

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

FAMILY COURT OF THE STATE OF DELAWARE,	:	
	:	
Petitioner,	:	
	:	Declaratory Statement
and	:	
	:	<u>D.S. No. 09-06-684</u>
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 27,	:	
	:	
Respondents.	:	

Appearances

*Aaron Shapiro, State Labor Relations and Employment Practice Specialist, for Family Court
Joel A. Smith & Linda McKeegan, Kahn Smith and Collins, PA, for UFCW Local 27*

The Family Court of the State of Delaware (“Court”) is a public employer within the meaning of 19 Del.C. §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994).

The United Food and Commercial Workers, Local 27 (“UFCW”) is an employee organization which admits public employees to membership, and has as a purpose the representation of those employees in collective bargaining pursuant to 19 Del.C. §1302(i). UFCW Local 27 is the certified exclusive bargaining representative of a unit of Family Court employees as defined by Representation Petition 06-05-519. 19 Del.C. §1302(j).

Delaware Family Court and the United Food and Commercial Workers Union, Local 27, are parties to the extant collective bargaining agreement which has a term of June 5, 2007 through June 4, 2010.

On or about June 11, 2009, the Court filed a Petition for Declaratory Statement which requests PERB consider “whether 19 Del.C. §1319 requires the Court to involuntarily withhold fair share fees regardless of language in a collective bargaining agreement requiring a prior signed authorization by the employee?”.

UFCW Local 27 responded to the Court’s petition on or about June 30, 2009, wherein it set forth alternative issues for resolution under the parties’ collective bargaining agreement:

- * What actions must the Court take to satisfy its union security obligations to the Union under §§3.1, 3.2. and 4.1 of the collective bargaining agreement, and if so [*sic*], what remedial actions must the Court undertake to satisfy those obligations?
- * If the absence of the receipt of an “application to pay dues/service fees” from a non-member employee consistent with §3.2 of the collective bargaining agreement, what actions must the Court take to enforce the terms of §3.1 which state [*sic*] that payment of a service fee is a “condition of employment.”? *Response to Petition 16.*

UFCW Local 27 requests PERB either (1) issue an order to dismiss the petition and refer the dispute to the contractual grievance procedure, or, alternatively, (2) act pursuant to PERB Rules 6.4(a) and 7 to convene a formal hearing or otherwise compile a factual record on the issues presented and issue a declaratory statement on the meaning, interpretation and application of 19 Del.C. §1319(a) and §§ 3.1, 3.2 and 4.1 of the collective bargaining agreement.

The Public Employment Relations Board convened an informal conference on September 21, 2009. During that meeting, the parties agreed to submit their dispute to

PERB under the declaratory statement process. This decision results from consideration of the relevant portions of the Public Employment Relations Act, applicable provisions of the parties' 2007-2010 collective bargaining agreement, and the positions of the parties as reflected in the pleadings.

APPLICABLE STATUTORY AND CONTRACTUAL PROVISIONS

§ 1301. Statement of policy.

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer. These policies are best effectuated by:

- (2) Obligating public employers and public employee organizations which have been certified as representing their public employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations;

§ 1302. Definitions.

- (k) "Fair share fee" means a fee that a nonmember shall be required to pay to the nonmember's exclusive representative to offset the nonmember's pro rata share of the exclusive representative's expenditures. Such fee shall be equal in amount to regular membership dues that a member of the exclusive representative's affiliated organizations, provided that the exclusive representative establishes and maintains a procedure by which any nonmember fee payer may obtain a rebate.

§ 1303. Public employee rights.

Public employees shall have the right to:

- (1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of a service fee as a condition of employment.

§ 1304. Employee organization as exclusive representative.

- (c) Upon the written authorization of any public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues or service fee as certified by the secretary of the exclusive bargaining representative and shall deliver the same to the treasurer of

the exclusive bargaining representative. Such authorization is revocable at the employee's written request. Such deduction shall commence upon the exclusive representative's written request to the employer. Such right to deduction shall be in force for so long as the employee organization remains the exclusive bargaining representative for the employees in the unit. The public employer is expressly prohibited from any involvement on the collection of fines, penalties or special assessments levied on members by the exclusive representative. (19 Del. C. 1953, § 1303; 55 Del. Laws, c. 126; 69 Del. Laws, c. 466, § 1.)

§ 1319. Fair share fees.

- (a) Where the provisions of a collective bargaining agreement so provide, a public employer shall deduct a fair share fee from each nonmember's salary or wages and promptly transmit this amount to the exclusive representative.
- (b) As a precondition to the collection of fair share fees, the exclusive representative shall establish and maintain a procedure that:
 - (1) Provides nonmembers with an adequate explanation of the basis for the fee and any rebate;
 - (2) Provides nonmembers with a reasonably prompt opportunity to challenge the amount of the fee and any rebate before an impartial decision maker; and
 - (3) Provides an escrow for the amounts reasonably in dispute while such challenges are pending.

A public employer shall not refuse to carry out its obligations under subsection (a) of this section on the grounds that the exclusive representative has not satisfied its responsibilities under this subsection.

- (c) In order to avoid undue delays in the receipt of and determination of the validity of fair share fees or rebates, any suit challenging a fair share fee or rebate must be filed within 6 months after receipt of the notice described in subsection (b) of this section or within 6 months after the nonmember exhausts the procedure described in subsection (b) of this section, whichever is later. (73 Del. Laws, c. 353, § 4.)

CONTRACTUAL PROVISIONS:

Article 3 – Union Membership

- 3.1 All bargaining unit employees shall have the right of Union membership consistent with State law. All bargaining unit employees who do not become members of the Union shall, as a condition of employment, pay to the Union a service fee not greater than the dues uniformly required of its members. All dues/service fees shall be paid in accordance with Article 4 of this Agreement.
- 3.2 All current bargaining unit employees shall, within 31 days of ratification

of this Agreement, make application to pay dues/service fees. New bargaining unit employees shall make application to pay dues/service fees upon completing their probationary employment. The State shall begin deducting the appropriate dues/service fees from the employee's paychecks in the second pay period following receipt of the employee's authorization.

Article 3 – Union Check Off

- 4.1 Dues/Service Fees Deduction: The State agrees to deduct the designated periodic membership dues/service fee uniformly from the earned wages of those employees paying such dues/service fee in equal amounts each pay period. Such deductions shall be made upon the completion and submission of a payroll authorization card signed by the employee. The State agrees to maintain a Union check-off system, whereby Union dues/service fees, which are determined and established by the Union, will be withheld from employees' pay in equal amounts each pay period. Union dues/service fee withholdings from the previous month's earnings will be transmitted to the designated Union Representative not later than the 20th day of each month. The Union shall notify the State in writing 30 days in advance of any change to the dues/service fees or the designated Representative. The term "dues" or "service fee" shall not include any initiation fee, fine, assessment, contribution or other form of payment required for Union members. Dues/service fee deductions for employees returning from leaves of absence shall be reinstated within 30 days following receipt of the necessary employee payroll authorization.
- 4.3 The Union shall indemnify and save the State harmless from any claims, suits, judgments, or attachments, and from any other form of liability as a result of making any deduction in accordance with the foregoing authorization and assignment under the conditions permitted by law.

DISCUSSION

The PERB determined in *Hoffman v. Dept. of Correction* (DS 03-01-375, V PERB 2881, 2888 (2003)) that the clear language of §1319(a) of the PERA takes precedence over §1304(c) because both provisions could not be applied without nullifying the other. Because §1319(a) was the more recently enacted provision, it was determined to control the deduction of fair share fees. Consequently, the statute has been

determined not to require a written authorization form signed by the employee for an employer to deduct a fair share or service fee from the non-member's salary or wages.

The current petition, however, raises a different question and requests the analysis precede one step farther. Specifically at issue here is whether Article 4.1 of the collective bargaining agreement conflicts with the statutory interpretation of *Hoffman*. The Court and UFCW Local 27 have contractually agreed to a procedure by which fair share fees may be withheld from salaries and/or wages. Article 4.1 states that the deduction of dues or service fees “shall be made upon completion and submission of a payroll authorization form signed by the employee”. {emphasis added}

There is no question that the statute permits public employers and exclusive bargaining representatives of their employees to enter into agreements which require the payment of a service fee as a condition of employment and further that the parties may also negotiate concerning the procedure by which a check-off procedure will operate. 19 Del.C. §1303; §1304; §1319. In this case, the parties have entered into negotiations and have agreed to a check-off procedure which requires that employees complete a payroll authorization card as condition precedent to the Court withholding either dues or service fees from wages of bargaining unit employees. There is nothing in this provision (nor has it been alleged) which violates the statute or which would require that the contractual provision be determined to be void or unenforceable.

A fair share fee is defined in §1302(k) to be a “a fee that a non-member is required to pay to the nonmember's exclusive representative to offset that nonmember's pro rata share of the exclusive representative's expenditures.” Section 1319 establishes procedures and requirements the union must meet as a “precondition to the collection of fair share fees”.

Failure or refusal to “complete and submit” the deduction authorization does not relieve the employees of their obligations to pay union membership dues or non-member service fees “as a condition of employment.” Full payment of the moneys owed to the exclusive bargaining representative (union) pursuant to the terms of the statute and the service fee provision of the contract is a condition an employee must meet in order to maintain his or her eligibility for employment. As stated by the Chancery Court in *Alvini, et al., v. Colonial School District et al*¹, “the Act does not implicitly guarantee to public ... employees a right to work free of the obligation to pay their fair share of the costs associated with the collective bargaining process.”

The obligation for bargaining unit employees who choose not to become members of the union to pay a service or fair share fee has been upheld by the U.S. Supreme Court and applied by the Chancellor of the Delaware Court of Chancery:

The United States Supreme Court has held that collective bargaining agreement provisions mandating payment of service fees to a union representing public employees do not violate the First Amendment guarantee of freedom of association. In *Abood v. Detroit Board of Education*, 431 US 209 (1977), the Supreme Court recognized that although payment of a service fee impacts employees’ First Amendment interests, those effects can be justified by the benefits derived from the payments, namely ‘labor peace’ and the discouragement of free-riding in the collective bargaining process. *Id.*, at 220-224. Justice Stewart wrote:

To be required to help finance the union as a collective bargaining agent might well be thought ... to interfere in some way with an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in [*Machinists v. Street*, 367 US 740 (1961) and *Railway Employees’ Dept. v. Hanson*, 351 US 225, 721 (1956) (finding no violation of First Amendment where financial support of a union was required)] is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of

¹ *Alvini, et al., v. Colonial School District et al.*, CA 13019, II PERB 909, 920, (Chan. Allen, 1993)

the union shop to the system of labor relations established by Congress.

Id. at 222 (footnote omitted). In *Chicago Teachers Unions Local No. 1 v. Hudson*, the Supreme Court restated its rejection of the claim that it is “unconstitutional for a public employer to designate a union as the exclusive collective-bargaining representative of its employees, and to require nonunion employees as a condition of employment to pay a fair share of the union’s costs of negotiating and administering a collective bargaining agreement.” 475 US 292, 302 (1986).

In this case, plaintiffs are required to pay a service fee that is justified as covering a part of the costs of collective bargaining and the administration of the grievance procedure.... Insofar as the plaintiffs have not alleged that the fees constitute compulsory subsidies on non-collective bargaining activities of the defendants, and since the payment of a service fees to cover collective bargaining costs has passed constitutional muster ... PERB did not err in affirming the Executive Director’s decision that the employees’ rights under the United States Constitution were not unlawfully abridged by permitting the assessment of a service fee. *Alvini* at 909, 914.

Employees may meet their obligation to pay a service fee in any mutually acceptable manner which insures that the Union receives timely payment for the costs of services rendered to the bargaining unit.

Prior decisions of Delaware courts have held that Delaware does not prohibit agency shop arrangements and that unions may sue to collect service fees. Delaware has not enacted a “right-to-work” statutes as some states have, nor does the PSERA² include “right to refrain” language that guarantees a right to work without mandatory payment of union service fees... Courts have consistently upheld the legality of representation fees to be paid by non-members of a union. Id. at 916.

Payment by payroll deduction is a convenient method for both the union and the employee, and the PERA permits a public employer to initiate that deduction.

² Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982) and/or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). Local 1590 v. City of Wilmington, Del.PERB, ULP 89-05-037 (1989), AFSCME Council 81 v. State of Delaware, Dept. of Transportation, ULP 95-01-111, II PERB 1279, 1289 (1995).

Employees can also meet their obligations by making regular direct payments to the union, so long as such payments are received in a timely manner.

The bottom line, however, is that it is the employees' responsibilities to ensure that they remain eligible to continue their employment by meeting their financial obligation for representation which the union is obligated to provide. The Court is not a party to the financial relationship between the Union and the bargaining unit employee. At the point an employee who chooses not to become a member of the union declines, refuses or becomes delinquent in meeting his service fee obligation, he is no longer meeting a requisite condition for continued employment. Upon notice by the Union to the employer, the employee may be terminated as he or she is no longer eligible to remain employed under the terms of the collective bargaining agreement and the Public Employment Relations Act.

DECISION

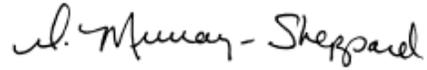
The negotiated provisions of the parties' 2007 – 2010 collective bargaining agreement require employees provide a signed payroll authorization form in order to have their dues or service fees withheld from their wages.

Failure or refusal to sign the required authorization form does not relieve the employees of their financial obligation to defray their pro rata share of the costs of negotiations and administration of the collective bargaining agreement which the union incurs in meeting its duty of fair representation of members and non-members alike of the bargaining unit.

At the point in time that an employee who chooses not to become a member of the union declines, refuses or becomes delinquent in meeting his service fee obligation,

he/she is no longer meeting a requisite condition for continued employment. Upon notice by the Union to the employer, the employee may be terminated as he/she is no longer eligible to remain employed under the terms of the collective bargaining agreement and the Public Employment Relations Act.

DATED: October 5, 2009



DEBORAH L. MURRAY-SHEPPARD
Executive Director, Delaware PERB