Napoli v. L.237, CEU, 37 OCB 25 (BCB 1986) [Decision No. B-25-86 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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FRANK A. NAPOLI,

DECISION NO. B-25-86

Petitioner,

-against- DOCKET NO. BCB-747-84

CITY EMPLOYEES UNION LOCAL 237,
I.B.T.

Respondent.
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DECISION AND ORDER

Petitioner Frank A. Napoli filed a verified improper practice petition on November 8, 1984, in which he alleged that respondent City Employees Union, Local 237, I.B.T. (hereinafter "Local 237" or "the Union") was committing an improper practice within the meaning of Section 1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL"). The Union submitted a verified answer and an amended verified answer on November 15 and 20, 1984, respectively. The petitioner did not submit a reply, although entitled to do so.[1]

On January 15, 1985, the Trial Examiner wrote to the parties, requesting clarification of the Union's agency fee rebate procedures, and inviting the submission

[1] Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules") §7.9.

of legal arguments concerning the application of the Supreme Court's ruling in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,[2] cited by both parties in their pleadings, to the facts of the present case. The Union's response was submitted on February 19, 1985. The petitioner replied to the Union's submission on March 5, 1985.

The petitioner submitted a second improper practice petition on April 1, 1985, raising an additional claim against Local 237 on the basis of the Ellis decision. Inasmuch as the question of the compliance of the Union's agency fee rebate procedures with the requirements of Ellis was a matter already raised in the pleadings in BCB-747-84, the parties were informed by the Trial Examiner, on April 9, 1985, that the second petition would not be docketed as a separate proceeding, but would be deemed to be a supplement to the original petition. The respondent Union was directed to submit a supplemental answer, which was in fact filed by the Union's attorney on April 16, 1985. The petitioner submitted a reply on April 23, 1985.

Finally, on September 19, 1985, the Union's attorney wrote to call the Board's attention to the recent issuance

[2] 104 S. Ct. 1003, 116 LRRM 2001 (1984), hereinafter referred to as Ellis.

by the New York State Public Employment Relations Board (hereinafter "PERB") of a decision in Barry v. United University Professions,[3] a case the pendency of which was referred to by the Union in its earlier February 19, 1985 submission. The petitioner did not respond to the Union's September 19 submission.

Nature of the Dispute

Petitioner Frank A. Napoli is employed as a Bridge Operator-in-Charge in the Bureau of Bridges of the Department of Transportation. Local 237 is the certified collective bargaining representative of the bargaining unit which includes the petitioner's job title.[4] The petitioner is not a member of Local 237. Pursuant to the authorization granted in §208.3(b) of the Taylor Law [5] and §1173-4.3a of the NYCCBL, Local 237 and the public employer, the City of New York, have included in their collective bargaining agreements 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.

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[3] 18 PERB §3063 (1985).

[4] Board of Certification Decision No. 67-78.

[5] Civil Service Law, Article 14.

These agency fees, together with union dues deducted by the employer, are forwarded to the Union for its use. However, pursuant to §208.3(b), as a condition of being permitted to collect agency fees, the Union is required to establish and maintain procedures through which an objecting non-member can-challenge the Union's use of any part of the agency fee in aid of activities or causes of a political or ideological nature which are unrelated to collective bargaining, contract administration, and grievance adjustment. The petition, as supplemented, in this proceeding presents a challenge to the sufficiency of Local 237's agency fee rebate procedures under applicable law.

Positions of the Parties

Petitioner's Position

In the original petition filed in this matter, the petitioner asserts that he " ... dissents from my union's expenditures beyond the realm of collective bargaining" and that he objects to " ... the union's being able to have temporary use of my fees, especially in this election year, for pursuit of their own political and ideological agenda." The petitioner alleges that the United States Supreme Court in Ellis set forth the

applicable requirements which a union's agency fee refund procedure must satisfy, including, according to the petitioner, a requirement that:

> "... 100% of my fees be placed into escrow until an independent determination of the pro rata amount used by the union for political and ideological purposes only incidentally related to the terms and conditions of employment is made."

The petitioner contends that Local 237's agency fee refund procedure is defective because it does not provide for 100% escrow of objectors' fees as allegedly required by the Ellis decision.

In his supplemental petition, the petitioner alleges an additional claim based upon his interpretation of Ellis. He argues that under Ellis, the Union may not collect agency fees from objecting employees until a collective bargaining contract is executed. Unstated but implied in the petition is the allegation that the applicable collective bargaining agreement had expired and a successor agreement had not yet been executed. The petitioner requests that the Union be ordered to refund all dues collected until a new contract is executed.

Union's Position

The Union contends that its agency fee procedures are in full compliance with the requirements established by the Supreme Court in Ellis. In its amended answer, the Union alleges that a percentage of the petitioner's agency fees has been placed in an interest bearing escrow account. It is further alleged that the escrowed percentage is in excess of the amounts that have been rebated to the petitioner in past years, under the procedures in effect prior to the Ellis decision.

However, based upon the written statement submitted by the Union's attorneys on February 19, 1985, it appears that the Union again has changed its procedures. In this statement, it is asserted that:

> "Rather than establish an escrow account the Union will refund to each objector from whom it received a timely objection an estimated 1984 rebate amount. In calculating the estimate the 1983 percentages and figures were calculated against the payments by each objector for 1984. Additionally, ten (10%) percent was added to protect against any underestimated projection."

The Union also notes that it will pay interest on the amounts of the "estimated rebates" from the approximate date of the Ellis decision.

The Union contends that the claimed requirement of a 100% escrow of agency fees, as asserted by the petitioner, was rejected by PERB in Barry v. United University Professions.[6]

It is submitted that neither the Ellis decision nor the Taylor Law require a 100% escrow. The Union alleges that Its "estimated rebate" procedure is comparable to the advance reduction procedure in Barry which was held to be an acceptable alternative to an escrow system.

Finally, in response to the petitioner's argument concerning the expiration of the collective bargaining agreement, the Union alleges that pursuant to §1173-7.0d of the NYCCBL, the status quo is maintained during the period of negotiations and the contract is, in effect, extended until resolution of the successor agreement.

For the above reasons, the Union requests that the petition be dismissed.

Discussion

We previously have reviewed in considerable detail the development of the law concerning agency shop agreements and the procedures incident thereto;[7] we do not find it necessary to reiterate that background at length

[6] 18 PERB §3063 (1985).

[7] Decision No. B-44-82.

in the present case. It is sufficient to observe that an agency shop has been thought to distribute fairly the cost incurred by a union in representing all employees in a bargaining unit, among all those who benefit from such representation. It has been said that such an arrangement 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.[8] However, it has been recognized that the First Amendment to the United States Constitution precludes a union from requiring public employees to contribute, by means of agency fees, to support ideological or political causes unrelated to collective bargaining, contract administration, and grievance adjustment.[9] Much litigation has resulted from attempts to devise procedures to safeguard the First Amendment rights of employees required to pay agency fees. The present case represents such a challenge by the petitioner to certain aspects of Local 237' s agency fee procedures.

[8] Abood v. Detroit Board of Education, 431 U.S. 209,95 LRRM 2411 (1977).

[9] Id.; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 104 S. Ct. 1003, 116 LRRM 2001 (1984).

The petitioner places great reliance on the decision of the Supreme Court in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks.[10] Insofar as relevant herein, Ellis stands for the proposition that an agency fee procedure which merely refunds the pro rata share of an individual's agency fees which were used by the union for political or ideological activities, after the fact, is inadequate to protect the individual's rights under the First Amendment. The Court in Ellis stated that such a pure refund procedure was impermissible because it gave the union a temporary loan from nonmembers for purposes the nonmembers could not be compelled to support over their objections. The Court suggested that constitutionally permissible alternatives to the pure refund procedure, which would avoid the "temporary loan" problem, might include the use of an interest-bearing escrow account, or an advance reduction in the amount of fees collected.

The Court in Ellis did not state expressly what portion of an individual's agency fees must be placed in an escrow account in order for such a system to satisfy constitutional requirements. The petitioner interprets Ellis to require that 100% of an objecting employee's

[10] 104 S. Ct. 1003, 116 LRRM 2001 (1984).

agency fees be placed in escrow pending a determination of amounts rebateable due to union expenditures in support of political or ideological causes. Further, the petitioner appears to contend that only an escrow system can satisfy the requirements of the First Amendment as set forth in Ellis.

We find that the petitioner's position is incorrect on both accounts. First, the Court in Ellis, as in its earlier decision in Abood v. Detroit Board of Education,[11] recognized that the union is entitled to the use of agency fees for purposes of collective bargaining, contract administration, and grievance adjustment. A 100% escrow would deprive the union of the use of agency fees for these legitimate purposes for an extended period of time. That this was not intended was emphasized by the Court most recently in Chicago Teachers Union v. Hudson.[12] In light of the Court's ruling in Hudson, it is clear that 100% escrow is not required. Rather, it is only necessary that the amount placed in escrow be sufficient to cover the proportion of agency fees reasonably expected to be refundable, based upon the union's experience in recent years past. The appropriateness and legality of such

[11] 431 U.S. 209,95 LRRM 2411 (1977).

[12] -----U.S.-----,121 LRRM 2793 (1986).

a partial escrow system has been recognized in this State by PERB.[13]

Second, we find that the petitioner has overlooked the express language in, Ellis which recognizes that an advance reduction in the agency fees collected may be a satisfactory alternative to an escrow system. It is allegedly such an advance reduction system which Local 237 has implemented through its "estimated rebate" procedures. We do not pass on the sufficiency of these particular procedures, since they have not been challenged in this proceeding. For purposes of ruling on the petition herein, it is sufficient that we find that an advance reduction system is not prima facie violative of the petitioner's rights.[14]

The petitioner also points to language in Ellis to the effect that until a contract is executed, no dues or fees may be collected from objecting employees who are not members of the union. Since the last current collective bargaining agreement had expired, the petitioner argues that the Union's collection of agency fees should be suspended until a new agreement is executed.

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[13] Barry v. United University Professions, 18 PERB §3063 (1985).

[14] Accord, Barry v. United University Professions, supra.

We find that this argument is based upon language taken out of context in the Ellis decision. The full text of the relevant passage from Ellis provides as follows:

> "Only a union that is certified as the exclusive bargaining agent is authorized to negotiate a contract requiring all employees to become members of or to make contributions to the union. Until such a contract is executed, no dues or fees may be collected from objecting employees who are not members of the union; and by the same token, any obligatory payments required by a contract authorized by §2, Eleventh terminate if the union ceases to be the exclusive bargaining agent."

It is apparent that the contract referred to in the above quotation is an initial agency fee agreement. It has no application to the renewal, by a certified collective bargaining representative, of a prior agreement including an agency fee provision. In any event, Local 237 is correct in noting that under the status quo provisions of §1173-7.0d of the NYCCBL, the terms of an expired collective bargaining agreement are continued during a period of negotiations. Therefore, we find that the Union's right to collect agency fees continues, and we reject the petitioner's arguments in this regard.

For the reasons stated above, we will dismiss the petition in this matter. However, we emphasize that our determination in this matter is limited to the issues raised in the petition. We are aware that the recent decision of the Supreme Court in Chicago Teachers Union v. Hudson[15] may require that unions reevaluate, and in many cases, revise the provisions of their agency fee procedures in order to comply with constitutional requirements. We do not address this question in the present case, since it was not raised by the parties. We assume that the Union will consider making any necessary adjustments in its procedures in order to protect the rights of agency fee payors, consistent with the standards set forth in the Hudson decision.

O R D E R

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

[15] -----U.S.-----,121 LRRM 2793 (1986).

ORDERED, that the petition of Frank A. Napoli be, and the same hereby is, dismissed.

DATED: New York, N.Y.
April 22, 1986

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

IDA TORRES
MEMBER