

Price, Nickels v. PBA, 47 OCB 32 (BCB 1991) [Decision No. B-32-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper
Practice Proceeding

-between-

DECISION NO. B- 32-91

PATRICK PRICE and
TIMOTHY L. NICKELS,

DOCKET NO. BCB-1262-90

Petitioners,

-and-

NEW YORK CITY HOUSING PATROLMEN'S
BENEVOLENT ASSOCIATION,

Respondent.

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INTERIM DECISION AND ORDER

On March 16, 1990, Patrick Price and Timothy L. Nickels ("the Petitioners") filed a verified improper practice petition against the New York City Housing Authority Patrolmen's Benevolent Association ("the HPBA" or "the Union"), alleging that the HPBA has failed to establish an agency shop rebate procedure as required by Section 208.3.(b) of the Taylor Law,¹ thereby interfering with the statutory rights of employees under Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL").² The petition also

¹ Civil Service Law, Article 14.

² NYCCBL §12-306 provides, in pertinent part, as follows:

Improper practices; good faith bargaining.

b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

(1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in section 1173-4.1 (now re-numbered as section 12-305) of this chapter, or to cause, or attempt to cause, a public employer to do so;

(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

NYCCBL §12-305 provides, in pertinent part, as follows:

Rights of public employees and certified employee organizations.

Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to

(continued...)

alleges that the HPBA conducted a union meeting to ratify a dues increase improperly. On March 28, 1990, Petitioner Nickels filed an amended petition consisting of a large number of documents in support of the Petitioners' original allegations.

The HPBA did not answer, but, instead, submitted a motion to dismiss the petition with an affirmation in support of the motion to dismiss, on May 17, 1990, on the ground that the petition failed to allege any facts sufficient to support a conclusion upon which relief may be granted under the NYCCBL.

On June 21, 1990, Petitioner Nickels filed an affirmation opposing the HPBA's motion. The Petitioners reaffirmed their allegation concerning the establishment of an agency shop rebate procedure, but they withdrew their charge concerning an alleged improperly conducted union meeting, conceding lack of jurisdiction by this Board.

On April 3, 1991, the Trial Examiner designated by the Office of Collective Bargaining wrote to the parties to request clarification on one of the issues raised in their pleadings. The PBA's attorney submitted a response, in the form of a supplemental affirmation, on April 12, 1991. Petitioner Nickels did not respond to the request.

BACKGROUND

The Housing Authority PBA is the certified bargaining representative for Police Officers employed by the New York City Housing Authority. The union security article in its collective bargaining agreement contains an agency fee clause by which the parties "agree to an agency shop to the extent permitted by applicable law . . ." (Article II, Section 4.).

Section 208.3.(b) of the Taylor Law, as amended in 1977, authorizes the

(...continued)

refrain from any or all such activities. * * * A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

incorporation of contractual provisions of this kind.³ Under the statute, parties may create an agency fee requirement whereby the wages of non-members will be reduced by an amount equivalent to the dues levied by an employee organization on its regular members. The employer forwards these agency fees, together with the ordinary union dues that it deducts, to the union for its use. The Law contains an important proviso, however:

[The agency shop provisions] 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 [of] 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.

According to Housing Authority records submitted by the Petitioners, there were 323 Union members and 1,286 agency shop members amongst the Housing Authority's complement of Police Officers, as of December 31, 1989. Petitioner Nickels' name is included in the list of agency shop members; Petitioner Price's name is included in the list of union members.

In late 1989, Petitioner Nickels, in his capacity as Headquarters Delegate to the HPBA, wrote an undated memorandum to "All PBA Members Assigned to Headquarters." The memorandum cites the applicable law, and declares that "the Union has not established a rebate procedure and hasn't filed authorization cards since 1977, or when the agency shop laws came into effect." The memorandum urges recipients to "send a letter to the Union requesting your cash rebate and let them tell you if you're a union member or a non member paying agency shop fees." The Petitioner applied for his own agency fee refund for the 1989 budget year by letter dated January 2, 1990.

Meanwhile, by letter dated December 19, 1989, the HPBA President advised his members of a possible discrepancy in payroll records concerning agency fee payers. His letter reads as follows:

³ Laws of 1977, Ch. 677, and Laws of 1977, Ch. 678.

Because of the new life insurance program and other association benefits, which will be offered only to members of the PBA, it is imperative that all members complete the enclosed membership card and immediately return it to the HPBA office in the enclosed self-addressed prepaid envelope. Otherwise, if a member does not complete the card and is considered agency shop, he will still pay a service charge equivalent to the dues but will not receive any of the insurance or other benefits, including PBA cards, calendar books, the right to vote for candidates and on issues, etc. which are reserved strictly for members. Unfortunately, the payroll system has a number of members listed as agency shop although these officers consider themselves members of the association, and this discrepancy must be corrected.

Sometime between the Fall of 1989 and the Spring of 1990, the HPBA issued a detailed policy pertaining to non-member agency employees ("the Agency Fee Payers Policy") that itemizes how it allocates monies collected from these employees.⁴ The policy separates fair share items from those that are non-chargeable, and it sets out a procedure for challenging the pro rata amount established by the Union before a neutral arbitrator. The complete text of the policy is appended to the end of this decision.⁵

POSITIONS OF THE PARTIES

PBA's Position

In its motion to dismiss the improper practice petition, the HPBA points out that it duly has established a comprehensive Agency Fee Payers Policy. In its view, because the policy is current, and because it includes a refund procedure for granting agency shop members individual refunds, the relief requested by the Petitioners already is available to them. Therefore, the Union concludes, there is no need for intervention by this Board, and it asks

⁴ In its supplemental affirmation, the HPBA claims that the policy was authorized by the HPBA Board in September of 1989, and was posted on bulletin boards of all commands of the Housing Police Department "on or about September 15, 1989." The Petitioners, however, contend that the Union created the policy only after they filed their improper practice petition on March 16, 1990.

⁵ See Appendix A, page 14, infra.

that the petition be dismissed in its entirety.

Petitioners' Position

The Petitioners maintain that the Union created the Agency Fee Payers Policy only after they filed their improper practice petition in March of 1990. Before this date, the Petitioners assert, the policy did not exist. In support of their claim, the Petitioners refer to a telephone conversation that took place in December of 1989 between Petitioner Price and the HPBA's 1st Vice President, during which the Union officer allegedly confirmed "that a procedure was not in place."

Beyond the matter of its publication date, the Petitioners object to the substantive provisions contained in the policy. They contend that it fails to provide a refund mechanism for calendar year 1989, because it "only mentions 1989 as a basis for advanced 1990 nonmember refunds." The Petitioners also object to the Union's 94.5% agency fee refund quotient. They demand that the HPBA prove that it did not use their pro rata shares improperly "in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

Finally, the Petitioners contend that the President's letter dated December 19, 1989, had the effect of denying bargaining unit members "the freedom of choice to decide whether or not to join the employee organization." According to the Petitioners, the letter "utilized the ambiguous terminology 'loss of benefits' to persuade agency shop members to join based upon the fear of losing benefits." They maintain that the letter violated the NYCCBL and the agency shop clause in their collective bargaining agreement in that it denied the membership their right to refrain from activities covered by the statute.

Discussion

When making a motion to dismiss an improper practice petition, the moving party concedes the truth of the facts alleged by the petitioner. In addition, the petition is entitled to every favorable inference, and it will be taken to allege whatever may be implied from its statements by reasonable and fair intendment.⁶

In the instant proceeding, the HPBA bases its motion to dismiss upon the premise that the existence of the Agency Fee Payers Policy renders the improper practice charges moot. The Petitioners respond that the policy came into being only after they filed their petition, and, in any event, they assert that its stated refund quotient is unsupported and inadequate.

In considering the Union's motion to dismiss, we must deem it to admit the Petitioners' allegation that an agency fee refund procedure did not exist in 1989. We also must deem it to admit that Petitioner Nickels, a non-union member in 1989, lacked an available means to seek a refund for that portion of his agency shop fee that may have been spent on political or ideological activities unrelated to collective bargaining, contract administration, or grievance adjustment during that year.

Accepting the truth of these allegations for the purpose of considering its motion, we reject the HPBA's assertion that the Petitioners' claims are moot. 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 the matter of deterring future violations, remains open to consideration.⁷ Moreover, in this case, the Petitioners challenge not only the HPBA's alleged failure to maintain a lawful refund procedure, but they also challenge the legal sufficiency of the

⁶ Decision Nos. B-51-90; B-32-90; and B-34-89.

⁷ Decision No. B-44-82.

Agency Fee Payers Procedure as it exists presently.

In Decision No. B-44-82, involving a dispute markedly similar to the one now before us, we reviewed the basic legal principles on the subject of agency fees, beginning with the United States Supreme Court decision in Aboud v. Detroit Board of Education.⁸ We then tracked the public sector agency fees doctrine as it developed in New York State and summarized the guidelines enunciated by the Public Employment Relations Board (PERB) in its various decisions on this subject, which we restate here:

1. The union must maintain a procedure for the determination and payment of refunds to agency fee objectors that 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.
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 that 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 that are claimed not to be refundable.
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.

In that decision, we said that we would be guided in some measure by these authorities. Finding that the union had failed to maintain any agency fee refund procedure before the improper practice charge was filed, we said that this failure constituted non-compliance with Section 208.3.(b) of the Taylor Law, and was an improper public employee organization practice under Section 1173-4.2(b)(1) [now §12-306b.(1)] of the NYCCBL.

Since we issued Decision No. B-44-82, several further important

⁸ 431 U.S. 209, 95 LRRM 2411 (1977).

developments in the agency fee doctrine have taken place. In Ellis v. Railway Clerks,⁹ the Supreme Court dealt with the question of what is a proper procedure for protecting independent employees. It held that a "pure rebate approach," by which the union collects agency fees from objecting nonmembers, uses some of that money for impermissible purposes, and then refunds the monies to objecting employees, was inadequate. The Court ruled that instead of using a "pure rebate approach," a union either must provide for an advance reduction of the agency fee based upon its experience in prior years, or it must deposit agency fees in an interest bearing escrow account.

Two years later, in Chicago Teachers Union, Local No.1, AFT, AFL-CIO v. Hudson,¹⁰ the Supreme Court reiterated its original ruling prohibiting a union from using agency fee funds for subsidizing political or ideological views, even though subsequently the union returns the funds to the agency fee payer. It mandated additional procedural protections for employees as well. The Court said that while a union need not escrow the entire amount of the agency fee, "it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified."¹¹ It also said that non-member employees must be informed adequately about the basis for the proportional share of an agency fee before any payroll deduction is taken. Finally, the Court said that a non-member employee must be given a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker.

⁹ Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, 466 U.S. 435, 116 LRRM 2001, 17 PERB ¶7511, (1984).

¹⁰ 475 U.S. 292, 121 LRRM 2793, 19 PERB ¶7502 (1986).

¹¹ Id. at note 23, 19 PERB ¶7502 at 7510.

The following year, in United University Professions v. Barry,¹² the PERB declared that the Supreme Court's holdings in the Hudson decision are "of paramount importance" in its evaluation of agency fee rebate procedures. The PERB acknowledged that, taken together, Hudson and Ellis "currently reflect the constitutional considerations which must govern our construction of § 208.3."¹³

In view of our own precedent and of the other authorities cited above, we are satisfied that the Petitioners have presented sufficient material facts in the case now before us to withstand the Union's motion to dismiss. Therefore, we shall order the PBA to serve and file an answer within ten days of receipt of this determination.

ORDER

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

ORDERED, that the motion of the New York City Housing Authority Patrolmen's Benevolent Association to dismiss the improper practice petition filed by the Petitioners individually named herein be, and the same hereby is, denied; and it is further

ORDERED, that the New York City Housing Authority Patrolmen's Benevolent Association shall serve and file an answer within ten (10) days of receipt of this Interim Decision and Order.

DATED: New York, N.Y.
May 23, 1991

¹² 20 PERB ¶3039 (1987).

¹³ Id. at 3073.

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DEAN L. SILVERBERG
MEMBER

Appendix A

NEW YORK CITY HOUSING PATROLMEN'S BENEVOLENT ASSOCIATION
NOTICE TO ALL NONMEMBER AGENCY FEE PAYERS

This Notice is being provided to all nonmembers who pay agency fees to the New York City Housing Patrolmen's Benevolent Association ("HPBA") under the collective bargaining agreement between the HPBA and the City of New York. PLEASE READ THIS NOTICE CAREFULLY. IT CONTAINS IMPORTANT INFORMATION AND PROCEDURES CONCERNING YOUR LEGAL RIGHTS.

THE HPBA AGENCY FEE

As a nonmember represented by the HPBA, you are being charged an agency fee which is equal to the regular dues paid by HPBA members.

The HPBA spends a portion of all fees collected from nonmembers on the following activities. The HPBA has determined that a pro rata portion of the expenses associated with these activities are chargeable to all nonmembers paying agency fees to the HPBA.

1. Gathering information in preparation for the negotiation of the collective bargaining agreement.
2. Gathering information from employees concerning collective bargaining positions.
3. Negotiating the collective bargaining agreement.
4. Adjusting grievances pursuant to the provisions of the collective bargaining agreement, as well as representing employees in proceedings under civil service laws or regulations.
5. Administration of ballot procedures on the ratification of negotiated agreements.
6. The public advertising of the HPBA's positions on the negotiation of, or provisions in the collective bargaining agreement.
7. Purchasing books, reports, and advance sheets used in (a) negotiating and administering the collective bargaining agreement, (b) processing grievances.
8. Paying technicians in labor law, economics and other subjects for services used (a) in negotiating and administering the collective bargaining agreement, (b) in processing grievances.
9. Organizing within the bargaining unit in which agency fee payers are employed.
10. Defending the HPBA against efforts by other unions or organizing committees to gain representation rights for the employees represented by the

HPBA.

11. Proceedings regarding jurisdictional controversies under the HPBA constitution and by-laws.

12. Membership meetings and conventions held to determine the positions of employees on collective bargaining issues, contract administration and other matters affecting wages, hours and working conditions.

13. Publishing newspapers and newsletters which concern collective bargaining issues, contract administration and other matters affecting wages, hours and working conditions.

14. Impasse procedures, including factfinding and mediation and arbitrations over provisions of collective bargaining agreements and the administration thereof.

15. The prosecution or defense of litigation or charges to obtain ratification, interpretation, or enforcement of the collective bargaining agreement and to enforce civil service law provisions and other guaranteed rights.

The HPBA spends a portion of all fees collected from members and nonmembers on the following activities. The HPBA has determined that a portion of the expenses associated with these activities are not chargeable to objecting nonmember agency fee payers.

16. The public advertising of the HPBA's position on subjects other than the negotiation of the collective bargaining agreement.

17. Purchasing books, reports, and advance sheets used in activities or for purposes other than negotiating the collective bargaining agreement and processing grievances.

18. Paying technicians in labor law, economics and other subjects for services used in activities other than negotiating the collective bargaining agreement and processing grievances.

19. Lobbying for legislation or regulations or to effect changes in legislation or regulations before Congress, state legislatures, local legislative bodies and federal, state or local agencies.

20. Supporting and paying affiliation fees to other labor organizations which do not negotiate the collective bargaining agreement governing the agency fee payer's employment.

21. Membership meetings and conventions held for purposes other than to determine the positions of employees on collective bargaining issues, contract grievance administration or other matters affecting wages, hours and working conditions.

22. Prosecution or defense of litigation or charges on matters other than the ratification, interpretation, or enforcement of the collective bargaining agreement, civil service law provisions and other guaranteed rights.

[23. omitted in original.]

24. Social and recreational activities.

25. Payments for insurance, medical care, retirement, disability, death, and related benefit plans for HPBA employees, staff, and officers.

26. Administrative activities and expenses allocable to HPBA activities and expenses for which agency fee payers are charged.

The HPBA spends a portion of all fees collected from members and nonmembers on the following activities. The HPBA has determined that none of the expenses associated with these activities are chargeable to objecting nonmember agency fee payers.

27. Training in voter registration, get-out-the vote, and political campaign techniques.

28. Supporting and contributing to charitable organizations.

29. Supporting and contributing to political organizations and candidates for public office.

30. Supporting and contributing to ideological causes.

31. Supporting and contributing to international affairs.

Applying these criteria to the activities of the HPBA for fiscal year 1989, the HPBA has determined that 94.5% of the dues regularly charged to members of the HPBA is chargeable to objecting nonmember agency fee payers. This percentage is based on the following: the ratio of chargeable expenses to total expenses as a percentage applied to income. This calculation will be effective until June 30, 1990. Subsequent to that date you will receive a new Notice containing a new calculation of chargeable versus non-chargeable expenses based on financial information for fiscal year 1990.

**PROCEDURE FOR OBJECTING TO THE EXPENDITURE OF
AGENCY FEES ON NON-CHARGEABLE ACTIVITIES**

The HPBA has established the following procedure for nonmembers who object to the expenditure of a portion of their agency fees on activities that the HPBA has determined are non-chargeable and who want an advance rebate of that portion of their dues or fees spent on those activities. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THESE PROCEDURES IN ORDER TO REGISTER AN OBJECTION AND RECEIVE AN ADVANCE REBATE.

A. Objections

Nonmembers who pay agency fees to the HPBA who wish to object to the expenditure of a portion of their fees on those activities and expenses that the HPBA has determined are non-chargeable must so inform the HPBA in writing by certified mail. The written objection must include the objecting nonmember's name, address, social security number, and work location.

The written objection must be sent to the HPBA at the following address,

by certified mail and post-marked no later than May 15, 1990.

Jack M. Jordan, President
New York City Housing Patrolmen's Benevolent Association
299 Broadway
New York, New York 10007

B. Advance Rebate

Upon receipt of the written objection, the HPBA will pay to the objecting nonmember an advance rebate equal to the difference between the fees collected from the objecting nonmember and that portion of the dues or fees found chargeable by the HPBA in accordance with the calculation set forth in this Notice for the period encompassing the 1990 fiscal year.

**PROCEDURE FOR CHALLENGING THE CALCULATION OF
CHARGEABLE VS. NON CHARGEABLE EXPENSES**

The HPBA has established the following procedures for individual nonmembers who pay agency fees and who wish to challenge the HPBA's calculation of chargeable versus non-chargeable expenses. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THIS PROCEDURE IN ORDER TO CHALLENGE THE CALCULATION OF CHARGEABLE VERSUS NON-CHARGEABLE EXPENSES.

A. Challenges

Individual nonmember agency fee payers who wish to challenge the calculation of chargeable versus non-chargeable expenses must inform the HPBA of their challenge in writing by certified mail. The written challenge must include the challenging fee payer's ("Challenger's") name, address, social security number, and work location.

The written challenge must be sent to the HPBA by certified mail at the following address and post-marked no later than May 15, 1990.

Jack M. Jordan, President
New York City Housing Patrolmen's Benevolent Association
299 Broadway
New York, N.Y. 10007

B. Arbitration Procedure

The HPBA established an Arbitration Procedure for resolving challenges to the HPBA's calculation of chargeable versus non-chargeable expenses. This procedure will result in expeditious decision on the challenge by an impartial arbitrator selected by the New York City Office of Collective Bargaining.

The impartial arbitrator will hold hearings in which challengers can participate personally or through a representative. In these hearings, the HPBA will have the burden of proof regarding the accuracy of the calculation of chargeable versus non-chargeable expenses. The challengers will be given the opportunity to present their own evidence and to present written arguments in support of their position. The arbitrator will issue a decision and award on the basis of the evidence and argument presented.

Challengers will receive further information regarding this procedure upon the HPBA's receipt of their challenge.

C. Escrow of Agency Fees

Upon receipt of a written challenge the HPBA will place an amount equal to 100% of the Challenger's agency fee in an interest bearing escrow account. As required by the United States Supreme Court, the escrowed figures will be independently verified. The agency fees will remain in escrow until the arbitration award issues and shall be distributed to the HPBA and the Challenger pursuant to the arbitrator's ruling.