

87-006 #9

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Loretta Liptak, et al.,
Petitioners,

and

Youngstown State University Chapter of
The Ohio Education Association,
Respondent,

CASE NUMBER: 86-REPF-1-0033

Billie S. Lynch,
Petitioner,

and

Austintown Education Association,
Respondent,

CASE NUMBER: 86-REPF-1-0034

John Mahoney,
Petitioner,

and

Niles Classroom Teachers Association,
Respondent,

CASE NUMBER: 86-REPF-1-0019

Charles Thomas Hatton,
Petitioner,

and

Columbus Education Association, et al.,
Respondent.

CASE NUMBER: 86-REPF-1-0013

DIRECTIVE REMANDING TO HEARING

DIRECTIVE REMANDING TO HEARING
February 26, 1987
PAGE 2 OF 2

Before Chairman Day and Vice Chairman Sheehan; February 26, 1987.

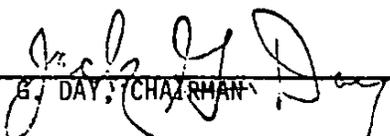
In January 1986, the Petitioners in the above-styled cases filed petitions to challenge fair share fee rebate determinations with the Board. These cases were heard by a Board hearing officer.

The Board has reviewed the record, the hearing officer's recommended determination, exceptions and responses. The request for oral argument is construed as a motion and is denied.

For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the hearing officer's finding of fact, conclusions of law, and recommendations as amended in the attached opinion, but not necessarily the analysis and discussions. These cases are remanded to the hearing officer with instructions to the respondents to establish and submit to the hearing officer, within 30 days, an internal union fair share fee rebate procedure consistent with the attached opinion. The hearing officer shall convene a hearing on the challenges, if any, and report to the Board pursuant to Ohio Administrative Code Rule 4117-11-01. The hearing will be confined to the questions stated in the attached opinion.

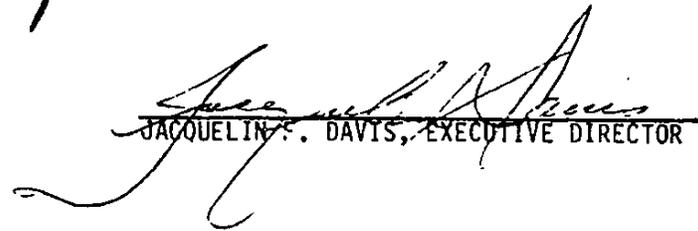
It is so directed.

DAY, Chairman, and SHEEHAN, Vice Chairman, concur.



JACK B. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 9th day of April, 1987.



JACQUELIN S. DAVIS, EXECUTIVE DIRECTOR

0281B:jTb

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Loretta Liptak, et al.,
Petitioners,

and

Youngstown State University Chapter of
The Ohio Education Association,

Respondent,

CASE NUMBER: 86-REPF-1-0033

Billie E Lynch,

Petitioner,

and

Austintown Education Association,

Respondent,

CASE NUMBER: 86-REPF-1-0034

John Mahoney,

Petitioner,

and

Niles Classroom Teachers Association,

Respondent,

CASE NUMBER: 86-REPF-1-0019

Charles Thomas Hatton,

Petitioner,

and

Columbus Education Association, et al.,

Respondent.

CASE NUMBER: 86-REPF-1-0013

OPINION

41

OPINION
Cases 86-REPF-1-0033, 86-REPF-1-0034
86-REPF-1-0019 and 86-REPF-1-0013

Page -2-

Day, Chairman:

The hearing in these consolidated cases was bifurcated on respondents' (OEA/NEA)¹ motion. The initial hearing was confined to two issues:

1. Whether the fair share fee rebate procedure of the Respondents during the 1984-85 school year complied with federal law and with O.R.C. Section 4117.09(C).
2. Whether the Petitioners properly invoked and exhausted the fair share fee rebate procedure of the Respondents."²

For reasons to be adduced below, the answer to the first question is "No." This response compels the conclusions (1) that the respondents' internal rebate procedure is arbitrary and capricious, (2) that a revision of that procedure in accordance with this opinion is necessary, and (3) that the second question cannot be resolved until objecting employees have had access to a revised internal procedure meeting constitutional standards.

I

The elements of first import in the consideration of rebate procedures are those implicating First Amendment rights applied to the states under the

¹Individual Respondent's names appear in the style of the case. They represent affiliates of the Ohio Education Association and the National Education Association (OEA/NEA).

²Hearing Officer's Recommended Determination (HORD), p.3. In the event the second portion of the bifurcated hearing is required the issues will be:

1. Whether the "items and amounts of the respective rebates" for non-member objectors were properly determined by the respondents.
2. Whether certain expenditures charged to non-member objectors are properly chargeable.

42

provenance of the Fourteenth Amendment.³ The point was recognized and taken by the Ohio Legislature in enacting the Ohio Public Collective Bargaining Act. The relevant portion of the statute provides in Section R.C. 4117.09(C):

"The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The arrangement does not require any employee to become a member of the employee organization, nor shall fair share fees exceed dues paid by members of the employee organization who are in the same bargaining unit. Any public employee organization representing public employees pursuant to Chapter 4117. of the Revised Code shall prescribe an internal procedure to determine a rebate, if any, for nonmembers which conforms to federal law, provided a nonmember makes a timely demand on the employee organization. Absent arbitrary and capricious action, such determination is conclusive on the parties except that a challenge to such determination may be filed with the State Employment Relations Board within thirty days of the determination date specifying the arbitrary or capricious nature of the determination and the State Employment Relations Board shall review the rebate determination and decide whether it was arbitrary or capricious. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee.

"The internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germane to the work of employee organizations in the realm of collective bargaining." (Emphasis added.)

³See Aboud v. Detroit Board of Education (1977) 431 U.S. 209; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, et al. (1984) 466 U.S. 435; Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, et al. v. Hudson, et al. (1986) 475 U.S. ___, 89 L. Ed. 2nd 232.

The meaning of "conform(s) to federal law" is crucial to a determination of rebate procedural propriety. Without guidance from federal statutes (apparently there are none), the instruction must come from federal case law.

II

The constitutionality of the agency shop in state public sector bargaining relationships is plain so long as collections from non-union, dissenting employees are not used in support of ideological or political programs unrelated to the collective bargaining duties of the exclusive representative.⁴ In addition, the amounts paid by non-union dissenters cannot exceed dues paid by members "in the same bargaining unit."⁵ This egalitarian condition rests on constitutional considerations as well as statutory ones. These general propositions are plain. Nevertheless, their implementation is not a simple matter.

* * *

At least as early as 1963, the Supreme Court of the United States suggested the desirability of a voluntary union procedure affording dissenting dues payers a remedy against union political expenditures with which the payers disagreed.⁶ The suggestion has become a necessity reflected in both the Ohio Statute governing public employee collective bargaining⁷ and

⁴Id.

⁵R.C. 4117.09(C).

⁶Brotherhood of Railway and Steamship Clerks v. Allen (1963), 373 U.S. 113, 122.

⁷Ohio Revised Code 4117.09(C).

OPINION
Cases 86-REPF-1-0033, 86-REPF-1-0034
86-REPF-1-0019 and 86-REPF-1-0013

Page -5-

federal decisional law.⁸ This necessity renders ineluctable the need for dissenters' access to internal union procedures to determine the nature and amounts of union expenditures in order to test whether a rebate is required.

III

To conform to federal law the procedure must incorporate three specific features compelled by the Hudson case:

"We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."⁹

The Hudson conditions comprise the minimal federal standards for a lawful rebate procedure in the Ohio public sector. This conclusion is grounded in federal constitutional considerations reenforced (if reenforcement were needed) by the statutory command that union internal procedures conform to federal law. However, there is additional learning to be gleaned from the federal cases.

The lodging of the rebate claim is the objecting employee's obligation,¹⁰ but initially the employee need only make the objection known.¹¹ A general objection is sufficient. A requirement of greater

⁸See Abood, Ellis, and Hudson, fn. 3, supra.

⁹Hudson, supra, 89 L. Ed. 2d at 249. See also fn. 23, id:

"If the Union chooses to escrow less than the entire amount, however, it must carefully justify the limited escrow on the basis of the independent audit, and the escrow figure must itself be independently verified."

¹⁰Id. at 247.

¹¹Id., in fn. 16.

45

OPINION
Cases 86-REPF-1-0033, 86-REPF-1-0034
86-REPF-1-0019 and 86-REPF-1-0013

Page -6-

specificity is improper at this point because it would require an employee to relinquish either the right to withhold support from personally objectionable political or ideological causes or the right to maintain beliefs without public disclosure.¹² Accordingly, a dissenter is not obliged to register specific objections until the employee organization supplies the data and method of calculation which makes a specific claim possible.

In sum, a licit internal procedure must include at least these elements:

- 1) Notice to all employees in the bargaining unit that an agency fee clause exists and that deductions are to begin and when. At this point, a dissenter is required to announce his or her status and to register at least a general objection to save the claim.¹³
- 2) An escrow of the sum of all deductions in the full amount at

¹²Abood, supra, at 241. It has been held that an objection need not be lodged before an internal procedure is in place. Ellis v. Western Airlines, Inc. (U.S.D.C.S.D. Calif. Dec. 17, 1986), Case No. 86-1041-E, relying on the concurring opinion in Hudson which quoted from Abood, supra, at 244. See also "...the 'advance reduction of dues' was inadequate because it provided nonmembers with inadequate information about the basis for the proportionate share. In Abood, we reiterated that the nonunion employee has the burden of raising an objection, but that the union retains the burden of proof: 'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.'" Abood, 431 U.S., at 239-240, n. 40, quoting Railway Clerks v. Allen, 373 U.S. 113, 122 (1963); Hudson, supra, 89 L. Ed. 2d. at 246-247.

¹³The announcement of objector status must be renewed with each contract renewal incorporating an agency fee clause. Coordinating objector status renewals with contract renewals will not be unduly burdensome on dissenters and will give play to the possibilities that experiences with the bargain have either resolved or hardened opposition.

46

interest. If less than the full amount is placed in escrow it must be done in compliance with footnote 23 of Hudson¹⁴

- 3) An audit by a neutral appointed by a method that does not give the employee organization unrestricted choice in the appointment.¹⁵
- 4) The audit must identify all expenditures for all purposes. The audit results, coupled to the method of calculation, must be communicated to all members of the bargaining unit before the time period for objection begins to run. This communication must be accompanied by directions specifying the procedure for registering objections.¹⁶

¹⁴See fn. 9, supra, for the relevant text of fn. 23.

¹⁵The neutral auditor will be paid by the employee organization, but the selection of the auditor must be divorced from an "unrestricted choice" by the employee organization. Cf. Hudson, supra, fn. 21.

There is no intention to suggest that the arbitrators making the determinations in these cases were not upright or behaved anyway but impeccably. The problem is that the union chose and paid them. This offends Hudson.

¹⁶Information in advance of an ultimate objection is a prerequisite to an effective right to object even though initially the "nonmember's 'burden' is simply to make his objection known," Hudson, supra, fn. 16. See also the observation in Hudson at L. Ed. 2d. 245:

"...the nonunion employee--the individual whose First Amendment rights are being affected--must have a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim."

When full information is available, an Ohio public employee objector is required under R.C. 4119.09(C) to make the objection specific. This does not conflict with Hudson and may be implicit in it.

- 5) After the communications specified in 4), the dissenter must have not less than 30 days to make his or her objections specific.¹⁷
- 6) The employee organization must make its rebate determination after the time for specific objections to expenditures has passed.
- 7) The rebate determination must be dated.

Any challenge to the determination may be raised by filing with SERB a petition for review within 30 days of the determination date specifying the arbitrary or capricious nature of the determination, if any. A copy of the petition must be served upon an officer of the employee organization pursuant to paragraph (B) of Rule 4117-1-02 of the Administrative Code. Within ten days of the service of the petition, the employee organization may file with the Board and serve upon the employee organization a petition. At this stage a full hearing on specific objections to the determination is by SERB or by a SERB hearing officer to decide whether the determination is arbitrary or capricious. Any hearing officer's report and recommendations on determinations of arbitrariness and capriciousness will be reviewed by SERB after the parties have been given a ten day opportunity to comment on the report and recommendations.

One question remains to be resolved before applying the constitutional principles to the issues presently here. That question is whether the dispositive constitutional standards were sufficiently developed on the effective date of Chapter 4117 to put the respondents on notice or, if they were not, whether the current standards are retroactive anyway.

IV

Retroactivity may be approached in either of two ways. One is to apply

¹⁷Id.

the doctrine of Gurish v. McFaul (6 Cir., 1986) 801 F. 2d 225, 227 and presume from Hudson's silence on the issue, that the Supreme Court intended the Hudson principles to apply retroactively. The other tack would follow the course of Chevron Oil Co. v. Hudson¹⁸ and apply a three-part test.¹⁹

The Chevron test precludes retroactivity or not based upon three considerations:

- (1) Whether the decision to be applied establishes a new principle of law either by overruling a "clear past precedent upon which litigants may have relied" or decides an issue "of first impression ... not clearly foreshadowed."²⁰
- (2) Whether on the basis of its merits and demerits, history, purpose and effect of the new rule, retroactivity "will further or retard its operation."²¹ And,
- (3) Whether the retrospective application will "produce substantial inequitable results"²²

Either Gurish or Chevron require retroactivity in the present instance. Gurish for the obvious reason that the silence in Hudson, on the Gurish principle, requires retrospective application as a matter of law; Chevron because the instant case meets Chevron standards. This is so because there has been no "clear" established precedent warranting reliance on a no rebate rule. On the contrary, over a number of years there have been clear rebate

¹⁸(1971) 404 U.S. 97.

¹⁹Id. at 106-107.

²⁰Id.

²¹Id.

²²Id.

developments adumbrating the Hudson principles.²³ And, on the effective date of Section 4117.09(C), April 1, 1984, an employee organization operating in the Ohio public sector was on notice, or should have been, that it was required to establish internal rebate procedures satisfying standards to "conform[s] to federal law."²⁴ Furthermore, retrospective application will certainly not retard application of the rebate rule and will assist its purpose. Finally, such minuscule sums are involved that inequity is hardly a factor.²⁵ Therefore, rebates must be retroactive and retroactivity will extend to April 1, 1984, the effective date of the Ohio Public Employees Collective Bargaining Act.

V

Measuring the respondent's procedures by the requisite standards, several flaws are evident. These are:

- 1) Inadequate explanation of the basis for the fair share fee.

²³For example, in 1977, in Abood v. Detroit Board of Education, *supra*, at 240, the Supreme Court noted with approval that Brotherhood of Railway and Steamship Clerks v. Allen 373 U.S. 113 (1963) 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.'"

²⁴R.C. 4117.09(C) was part of the statute passed on October 6, 1983, effective April 1, 1984.

²⁵Moreover, retroactivity furthers First Amendment rights without placing crippling difficulties on complying employee organizations. Experience seems to indicate that compliance will generate insignificant costs beyond those connected with the review procedures. And the latter procedures will be required in substantial part whether or not rebates are retroactive. This conclusion is reinforced by the consideration that at this point there is unlikely to be a large accumulation of claims. It can be argued pragmatically that it is better to err in favor of retroactivity and on the side of First Amendment rights, both because of the importance of those rights and to avoid the expense of litigation testing the question of retroactivity.

Objectors have had neither the advance information necessary to determine whether to object nor to what. This may not be a fatal fault if coupled with a sufficiently protective escrow. Full escrow will provide time for the union to develop and make available the data necessary to an informed claim without risking that the dissenter, in effect, makes an involuntary loan to the employee organization.²⁶ While the objector has the burden of objection in order to trigger protection of the claim, the employee organization carries the burden of proving the purpose of expenditures, because it controls access to the evidence. Thus the preservation of an objector's claim can be effected initially by a simple objection. But to satisfy Hudson, an employee organization must provide neutral verification for the specific inclusions and exclusions and make the numbers accessible to objectors for specifying objections before the deduction is licit²⁷ under Hudson and R.C. 4117.09(C).

2) Verification procedure.

The process must include a review by an independent auditor appointed by a neutral in a way to prevent unrestricted choice of

²⁶See Hudson, supra, 89 L.Ed. 2d at 246, 248-249.

²⁷The propriety of specific inclusions and exclusions are not reached in the first part of the bifurcated hearing provided in the instant cases. However, the conclusion seems warranted that verification of the uses of the fees is necessary. Since a limited escrow (i.e., one based on a union's advance determination of amounts) "must carefully" be justified on the basis of an "independent audit, and the escrow figure ... itself be independently verified," see fn. 9, supra, it follows that a post escrow determination of the ultimate fair share must include substantiation of the same quality and degree.

the neutral by the employee organization. The audit must determine all the purposes and portions of expenditures from dues. After the audit, but before a final determination by the employee organization, the employee organization must provide the objectors an opportunity to make their objections specific. In the usual case challenge before SERB on "arbitrary and capricious" grounds would be the next step. However, because the necessary first steps have not been followed in the present cases, the existing internal procedure obviously blocks recourse to the statutory review and, therefore, would fail the "arbitrary or capricious" test of R.C. 4117.09(C).

3) Escrow defects.

OEA/NEA has made an apparent good faith effort to establish an adequate (although less than total) escrow by adding a 5% cushion to the union selected arbitrator's conclusions respecting expenditures chargeable to dissenters.²⁸ However, apart from the lack of an audit by an impartial neutral as defined in Hudson, the escrow may suffer from an intractable time defect. For there is a time lag which renders data for a proportional escrow one year late.²⁹ Last year's expenditures provide the base calculations

²⁸HORD p. 14.

²⁹See HORD, p. 15:

"The primary problem with the escrow system as established is that the amount is based on last year's expenditures, while the rebate itself is based on this year's expenditures. In fact, the evidence demonstrates that the 1983-84 school year rebate (i.e., 'the Final Refund for the preceding membership year') was not known until sometime in 1985. This was too late to use it to determine the advanced reduction in dues or escrow amount for the 1984-85 school year, which began with the October 15, 1984 paycheck."

OPINION
Cases 86-REPF-1-0033, 86-REPF-1-0034
86-REPF-1-0019 and 86-REPF-1-0013

Page -13-

for the escrow amounts, while current expenditures provide the data for the rebate. Rebates so derived are arguably inaccurate. The solution for this problem may require a revamping of OEA/NEA accounting procedures. If that is not feasible, the problem can be handled by joining a total escrow of dues at interest³⁰ to a system of rebate computations that are regularly not current but represent a proper figure one year old protected by escrow at interest. Total escrow at interest will counter any objection that the delay involves an illicit loan to the employee organization.

VI

A. This case is remanded to the Hearing Officer with instructions to the respondents to establish and submit to the Hearing Officer, within 30 days from the date of this directive, an internal union fair share fee rebate procedure consistent with this opinion. The procedure must be available and announced to all employees including the dissident employees involved in the present cases and must include a legal escrow of dues at best available current interest rates.

B. Upon receipt of the internal procedure mandated in A., the objectors shall be given access to the audit of expenditures and an opportunity to make their objections specific.

C. After receiving the objectors' specifications, the respondents shall determine rebates and advise the dissidents of amounts due, if any.

³⁰At least one federal case suggests that the employer deducting fair share fees should deposit the entire amount in an interest bearing escrow account and retain control until further order of the court, Lowary, et al. v. Lexington Local Board of Education, et al., (U.S.D.C.M.D. Eastern Div. (1986), Case No. C86-1536A, Memorandum Opinion, p. 10.

OPINION
Cases 86-REPF-1-0033, 86-REPF-1-0034
86-REPF-1-0019 and 86-REPF-1-0013

Page -14-

Determinations shall be dated.

D. A dissident may obtain SERB review by specifying the arbitrary or capricious nature of the rebate determination and filing a challenge with the Hearing Officer, as representative of SERB, within thirty days of the date of determination.

E. The Hearing Officer shall convene a hearing on the challenges, if any, and report to SERB pursuant to the Administrative Code Rule 4117-11-01.

The hearing will be confined to three questions:

1. Did the objectors exhaust the internal procedure prescribed in paragraph A?
2. Were the expenditures charged to non-member objectors properly chargeable?
3. Were the "items and amounts of the respective rebates" for non-member objectors properly determined by the respondents?

Sheehan, Vice Chairman, concurs.

02578:d/b:4/08/87:d

54