

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 89-004

In the Matter of

Ellen D. Gibney, et al.,

Petitioners,

and

Toledo Federation of Teachers,

Respondent.

CASE NUMBER: 86-REPF-11-0358

DIRECTIVE
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
February 9, 1989.

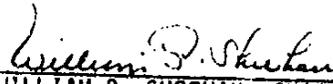
On November 12, 1986, a petition to challenge rebate determination was filed pursuant to Ohio Revised Code (O.R.C.) 4117.09(C). The case was directed to hearing. On August 19, 1987, the hearing officer issued a recommended determination. On February 24, 1988, oral arguments were heard by the Board.

The Board has reviewed the record, the hearing officer's recommended determination, exceptions, responses, amicus curiae briefs, and all other documents filed in this case. For the reasons stated in the attached opinion, incorporated by reference, the Board adopts the Stipulations, Findings of Fact, Conclusions of Law, Recommendations 1, amends Recommendation 2 by changing the last phrase to read: ". . . and the terms stated in the opinion in this case," and rejects Recommendation 3.

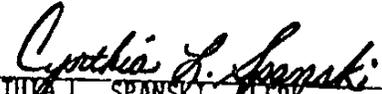
The Toledo Federation of Teachers is directed to return all fair share fees collected during the 1986-87 school year with interest to all employees who paid fair share fees that year and to cease and desist from further collection of fair share fees until such time as it has sent to the Board and has in place an internal procedure to determine fair share fee rebates which conforms to federal law and the terms stated in the attached opinion.

It is so directed.

SHEEHAN, Chairman; DAVIS, Vice Chairman; and LATANE, Board Member,
concur.


WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party
on this 9th day of February, 1989.


CYNTHIA L. SPANSKI, CLERK

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OPINION

Sheehan, Chairman:

I. Introduction

This action brought by the petitioners (Ellen D. Gibney, et al.) challenges the fair share fee rebate determination procedure of the Respondent (Toledo Federation of Teachers) as to whether the procedure is in conformance with federal law and Ohio Revised Code (O.R.C.) §4117.09(C). Petitioners also questioned the propriety of certain expenses charged them by the Respondent for the 1986-87 school year.

The State Employment Relations Board (Board or SERB) directed the cases to hearing and on March 2, 1987, a public hearing was held before the Board Hearing Officer, Michael R. Hall. On the question of the propriety of certain expenses, the Hearing Officer ruled that it was premature to attempt to resolve issues of expenses for the 1986-87 school year because that school year had not yet expired as of the date of the hearing. Therefore, one issue remained for determination:

Whether the Respondent's fair share fee rebate procedure in effect during the 1986-87 school year complied with federal law and with O.R.C. §4117.09(C).

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Subsequent to the Hearing Officer's proposed order, letters were received requesting oral arguments. The Board construed the letters as motions and granted the requests. The Board also allowed amicus curiae briefs. Oral arguments were heard on February 24, 1988, before the full Board.

II.

In Liptak, SERB Opinion 87-006 (4-9-87), the Board held that 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.¹
- 2) An escrow of the sum of all deductions in the full amount at interest. If less than the full amount is placed in escrow it must be done in compliance with footnote 23 of Hudson.²
- 3) An audit by a neutral appointed by a method that does not give the employee organization unrestricted choice in the appointment.³

¹The announcement of objection status must be renewed with each contract renewal incorporating an agency fee clause. Coordinating objection status renewals with contract renewals will not be unduly burdensome on dissenters and will give play to the possibilities that experience with the bargain have either resolved or hardened opposition.

²Chicago Teachers Union, Local No. 1, AFT, AFL-CIO, et al. v. Hudson, 106 S. Ct. 1066, n. 23 (1986)

³The 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*, at 1077, n. 21.

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.⁹

5) After communications specified in Paragraph 4), the dissenter must have not less than 30 days to make his or her objection specific.

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.

The Board further held that dispositive constitutional standards were sufficiently developed on the effective date of Chapter 4117 to require retroactivity to April 1, 1984.

III.

Building on Liptak, the Hearing Officer in the instant case further refined the standards for a fair share rebate procedure in his proposed order to require:

- 1) An annual audit of each employee organization which is a recipient of fair share fees by a neutral appointed by a method that does not give the employee organization unrestricted choice in the appointment. The neutral auditor will be paid by the employee organization(s).

⁹Information in advance of an ultimate objection is a prerequisite to an effective right to object even though initially the "nonmembers' burden" is simply to make his objection known." Hudson, supra, at 1076, n. 16

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- 2) The audit must verify all employee organization expenditures from regular dues and fair share fees of employees, including the purposes of such expenditures, in sufficient detail so that nonunion employees have a fair opportunity to identify the impact those expenditures have on their rights and to assert a meritorious First Amendment claim.
- 3) The certified employee organization may use these audit(s) as the basis for making its annual advance reduction of fair share fees, and/or as the basis for making its initial rebate determination. The audit results must be communicated to all nonunion members of the bargaining unit before the time period for objection and the first annual deduction of fair share fees begins to run. The communication must be accompanied by directions specifying the procedure for registering objections (including the deadline) and appealing the employee organization's rebate determination, as well as a notice to all nonunion employees in the bargaining unit that an agency fee clause exists and that deductions are to begin and when.
- 4) The rebate procedure of the certified employee organization must give each nonunion employee in the bargaining unit at least 30 days after the communications required in Paragraph 3) within which to announce his or her status and to register at least a general objection to paying a fair share fee equal to regular union dues to save the claim. Upon receipt of a general objection, the certified employee organization must immediately reduce the fair share fee by those pro rata amounts which it agrees are or were expended by it

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or its affiliates for purposes unrelated to collective bargaining, grievance adjustment, and contract administration. Where the objection is only as to certain expenditures, the certified employee organization may make an advance reduction of fees limited only to the expenditure objected to. The advance reduction of fees and the rebate determinations of the certified employee organization must be communicated to all objectors by certified mail, return receipt requested, together with a full explanation of which expenditures in the neutral audit the certified employee organization has determined to be chargeable to the objectors.

- 5) After the certified employee organization makes its initial rebate determination, the objectors must have at least thirty (30) days to reject or appeal pursuant to the internal rebate procedure of the certified employee organization specifying the basis for the objectors' disagreement with the initial rebate determination. Upon receipt of such appeal(s), the employee organization must expeditiously render a final rebate determination.⁵
- 6) All rebate determinations must be dated.
- 7) Any fair share fees reasonably in dispute must be placed in a separate, interest-bearing escrow account in an Ohio financial institution by the certified employee organization until the

⁵The certified employee organization may use whatever internal mechanism it deems appropriate to resolve such internal appeals, including but not requiring a neutral arbitrator, but, absent the voluntary agreement of the employee, it cannot waive the employee's right to ultimately appeal to SERB. The availability of SERB to review such determinations satisfies the constitutional requirements of Hudson for a neutral, while the internal appeal satisfies Section 4117.09(C).

- dispute is ultimately resolved. If less than the full amount is placed in escrow, the certified employee organization must carefully justify the limited escrow on the basis of the audit referred to in Paragraphs 1) and 2), and the escrow figure must itself be independently verified.
- 8) A challenge to the certified employee organization's final rebate determination may be raised by filing with SERB a petition in conformance with O.A.C. Rule 4117-11-01 to challenge rebate determination within 30 days of the final rebate determination date specifying the reason why the employee believes the final rebate determination is arbitrary or capricious or otherwise fails to conform to federal law. A copy of the petition must be served by the objector upon the certified employee organization official designated in the rebate procedure to receive appeals from rebate determinations.⁶
- 9) Within ten days of the service of the petitions, the certified employee organization may file with the Board and serve upon the petitioners its objections to the petition. Thereafter, either the Board or a SERB hearing officer will decide whether the rebate determination is arbitrary and capricious or fails to conform with federal law. Any hearing officer's report and recommendation will be reviewed by SERB after the parties have been given a ten-day opportunity to file exceptions, responses or cross-exceptions on the report and recommendation pursuant to O.A.C. Rule 4117-1-13.

⁶Such service is required by Paragraph B. of the O.A.C. Rule 4117-1-02.

According to the above procedures, an employee need make only one general objection to paying fees equal to union dues in order to receive the automatic advance reduction in fees by the certified employee organization as well as the certified' employee organization's initial rebate determination.

A general objection is sufficient. A requirement of greater 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 belief without public disclosure.

Liptak, supra, at 319 (footnote omitted). See, Abood v. Detroit Board of Education, 431 U.S. 209, 241 (1977).

Elaborating on the specificity issue, the hearing officer recommended that specificity is required when appealing from the initial rebate determination so that the employee organization initially, and SERB eventually, can determine why the rebate determination is alleged to be improper. At this point, the dissenting employee shall not need to disclose their reason(s), if any, for their opposition to paying for representation services other than collective bargaining, contract administration, and grievance adjustment. They need only specify what is wrong with the rebate determination.

The hearing officer recommended the following categories of employee organizational expenditures be clearly identified and broken out with an explanation of the purpose of each item:

⁷Certified employee organization as used throughout this recommended procedure includes deemed certified employee organizations pursuant to O.R.C. §4117.05(B) and 1983 Am. Sub. S.B. 133, Section 4.

- 1) Each political candidate or ideological cause contributed to,
- 2) Each lobbying activity engaged in,
- 3) All organizing activity expenses,
- 4) Each charitable contribution,
- 5) Each member-only benefit provided,
- 6) Each employee organization publication or literature,
- 7) Each litigation engaged in,
- 8) Each convention and social activity,
- 9) Any other activity arguably unrelated to collective bargaining, contract administration or grievance adjustment.

Amplifying on the explanation needed for the potential objector to make an informed judgment, the hearing officer noted that overhead, administrative costs, and salaries should be allocated to each of the above items where feasible. In the absence of adequate employee organization records to make such a specific allocation of overhead and related expenses, it will be presumed that the overhead, administrative and salary expenses attributable to the above items are in the same percentage rates as the above expenses relate to the employee organization's total expenditures (minus the overhead, administrative and salary expenses).

IV.

Applying the standards of Hudson (supra) against Respondent's procedure, the hearing officer found the procedure deficient in the following constitutional and statutory requirements:

- 1) It did not involve an immediate advance reduction in fair share fees for the objecting nonunion employee of the amounts that Toledo

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Teachers Federation does not dispute are for "political or organizing purposes."

- 2) It failed to provide nonunion employees with adequate information about the basis for the proportionate choice from which the advance deduction of dues was calculated.
- 3) Potential objectors did not have the necessary advance neutral auditors report, together with the employee organization's explanation for how it determined the chargeable and non-chargeable expenditures, in its initial rebate determinations and/or the advance reduction of fair share fees. The financial information of the Ohio Federation of Teachers (Respondent's Exhibit #1) is also incomplete as a financial statement, not audited, and not prepared by a neutral auditor. Likewise, American Federation of Teachers' Accountant Report (Respondent's Exhibit #1) suffers from the same constitutional defect. It fails to list and explain the various categories sufficiently to be useful to potential objectors.

Accordingly, the hearing officer concluded that Respondent's fair share fee rebate dispute procedure for the school year 1986-87 is arbitrary and capricious within the meaning of D.R.C. §4117.09(C) and fails to conform with federal law and recommended:

- 1) The Board adopt the Stipulations, Findings of Fact and Conclusions of Law
- 2) The Board issue an order requiring Respondent to return all fair share fees collected during the 1986-87 school year and requiring Respondent to cease and desist from further collection of fair share fees until such time as Respondent has sent to the Board and

has in place an internal procedure to determine fair share fee rebates which conforms to federal law and the order of the Board in this case.

- 3) The Board adopt the procedure discussed herein as representing the minimum requirements of an internal rebate procedure which conforms to federal law and Section 4117.09(C).

V.

The Board concurs with the Stipulations, Findings of Fact, Conclusions of Law and Recommendations No. 1, amends Recommendation No. 2 to read: "The Board issue an order requiring Respondent to return all fair share fees collected during the 1986-87 school year with interest to all employees who paid fair share fees that year, and requiring Respondent to cease and desist from further collection of fair share fees until such time as Respondent has sent to the Board and has in place an internal procedure to determine fair share fee rebates which conforms to federal law and the terms stated in the opinion in this case." but rejects Recommendation No. 3 for the reasons adduced below.

In Hudson, (Chicago Teachers Union, No. 1 v. Hudson, 106 S. Ct. 1066 (1986)), the Supreme Court set forth three constitutional requirements that must be incorporated into a union's procedure for collecting agency fees in order to conform to federal law. They are:

- 1) An adequate explanation of the basis for the fee,
- 2) A reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker,
- 3) An escrow for the amounts reasonably in dispute while such challenges are pending.

The Hudson requirements comprise the minimal federal standards for a lawful rebate procedure in the Ohio public sector. Clearly, as the hearing officer has determined, the employee organization's procedures in the instant case did not fulfill these requirements nor those of O.R.C. §4117.09(C).

Ohio Revised Code §4117.09(C) requires public employee organizations to prescribe an internal fair share fee procedure "which conforms" to federal law. In pertinent part, O.R.C. §4117.09(C) provides:

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. (Emphasis added.)

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.

Upon challenge by an objecting nonunion member, the Board's responsibility is to review internal rebate procedures for their conformance to federal decisional law and their absence of arbitrary and capricious action.

The Board in Liptak and the hearing officer in the instant case strove to fashion a procedure to guide public employee organizations in meeting the minimum requirements of federal case law and to comport with O.R.C. §4117.09(C). In fashioning such procedure, the Board in Liptak and the hearing officer in the instant case, to an even larger degree, went beyond the requirements of both. Retrospectively, the Board acknowledges that the "minimum" constitutional safeguards prescribed in Liptak, and now the recommendation of the hearing officer in the instant case, exceed the mandated requirements of federal case law and O.R.C. §4117.09(C).

Specifically, federal decisional law does not require:

- 1) Notice to all employees in the bargaining unit that an agency fee clause exists and that deductions are to begin and when.
- 2) An independent neutrally appointed auditor.⁹

⁹Liptak at 3-19. The hearing officer correctly concluded that this means all nonunion members (H.O. p. 12, fn. #5). Hudson does not require advance financial information be provided to union members. See Hudson at 1075, 1076.

¹⁰Liptak, p. 7, sub. para. 3; Hearing Officer's Recommended Determination (HORD), p. 18, Item No. 1. Federal courts have allowed unions to choose their independent auditors. Lowary v. Lexington Local Board of Education, et al., 1988 SERB 4-19, (ND, Ohio 3-2-88) (unreported), rev'd. for other reasons, 1988 SERB 4-67 (6th Circuit, Ohio, 8-11-88); Tierney v. City of Toledo, 824 F. 2d 1497 (6th Cir. 1987); Damiano v. Matish, 830 F. 2d, 363 (6th Cir. 1987). A neutrally selected auditor is not a requirement of Hudson, nor is there any decisional law to support the proposition that employee organizations' selection of an independent auditor would violate [Footnote continued next page.]

- 3) An exhaustive and detailed list of all expenditures.¹⁰
- 4) All communications to objectors be by certified mail and deposit escrowed funds only in Ohio financial institutions.¹¹
- 5) A procedure for selecting the auditor through AAA.¹²
- 6) Reimbursement to non-objecting nonmembers.¹³

the rights of fair share fee payers. "Hudson's auditor requirement is only designed to ensure that the usual function of any auditor is fulfilled. That usual function is to ensure that expenditure which the union claims it made for certain expenses were actually made for those expenses. The union's plan satisfies this requirement. The appellant's interpretation of Hudson's auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses." Andrews v. Education Ass'n. of Cheshire 829 F. 2d 335, 340 (2nd Cir. 1987).

The independent auditor requirement does not prohibit or restrict the employee organization from engaging or hiring the auditor. It only mandates that the auditor must not be a part of the employee organization.

The independent auditor and the impartial decisionmaker are two distinct and separate requirements of Hudson and are not to be confused as one and the same as in Liptak and the Hearing Officer's Recommendation. Andrews, at 1377, 1378 *supra*. Hudson prohibited the union from choosing the impartial decisionmaker who ultimately reviews the chargeability determination but did not alter the union's practice of choosing their own accountants.

¹⁰Hudson at 1076 (*supra*), n.18. The union does not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include major categories of expenses, as well as verification by an independent auditor. (Relatively large expenditures, the court indicates should be divided into their component parts so as to demonstrate with specificity the nature of the expenditure.)

¹¹Federal case law makes no requirement that all communications to nonunion objectors be by certified mail. Nor is there a requirement that the escrowed funds be deposited only in Ohio financial institutions. Hudson, *supra*; Ilerney, at 1504.

¹²Again, confusion between independent auditor and impartial decisionmaker. Andrews, 829 F.2d at 340.

¹³Aboud v. Detroit Board of Education, 431 U.S. at 238. "[O]nly employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief."

7) A single procedure for all unions.¹⁴

Both Liptak and the Hearing Officer's recommended standards exceed the minimum constitutional requirements of Hudson, and the application of either imposes an unrequired burden on employee organizations to such an extent that the latter standard, if adopted, might result in a de facto denial of an employee organization's statutory right to collect agency fees. How then should SERB fulfill the mandate of O.R.C. §4117.09(C)?

VI.

As noted earlier, the Board's responsibility is to decide whether the rebate determination of an employee organization is arbitrary or capricious and conforms to federal law when such challenge is raised by a nonunion member of the bargaining unit.

In fulfilling the mandate of O.R.C. §4117.09(C) what, for instance, does the Board examine upon review - the employee organization's procedure, the ultimate rebate determination, or both? Two additional elements further complicate the issue: the requirement that the employee organization's rebate determination must conform to federal law and the requirement that the rebate procedure provides for a rebate of expenditures in support of partisan politics or ideological causes not germane to the work of the employee organization in the realm of collective bargaining.

¹⁴Andrews, 653 F. Supp. at 1377: "[A]nd this court does not read Hudson as prescribing a single scheme for every union, but rather, as establishing general constitutional norms that may be met by a variety of different systems suitable to the particular circumstance in which they are designed to function."

Both Liptak and the Hearing Officer's Recommendation tended to impose a single complex system for all unions. This was not the intent of Liptak, but it is conceded that its application could well be as if it were

The statute specifically provides that "absent arbitrary or capricious action," such determination is conclusive except that a challenge to such determination may be filed within thirty (30) days of the determination specifying the arbitrary or capricious nature of the determination, and that the Board shall review the rebate determination and decide whether it was "arbitrary or capricious." While it is clear that the standard of review is "arbitrary or capricious," it is less clear whether it is only the rebate determination which is reviewed, as some have argued, or the procedure used to reach the determination. When reviewing the actual rebate determination, should the Board only review whether the substantive federal standard was followed in determining the rebate? For it is the federal standards devised in Hudson which protect the First Amendment rights of nonunion members seeking a rebate. Or should the Board also examine whether O.R.C. Chapter 4117's statutory standard was followed requiring: "the rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germane to collective bargaining?"

Is a proper reading of the statute to mean that any fair share fee determination procedure inconsistent with Ohio's substantive statutory standard and substantive federal standards is subject to being held arbitrary or capricious? Or, in the context of a petition to challenge a rebate determination, is the rebate procedure beyond the Board's scope of review?

The thrust of the statute's language would seem to argue against the latter,¹⁵ especially since the employee organization's procedure must

¹⁵A review of the provision's legislative history does not provide any insight into the legislative intent.

conform both to federal law and Ohio's statutory rebate requirements and must be reviewed as to determine whether it is arbitrary or capricious. When read in whole, the provision's language seems quite clear and reduces the options for interpretation leaving the ineluctable translation that the Board's review of a rebate determination must include a review of the employee organization's procedure for determining the rebate, and not merely a re-examination of the impartial decisionmaker's determination. Otherwise, the procedure's conformance to federal law could not be satisfied, nor could expenditures in support of partisan politics or ideological causes not germane to the work of employee organizations in the realm of collective bargaining be determined. Moreover, there is no authority for delegating the Board's responsibility to others.¹⁶

It is, therefore, the opinion of the Board that the statutory rebate provision must be read to mandate that the Board review rebate determinations for their conformance to both federal procedure and Ohio's substantive statutory standard. Should a review of a rebate determination reveal that a proper procedure to determine rebate was not followed, and the standard employed does not satisfy federal law and the statutory standard, then the rebate determination must be considered arbitrary.

¹⁶Federal case law establishes a role for an impartial decisionmaker to determine the validity of a challenger's claim, but O.R.C. §4117.09(C) makes no provision for delegating the Board's responsibility to the impartial decisionmaker. The Board is compelled to conclude that its role is in addition to that of the impartial decisionmaker.

VII.

It is useful to review the federal standards.

Since Hudson, subsequent federal case law has further defined the three constitutional requisites and identified the elements necessary for an agency fee rebate determination procedure to meet these minimum requirements.

The courts have held that before an employee organization is entitled to collect agency fees,¹⁷ it first must adopt a rebate determination procedure which provides for:

- 1) A notice¹⁸ to all nonunion members that a fair share fee provision is contained in the current collective bargaining

¹⁷No agency fee should be deducted from nonunion members' paychecks until after the time for objection has passed, Tierney, supra, at 1504; Domiano v. Matish, 830 F.2d 1363, 1369 (6th Cir. 1987)

¹⁸Aboud at 224; Lehnert v. Ferris Faculty Association, MEA-NEA, 643 F. Supp. 1306, 1331 (W.D. Mich. 1986); Gilpin v. AFSCME, 643 F. Supp. 733, 737 (C.D. Ill. 1986).; Tierney at 1503: [quoting Hudson [r]equiring them to object in order to receive information is impermissible.]

The notice to nonunion members is a yearly obligation based on the most recent employee organization's annual audit.

Upon receipt of the notice, the objecting nonunion member must make his challenge to the fair share fee determination within the period and manner so prescribed and specify the portion of chargeable expenditures to which he objects. Once the objection is made that portion of the advanced fair share fee in dispute must be placed in an interest bearing escrow account.

The matter is then referred to the impartial decisionmaker for determination of the validity of the employee organization's assessment of the fee.

The determination is conclusive on the parties, except the objector may file with SERB an arbitrary and capricious challenge to the determination pursuant to O.R.C. §4117.09(C). The arbitrary or capricious nature of the determination must be specified. SERB will then review the rebate determination for whether it is arbitrary or capricious.

agreement and dues based on advance calculation¹⁹ of the nonmember's fair share fee will be deducted on a predetermined date and accompanying the notice:

- a) An adequate explanation for the basis of the fee, including a disclosure of the employee organization's yearly budgetary expenditures²⁰ broken down between chargeable and non-chargeable categories.²¹

¹⁹It appears the courts would prefer that the employee organization first, determine how much of its yearly budget will be spent on political/ideological activities, and then reduce the nonunion member fee accordingly before a deduction is made from a nonunion member's paycheck, Tierney at 1503; Hudson, at 1076, n. 18; Andrews, at 1377. A substantial First Amendment violation occurs when the procedure implemented to effectuate a rebate of fair share dues expended on activities unrelated to collective bargaining, contract administration, and grievance procedures are so deficient as to result in a portion of the dues being used even temporarily to support such unrelated activities, Hudson, at 1075.

²⁰The employee organization's previous year's audit may be used, Hudson, at 1076, n.18: The union need not provide nonmembers with an exhaustive list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor.

²¹Included among chargeable expenses are: lobbying activities pertinent to the duties of the union as a bargaining representative and not for political or ideological positions of the union; litigation incident to contract administration; grievance and dispute resolution; fair representation matters; and inter-union jurisdictional disputes; attending national conventions; publications--portion regarding collective bargaining issues, Lenhert, at 1320-1326.

Included among non-chargeable expenses are: organizing activities; political or ideological activities; per capita tax to national and state organizations, unless these organizations provide a breakdown of their expenditures and, if so, then only the portion of the per capita not expended on political or ideological activities or work not germane to collective bargaining.

- b) An adequate explanation of how challenges to the determination may be made allowing a reasonable period of time in which objections may be filed.²²
- 2) An independent auditor²³ to verify the expenditures as represented by the employee organization.
- 3) An impartial decisionmaker²⁴ to make a reasonably prompt determination upon challenge by a nonunion member of the validity of the employee organization's fair share fee.
- 4) A reasonable time²⁵ for the adjudication of the validity of the employee organization's assessment of the fair share fee by the impartial decisionmaker and for refund of additional rebate, if any, to the objecting nonunion member.
- 5) An escrow account²⁶ for the amount reasonably in dispute.

If an agency fee rebate determination procedure fails to meet these requirements, it will be found statutorily deficient and, therefore,

²²Tierney at 1503.

²³Lowary, supra, note 9.

²⁴Hudson at 1076; Domiano, at 1371; Gilpin at 738.

²⁵The impartial decisionmaker must make his determination within a reasonable period of time. Reasonable time has been approved by the courts for as short as thirty days and as long as forty-five days. Any procedure which takes a year or longer will be held unconstitutional, McGlumphy, 633 F. Supp. at 1082, 1083.

²⁶Once an objector challenges the calculation of the fair share fee, the employee organization must deposit the disputed amount in an interest bearing escrow account, Hudson, at 1077-0178.

declared arbitrary and capricious. Where Liptak conflicts with these minimum constitutional requirements, Liptak is overruled.

Davis, Vice Chairman, and Latané, Board Member, concur.

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