notarized statement of the receipts and expenditures of monies paid in by members of your Local.

c. A copy of the refund procedure, and forms if required."

In a letter dated July 14, 1981, Local 237's President responded to petitioner's request, stating:

> "In as much as Local 237, Teamsters has not expended any agency shop fee money received for either ideological or political purposes, there is no portion of the agency shop fee which you paid, due to be returned to you."

The Local President's letter did not provide the financial information sought by petitioner, nor did it include a copy of any refund procedure.

Subsequently, by letter dated July 21, 1981, petitioner again wrote to Local 237's President, asserting that the Union's response was "insufficient" and "in violation of my rights under Civil Service Law 1202". Petitioner explained in the letter his understanding of the Union's obligations to agency fee payers under the Taylor Law, and he directed the Union's attention to an attached copy of a recent decision of the New York State Public Employment Relations Board (hereinafter "PERB") in the case of Hampton Bays Teachers Association (Sullivan).[3] He concluded his letter by stating:

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[3] 14 PERB ¶3018 (1981)

> "In the interest of fair play, I am willing to give you one more chance to comply with your duty to establish and maintain a refund procedure. Your right to receive agency fees is conditioned on your satisfaction of that duty.
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> You have thirty days from the date of this letter to provide me with financial information in satisfaction of your duty as defined in Hampton Bays. If I do not receive such information by that time, I will be forced to vindicate my rights through the full processes of the law."

Local 237 did not reply to petitioner's further request within the thirty day limitation which petitioner purported to impose. However, in a letter dated September 2, 1981, the Union’s attorneys wrote to petitioner concerning his rebate request. Enclosed with the attorneys' letter was a copy of Local 237's agency fee rebate procedure. Petitioner was informed that his letter of July 6, 1981 would be deemed a timely rebate request for the period of calendar year 1981. Additionally, petitioner was advised that his rebate request would be administered “... as though it had been filed with any 1982 requests we may receive." The Union's explanation for its delayed consideration of petitioner's request was that:

> "Due to the still unsettled state of of the law, the Courts have not finally ruled on the information to which you are entitled.
>
> We believe that clarifications of our obligations will be forthcoming [sic] from the Appellate courts very shortly. At such time, our accountants will proceed to assemble such information to which you may be entitled. This process will necessarily take some time. Therefore, your 1981 request will be processed on the 1982 timetable."

Shortly after receipt of the letter from Local 237's attorneys, petitioner commenced this improper practice proceeding on September 10, 1981.

Petitioner's Position

Position's of the Parties

The petition alleges that Local 237 has knowingly and willfully failed to maintain a lawful agency fee ref und procedure, and that its failure to do so has interfered with, restrained, and coerced the petitioner in the exercise of his rights under NYCCBL §1173-4.1.

Petitioner notes that when he first requested a refund, on July 6. 1981, the only response he received was a "form letter" which claimed that no refund was due, and which failed to respond to his request for a copy of the Union's refund procedure. Petitioner argues that,

at that time, Local 237 entirely failed to maintain a refund procedure and similarly failed to make any determination as to the refundability of its own expenditures.

The petitioner further challenges the sufficiency of the refund procedure promulgated by Local 237 and supplied to petitioner on September 2, 1981, on the grounds that (a) the procedure does not provide for a refund of the non-chargeable expenditures of Local 237's affiliates, including the I.B.T.; (b) the appellate steps of the procedure are redundant and can serve no purpose but delay; and (c) that part of the procedure which provides for review by the courts, improperly purports to diminish a statute of limitations and to limit venue.

The petitioner initially complained of Local 237's failure to furnish financial disclosure consistent with the decisions of PERB on this issue, but later clarified its position by alleging that adequate financial disclosure must be provided at the time the union tenders its refund determination to the applicant, a point in time not reached in the record of this case.[4]

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[4] We have been informed that the Union has made and tendered to petitioner a determination and refund since the date of the last pleading submitted in this case. This fact is not a part of the record before us, and has not been contested by the parties at this time. Therefore, we do not consider this fact in reaching our decision herein. However, see discussion on page 26, infra.

The petitioner argues that the maintenance of a lawful agency fee refund procedure is a condition precedent to the receipt of agency fee deductions, pursuant to 5208.3(b) of the Taylor Law. Petitioner contends that because of Local 237's failure to maintain a lawful refund procedure, it should be penalized by the suspension of its agency fee check-off privilege for a period of one year, and it should be required to refund to petitioner the full amount of agency fees deducted from his salary during the last fiscal year, together with interest.

Local 237's Position

Local 237 asserts several different affirmative defenses to the petitioner's improper practice charge. First, Local 237 argues that since the petition is based upon the claimed failure of the Union to maintain a lawful refund procedure, and since the Union in fact provided a copy of its procedure to the petitioner on or about September 2, 1981, a date prior to the date of verification of the improper practice petition, the improper practice charge is therefore moot and should be dismissed.

Second, Local 237 alleges that while the petitioner's objection to the use of his agency fees for purposes other than collective bargaining, contract administration, and grievance adjustment dates back as far as 1977, he failed to formalize that objection through the filing of an improper practice petition until a date more than four months after the commencement of the Union's then-current fiscal year. Specifically, Local 237 alleges that its fiscal year began on January 1, 1981, but the improper practice petition was not filed until September 10, 1981. Accordingly, argues Local 237, the petition is barred by the four-month statute of limitations contained in §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules"), and must be dismissed.

Third, the Union contends that petitioner lacks standing to represent or seek relief on behalf of all agency fee payers in the bargaining unit. The Union alleges, upon information and belief, that no other agency fee payer in the unit has ever filed a rebate request. Local 237 concludes that on this basis, the petitioner's request for the suspension of the Union's agency fee check-off privilege for all agency fee payers

in the unit should be denied.

Fourth, Local 237 asserts that the question of the Union's compliance with the agency shop provisions of the Taylor Law and the NYCCBL cannot constitute an improper public employee organization practice within the meaning of §1173-4.2(b) of the NYCCBL. For this additional reason, the Union submits that the petition must be dismissed.

Fifth, Local 237 claims that the PERB decisions relied upon by petitioner, "... are still being, or recently were litigated" and that because of this fact, "... the..state of the respondent's obligations to agency fee payers is unsettled." The Union implies that it was because of these circumstances that a refund procedure was not supplied to petitioner until September 2, 1981. Local 237 alleges that petitioner was not prejudiced by any of its actions and that the refund procedure supplied on September 2, 1981, was lawful and adequate. Local 237 concludes that the violations of law alleged by petitioner, even if true, are therefore de minims, and do not require the granting of relief by this Board.

Discussion

Before considering the merits of the petitioner's complaint, we first address the respondent's procedural

defenses. We have-carefully considered each of Local 237's contentions, and have found them all to be without merit, for the following reasons:

First, the Union's argument that this matter is moot must be rejected. An improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law, and this matter of deterring future violations, remain open to consideration. Moreover, in the present case, the petitioner challenges not only the Union'S alleged failure to maintain a lawful refund procedure, but also the legal sufficiency of the procedure promulgated by the Union and supplied to the petitioner two months after his initial request. On this basis. we find that this matter is not moot.

Second, Local 237's defense based on the four month statute of limitations[5] is without merit. Local 237 contends that the four month period should be measured from January 1, 1981, the commencement of the Union's fiscal year during which the improper practice petition was filed. Clearly, the petition was not filed

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[5] OCB Rules, §7.4. This limitation is consistent with PERB's rule on this subject. PERB Rules of Procedure, §204.1.

within four months of that date. But, the Union has failed to allege what relevance the start of its fiscal year has to the improper practice charge herein. We find that the maintenance of a lawful refund procedure is a continuing responsibility for any union which receives agency shop fees. It is not an obligation which arises only at the commencement of its fiscal year. While we need not here determine the cut-off date for challenging the legal sufficiency of an _existing_ refund procedure, we do hold that a petition challenging a union's failure to maintain any refund procedure may be filed at _any_ time.

Third, we decline to adopt the Union's argument that the petitioner lacks standing to request the suspension of the union's agency fee check-off privilege for all agency fee Payers in the unit. The fact that other agency fee payers in the unit have not filed rebate requests is irrelevant to the question of the Union's compliance with the statutory obligation to maintain an agency fee refund procedure. While the Union is correct in alleging that the OCB Rules do not authorize the maintenance of a class action, that fact does not serve to limit this Board's power to grant appropriate relief for violations of law. An individual employee may properly seek to vindicate the statutory

rights of all affected employees, regardless of whether those others have expressed an interest in their rights, and this Board is empowered to fashion a remedy sufficient to ensure compliance with the provisions of the NYCCBL and Taylor Law with respect to the rights of all affected employees. For this reason, we reject the Union's attempt to foreclose our consideration of all possible appropriate remedies, in the event that a remedy is warranted.

Fourth, the Union's claim that the issue of its compliance with the agency shop provisions of the law cannot Constitute an improper practice within the meaning of the NYCCBL, has previously been considered and rejected by PERB in cases brought under the substantially equivalent improper practice provisions of the Taylor Law. In United University Professions (Eson), 12 PERB ¶3117 (1979), PERB held that a union's misuse of agency shop fees constituted interference with, restraint, and coercion of a public employee in the exercise of his statutory right to refuse to join or participate in a union. The Appellate Division, Third Department affirmed PERB's determination, sub nom. United University Professions v. Newman, 80 A.D. 2d 23, 14 PERB ¶7011 (1981), expressly upholding PERB's jurisdiction over matters

related to the deduction of agency shop fees. This holding has been reaffirmed in numerous later cases.[6]

The NYCCBL similarly guarantees to public employees the right to refrain from joining or assisting public employee organizations,[7] except to the extent of paying agency shop fees[8] subject to the provisions of the Taylor Law.[9] We agree with PERB and the courts that a misuse of agency shop fees or a failure to comply with the provisions of the Taylor Law regarding such fees would constitute interference with, restraint, or coercion of an employee's rights under the NYCCBL. Such acts would constitute an improper practice within the meaning of §1173-4.2 W (1.) of the NYCCBL. Accordingly, the allegation of such acts is clearly a matter that is within our jurisdiction under the law.

Fifth, we find that Local 237's contention that its delay in providing a copy of its refund procedure to petitioner was due to the "unsettled state" of the law, and that its violation of the law, if any, was de minims, may be considered by this Board as mitigating factors in determining an appropriate remedy, but these excuses do not act as a bar to our consideration of the of the Taylor Law.

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[6] See e.g., United University Professions (Barry), 173 PERB ¶3090 (1980) aff'd __ A.D. 2d __ , 15 PERB ¶7001 (3d Dept. 1982), mot. for leave to appeal denied, N.Y. 2d__ , 15 PERB ¶7010 (1982); Westbury Teachers Association (Handy), 14 PERB ¶3063 (1981); Hampton Bays Teachers Association Sullivan), 14 PERB ¶3018 (1981).

[7] NYCCBL §1173-4.1.

[8] NYCCBL §1173-4.2(a)

[9] Civil Service Law §208.3(b).

merits of the petition. A union's motivation for failing to comply with the law, and the extent to which anyone was prejudiced by such failure, do not affect the question of whether the law was in fact violated. They may however, affect the remedy, if any, which we are prepared to order on account of a violation of law. Therefore, we will dismiss this defense, but will bear the Union's contentions in mind as part of our consideration of the merits of the petition.

We turn now to the substantive issue before us. The subject of the permissible use of agency shop fees, and the related question of the adequacy of procedures for the refund of such fees used for non-permissible purposes, have engendered much litigation before administrative labor relations agencies and the courts since the United States Supreme Court's landmark ruling on these matters in Abood v. Detroit Board of Education, 431 U.S. 209, 95 LRRM 2411 (1977). Since the time that the Taylor Law was amended[10] to authorize the negotiation of agency shop agreements, numerous challenges to unions' expenditure of agency shop fees and to the sufficiency of union's refund procedures have been brought before PERB and the New York courts. In all this time, however, no such

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[10] Laws of 1977, Ch.677, §3, and Laws of 1977, Ch.678, 2.

challenge has arisen under the jurisdiction of this Board, until the commencement of the instant improper practice proceeding. Accordingly, since this is a case of first impression under the NYCCBL, we take this opportunity to review the basic principles underlying the subject of agency shop fees, as they relate to the claim of the petitioner herein.

The petitioner asserts that the Union failed to maintain a lawful agency fee refund procedure, as required by the Taylor Law, and that the refund procedure belatedly promulgated by the Union is, on its face, inadequate. The Union does not deny that when it received petitioner’s initial refund request, it wrote to him, indicating that he was not entitled to any refund, and failing to respond to his request for a copy of the Union's refund procedures. Local 237 argues that it did this because the state of the law concerning the Union's obligations to agency fee payers was "unsettled". Moreover, Local 237 contends that it supplied petitioner with a copy of a refund procedure on September 2, 1981, and that such procedure is in compliance with the requirements of law. In order to properly evaluate the parties' respective contentions, it is necessary to undertake a brief review of the established law on this subject.

The starting point in our review is the decision of the United States Supreme Court in Abood v. Detroit Board of Education, 431 U.S. 209, 95 LRRM 2411 (1977). In that case, the Court ruled that an agency shop agreement entered into pursuant to statutory authorization did not violate public employees' First Amendment right to freedom of association, to the extent that agency fees were used for purposes of collective bargaining, contract administration, and grievance adjustment. However, the Court also ruled that the First Amendment precludes a union from requiring public employees to contribute, by means of agency shop fees, to support ideological or political causes unrelated to collective bargaining, contract administration, and grievance adjustment.

The Court recognized that the compulsory payment of agency shop fees may have an impact upon First Amendment interests, but held that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the agency shop and union shop to our system of labor relations. The Court observed that an agency shop or union shop arrangement has been thought to distribute fairly the cost incurred by the union in representing all employees in a bargaining unit, among all those who benefit from such representation. The Court stated that this arrange-

ment counteracts the incentive employees might otherwise have to become "free riders"- to refuse to contribute to the union while obtaining the benefits of union representation which necessarily accrue to all employees.

In reaffirming that employees' First Amendment rights would be violated by the union's expenditure of their agency shop fees to support political or ideological causes unrelated to collective bargaining, contract administration, or grievance adjustment, the Court referred with approval to earlier decisions,[11] rendered under the union shop provisions of the Railway Labor Act, in which "the Court, recognized that appropriate remedies for the political or ideological expenditure of compulsory union dues would include (1) an injunction against such expenditures, or (2) restitution of a pro rata share of dues paid, equal to the fraction of total union expenditures which were made for political purposes. Recognizing the difficulties posed by judicial administration of such remedies, the Court noted that in the Allen case, it had suggested that it would be highly desirable for unions to adopt a voluntary plan by which dissenters would be afforded an internal union remedy. The Court in Abood reiterated this suggestion, finding it particularly

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[11] International Association of Machinists v. Street, 367 U.S. 740, 48 LRRRM 2345 (1961); Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113, 53 LRRM 2128 (1963).

relevant to the agency shop case at bar. However, the Court did not rule upon the adequacy of the union's internal remedy, a matter which was not raised in the case before the Court.

Shortly after the issuance of the decision in Abood, the New York State Legislature amended[12] the Taylor Law to include, inter alia, the following provision:[13]

> "... every employee organization that has been recognized or certified as the exclusive representative of employees within a negotiating unit of other than state employees shall be entitled to negotiate as part of any agreement entered into pursuant to this article to have deductions from the wage or salary of employees of such negotiating unit who are not members of said employee organization the amount equivalent to the dues levied by such employee organization and the fiscal or disbursing officer of the local government or authority involved shall make such deductions and transmit the sum so deducted to such employee organization. Provided, however, that the foregoing provisions of this subdivision shall only be applicable in the case of an employee organization which has established and maintained a procedure providing for the refund to any employee demanding the return any part of an agency shop fee deduction

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[12] Laws of 1977, Ch.677, and Laws of 1977, Ch.678.

[13] Civil Service Law §208.3(b).

> which represents the employee's pro rata share of expenditures by tRe organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

This provision effectively authorizes the negotiation of agency shop agreements. The proviso relating to the establishment and maintenance of internal union refund procedures reflects the Legislature's apparent intention to adopt the Supreme Court's suggestion of the preferred means for resolving, at least initially, challenges to alleged political and/or ideological expenditures.

As mentioned, supra, PERB has held that it has jurisdiction over matters related to the deduction of agency shop fees and refund procedures incident thereto, because a procedure which does not adequately protect the rights of non-member agency fee payers, interferes with non-members' rights to refrain from participating in an employee organization and thus constitutes an improper practice within PERB's jurisdiction.[14] For the same

[14] United University Professions (Barry), 13 PERB ¶3090 (1981)0 aff'd sub nom. United University Professions v. Newman, __ A.D. A.D. 2d __ , 15 PERB ¶7001 (3d Dept. 1982), mot. for leave to appeal denied, __ N.Y. 2d __ , 15 PERB ¶7010 (1982); accord, Westbury Teachers Association (Handy), 14 PERB ¶3063 (1981); Hampton Bays Teachers Association (Sullivan), 14 PERB ¶3018 (1981); see United University Professions (Eson), 12 PERB ¶3117 (1979), aff'd sub nom; United university Professions v. Neuman, 80 A.D. 2d 23, 437 N.Y.S. 2d 79b, 14 PERB ¶701l (3d Dept. 1981), mot. for leave to appeal denied, __ N.Y. 2d __ NYLJ 10/29/81, p.5, col.2.

reason, these matters are within the scope of this Board's improper practice jurisdiction under the NYCCBL. Thus, we are authorized and required to rule upon-+he substance of the petitioner's claim in this proceeding.

Pursuant to §212 of the Taylor Law, this Board is required to implement and enforce the NYCCBL and the applicable sections of the Taylor Law, including §208.3(b), in a matter substantially equivalent, but not necessarily identical, to PERB's application of the Taylor Law. While the decisions of PERB in this area are not binding upon us, they may be instructive in our effort to develop our own standards by which to measure a union's agency fee refund procedure.[15] Accordingly, we summarize the guidelines enunciated by PERB in its various decisions on this subject:

> 1. The union must maintain a procedure for the determination and payment of refunds to agency fee objectors which is reasonably expeditious. Generally, all steps of the refund procedure must be completed prior to the time for the objector to file a refund for the following year.[16]

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[15] The statute which mandates the establishment and maintenance of an agency fee refund procedure, does not contain any standards which a refund procedure must satisfy.

[16] United University Professions (Eson), 12 PERB ¶3093 (1979), aff'd sub nom. United Universitv Profession v. Newman, 77 A.D 2d 709, 13 PERB ¶7010 (3d Dept. 1980), mot. For leave to appeal denied, 51 N.Y. 2d 707, PERB ¶7016 (1980).

2. At the point at which the union tenders its refund determination and refund payment to an objector, it must provide the objector with financial information as to the basis of the refund. The information provided should include an itemized, audited statement of the complete receipts and expenditures of both the union and any of its affiliates which receive, directly or indirectly, any portion of its revenues from agency shop fees or dues, together with a statement of the basis of the union's determination of the amount of the refund, including identification of those items of expense determined by the union and its affiliates to be refundable and those items which are claimed not to be refundable.[17]

3. The union's internal appeal procedure may, but is not required to, culminate in submission of the dispute to an impartial arbitrator, provided that the objector is not required to bear any part of the cost of the arbitration.[18]

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[17] United University Professions (Barry), 13 PERB ¶3090 (1981), aff'd sub nom. United University Professions v. Newman, __ A.D 2d __, 15 PERB ¶7001 (3d Dept. 1982), mot. for leave to appeal denied, __ N.Y. 2d __ , 15 PERB ¶7010 (1982); Hampton Bays Teachers Association (Sullivan), 14 PERB ¶3018 (1981); East Moriches Teachers Association (Upham), 14 PERB ¶3056 (1981); Westbury Teachers Association (Handy), 14 PERB ¶3063 (1981); Middle Country Teachers Association (Werner), 15 PERB ¶3004 (1982); Professional Staff Congress (Rothstein); 15 PERB ¶3012 (1982); Public Employees Federation (Raterman), 15 PERB ¶3024 (1982); Goddard (Gates-Chili Teachers Association),15 PERB ¶3062 (1982).

[18] See, United University Professions (Eson), 11 PERB ¶3068 (1978).

PERB has also ruled that while it possesses jurisdiction to review the adequacy of agency shop refund procedures and the continuing implementation thereof, it does not possess jurisdiction to review the amount of a refund in any given case; PERB holds that the question of the correctness of the amount of a refund is a matter of a type traditionally resolved by the courts.[19] PERB has further held that it lacks jurisdiction to consider the propriety of the "standards" used by a union in determining the amount of a refund.[20]

In this regard, we note, however, that in at least three other jurisdictions, Wisconsin, Massachusetts, and California, the Courts have deferred to proceedings before state labor relations agencies for the determination of the correct allocation of refundable and non-refundable expenditures.[21] We further note that other

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[19] Hampton Bays Teachers Association (Sullivan), 14 PERB ¶3018 (1981).

[20] East Moriches Teachers Association (Upham), 14 PERB ¶3056 (1981).

[21] See, Browne v. Milwaukee Board of School Directors, 83 Wis. 2d 316, 98 LRRM 2574 (Sup. Ct. 1978) ; School Committee of Greenfield v. Greenfield Education Association, 395 Mass. 70, 109 LRRM 2420 (Sup. Jud. Ct. 1982); Leek v. Washington Unified School District, GERR 941:22 (Calif. Ct. of App., 3d Dist., 1981). Following remand in the Greenfield case, supra, the Massachusetts Labor Relations Commission has promulgated detailed rules (402 CMR §17.01 et seq.), effective December 9, 1982, under which an agency lee payer may challenge the

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jurisdictions have sanctioned the submission of this issue for determination by a panel of impartial arbitrators. in fact, following the Supreme Court's decision in Abood v. Detroit Board of Education, supra, the issue of the correct allocation of expenditures in that case was submitted to an impartial panel established by the Detroit Federation of Teachers.

Our recitation of some of the leading findings of PERB and the courts is made, in considerable part, only for the purpose of indicating the general state of development of the law in the area of agency fees, and does not denote either our concurrence or disagreement with the positions described above. Guided in some measure by these authorities, however, we reach the following conclusions:

Local 237 failed to maintain any agency fee refund procedure prior to September of 1981. The Union's excuse that the state of the laws regarding its obligations to agency fee payers was "unsettled" is not persuasive,

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(Footnote 21/ continued)

validity or amount of an agency fee, including the allocation of refundable and non-refundable expenditures, in a proceeding before the Labor Relations Commission. These rules also contemplate deferral to a union's refund procedure, provided that such procedure satisfies certain standards established by the Commission.

inasmuch as the statute[22] has expressly required the maintenance of a refund procedure since the date of its enactment in 1977, and PERB has declared and enforced that requirement since at least 1978.[23] Manifestly, Local 237's failure to maintain any refund procedure until September of 1981 constitutes non-compliance with the provisions of the Taylor Law and is an improper public employee organization practice under 51173-4.2(b)(1) of the NYCCBL.

Additionally, petitioner challenges the sufficiency of the refund procedure promulgated by the Union on September 2, 1981, on several grounds. First, petitioner argues that the Union's procedure does not provide for a refund of the non-chargeable expenditures of Local 237's affiliates, including the I.B.T. While we agree that the text of the procedure makes no reference to Local 237's affiliates, we will not presume that the procedure does not contemplate the inclusion of affiliates in the refund process. Certainly, the procedure is not worded so as to mandate the exclusion of affiliates from that process. We believe the wiser course is to await the submission of the union's refund determination so that a concrete basis

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[22] Civil Service Law §208.3(b).

[23] United University Professions (Eson), 11 PERB ¶3068 (1978).

will exist to ascertain whether the expenditures of affiliates have been included in the refund determination, as required by the decisions of PERB.[24] Therefore, we do not now find that Local 237's procedure is defective on
this account.

Second, petitioner asserts that the appellate steps of the Union's refund procedure are redundant and can serve no purpose but delay. It is true that PERB has emphasized that "... expedition must be considered of utmost importance in evaluating the reasonableness of any refund procedure.[25]

However, under PERB's own guidelines, a refund procedure is sufficiently expeditious if all of its steps are completed prior to the time that an objector is required to file a refund request for the following year. In the present case, the petitioner has not yet exhausted any appellate step of the Union's procedure. He has failed to allege that this procedure could not be completed within the time frame permitted by PERB. His challenge to the appellate aspect of the Union's procedure is at this point

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[24] See, e.g., East Moriches Teachers Association (Upham), 14 PERB ¶3056 (1981).

[25] United University Professions (Eson), 12 PERB ¶7093 (1979), aff'd sub nom. United University Professions v. Newman, 77 A.D. 2d 709, 13 PERB ¶7010 (3d Dept. 1980), mot. for leave to appeal denied, 51 N.Y. 2d 707, 13 PERB ¶7016 (1980).

merely speculative. We note that this procedure involves only a single appellate step. Accordingly, we find that the appellate step of Local 237's refund procedure is not, on its face, inconsistent with the requirements of the Taylor Law.

Third, the petitioner contends that that part of the Union's refund procedure which provides for ultimate review by the courts, improperly purports to diminish a statute of limitations and to limit venue. Specifically, the Union's procedure provides that a plenary action may be commenced against the Union within one year of the Union Executive Board's determination, and that venue for such action shall be in Kings County. The Union submits that this venue provision is intended to decrease its legal expenses, inasmuch as the offices of its General Counsel are located in that County.

We do not believe that it is within our jurisdiction to rule on the validity or enforceability of a unilateral decree as to the applicable statute of limitations and venue to be applied in a court proceeding. This question involves a determination of the rights of the parties under the Civil Practice Law and Rules,[26] a statute whose construction has not been placed under our

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[26] See, CPLR Articles 2 (statute of limitations) and 5 (venue).

jurisdiction. We are aware that PERB has sanctioned a union's determination of venue for the holding of hearings before an impartial arbitrator,[27] but we believe that to be an entirely different situation from that presented here. Therefore, we decline to rule on the validity of this aspect of Local 237's refund resolution. For our purposes, it is sufficient that we find that the Union's procedure does not preclude access to the courts.[28]

As we noted earlier, this Board has been informed that Local 237 has made a refund determination for its 1981 fiscal year, and has supplied that determination, with supporting financial information, to agency fee payers who requested refunds, together with the various a of the refunds calculated by the Union. Apparently, the refund determination includes expenditures by Local 237's affiliates. However, petitioner's refund determination and supporting information are not part of the record in this proceeding, and the petitioner has not been given the opportunity to question the legal sufficiency of the information supplied by the Union. We do not deem it advisable to delay issuance of this decision pending further

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[27] See, United University Professions (Barry), 14 PERB ¶3099 (1981).

[28] Such preclusion would invalidate the Union's Procedure. See, United University Professions (Eson), 11 PERB ¶3068 (1978).

developments in this case. Accordingly, we will retain jurisdiction over this matter to the extent necessary to resolve any further disputes arising out of the petitioner's challenge to Local 237's agency fee refund procedures.

Having found that Local 237 committed an improper practice by failing to maintain an agency fee refund procedure, we are now required to determine an appropriate remedy. We are mindful of the fact that in cases of failure to maintain adequate refund procedures occurring after the date of PERB's decision in United University Professions (Barry)[29], on November 11, 1980, PERB has generally required that the union correct its procedure and refund the petitioner's full agency shop fees for the year in question, together with interest at the legal rate.[30] However, the question of remedy is one which is within the discretion of this Board and we are not bound to follow the particular remedy imposed by PERB in any given case. In the present case, we are persuaded that a less drastic remedy is warranted, since the Union admittedly

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[29] 13 PERB ¶3090 (1980), aff'd sub nom. United University Professions v. Newman, __ A.D. 2d __, 15 PERB ¶7001 (3d Dept. 1982), mot. for leave to appeal denied, ___ N.Y. ___, 15 PERB ¶7010 (1982).

[30] See, e.g. Public Employees Federation (Raterman), 15 PERB ¶3024 (1982); Goddard (Gates - Chilli Teachers Association),15 PERB ¶3062 (1982).

promulgated an agency fee refund procedure prior to the date the improper practice petition was served and filed.[31] Thus, Local 237 acted, though belatedly, to Comply With the law prior to the petitioner availing himself of the processes of this Board. We believe that this voluntary compliance serves to mitigate the Union's fault. Additionally, we have found the Union's refund procedure, on its face, to be in conformity with the requirements of the Taylor Law, and we will retain jurisdiction to insure that the actual application and implementation of the procedure is equally consistent with applicable law. The Union has represented that it will process the petitioner's refund request under its refund procedures. Thus, any prejudice to petitioner's rights appears to have been minimal. For these reasons, we will not impose a financial remedy, but will order the Union to continue to maintain a lawful agency fee refund procedure.

[31] We note that petitioner's letter to the Union, dated July 21, 1981, stated that petitioner was "... willing to give you one more chance to comply with your duty to establish and maintain a refund procedure." Local 237 did establish and provide to petitioner a refund procedure within six weeks of receipt of petitioner's letter, although not within the thirty day period specified by petitioner's letter. The letter's further request for financial information was admittedly premature. Thus, the Union substantially satisfied petitioner's request prior to the date the improper practice petition was filed.

O R D E R

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that Local 237, I.B.T. committed an improper public employee organization practice by reason of its failure to establish and maintain a lawful agency fee refund procedure prior to September 2, 1981; and it is further

DETERMINED, that since September 2, 1981, Local 237, I.B.T. has maintained a written agency fee refund procedure which, on its face, is consistent with the requirements of ¶208.3(b) of the Taylor Law; and it is further

ORDERED, that the petition be, and the same hereby is, granted, to the extent of directing Local 237, I.B.T. to continue to maintain an agency fee refund procedure, consistent with the requirements of the Taylor Law; and it is further

ORDERED, that to the extent that questions remain concerning the legal sufficiency of Local 237's continuing implementation of its agency fee refund procedure, this Board shall retain jurisdiction over any further claims arising from the petitioner's improper practice complaint in this matter.

DATED: New York, N.Y.
December 23, 1982

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL. G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD J. CLEARY
MEMBER

JOHN D. FEERICK
MEMBER

PATRICK F.X. MULHEARN
MEMBER

LOCAL 237, I.B.T.

AGENCY FEE RELATE PROCEDURE

1. Any agency fee payer (objector) who demands a rebate of that pro-rata portion of the annua-il agency fee paid by said employee to the Union which represents the employee's pro-rate share of expenditures by the Union in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment, shall, between January 1 and January 15 of the next succeeding contract year file such demand with the Secretary-Treasurer of the Union at its offices at 216 West 14th Street, New York, New York, by certified letter, return receipt requested.

2. The President shall determine the amount of the rebate, if any, by October 1, following said demand, and the objector shall be notified within 15 days thereof of said determination.

3. By November 1, following the demand, the objector may appeal the President's determination to the Executive Board, which shall render its determination thereon, and reasons therefore, and notify the objector thereof, by December 31 of the year in which the demand was filed.

APPENDIX A

4. The amount of rebate, if any, represented by the determination of the President or the Executive Board, as the case may be, shall be mailed to the objector within 30 days of said determination.

5. The objector shall submit to the Executive Board of the Union, together with his appeal, a statement of the basis for his appeal, and the facts or law upon which it is based.

6. An objector who believes he has been aggrieved by the determination of the Executive Board may commence a plenary action against the Union within one year of the Executive Board’s determination Venue for said action shall be located in Kings County, in the City of New York, State of New York.