PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

SMYRNA EDUCATORS' ASSOCIATION,	:	
Petitioner,	:	
	:	
and	:	A.D.S. No. 89-10-046
	:	
BOARD OF EDUCATION OF THE SMYRNA	:	
SCHOOL DISTRICT,	:	
Respondent.	:	

REVIEW OF THE EXECUTIVE DIRECTOR'S DECISION OF JANUARY 25, 1990

Procedural Posture

This dispute is centered around the following language proposed by the Smyrna Educators' Association (the "Petitioner") during the course of collective bargaining, pursuant to 14 Del.C. section 4001, with the Smyrna Board of Education (the "Respondent"):

> ... A. All certified employees in the bargaining unit who do not become or do not remain members, will, during such period of nonmembership, pay to the Association by payroll deduction a service fee set by the Association...

The Respondent refused to bargain over the above-cited language, claiming that it would be illegal to do so. The parties ultimately reached and entered into a collective bargaining agreement which did

not include this language. It is due to expire on June 30, 1990.

On October 12, 1989, the Petitioner filed with the Public Employment Relations Board ("PERB") a petition for a declaratory statement concerning whether the parties could legally engage in collective bargaining and/or enter into an agreement which contained the same. After briefing by the parties, the Executive Director of the PERB held:

> ....4. A "service fee" charged by an exclusive bargaining representative to bargaining unit members who are not members of the exclusive representative association, does not violate Section 4003(1) or Section 4004(c), of the Act and is, therefore, legal.
>
> 5. The subject of a "service fee" does not constitute a term and condition of employment within the meaning of Section 4002(p), of the Act and is not, therefore, a mandatory subject of bargaining.
>
> 6. The "automatic deduction" requirement contained in the language proposed by the Association violates Section 1107 of the Wage Payment and Collection Act and is, therefore, illegal.... Decision of the Executive Director in Smyrna Educators' Association v. Bd. of Education of Smyrna School District, D.S. No. 89-10-046 (1/25/90), at p. 19.

The Petitioner requested that the PERB review the entire decision of the Executive Director on January 30, 1990. The Respondent followed suit on January 31, 1990, but only as to whether the subject of a service fee constitutes an illegal subject of bargaining under the Public School Employment Relations Act ("PSERA").

The issues before this Board are therefore the same threee that the Executive Director confronted, but in a different order:

1. Is the proposed language a violation of any law of the State of Delaware and therefore illegal?

2. Whether the issue of the deduction of a service fee is generally an illegal subject of bargaining?

3. If not, is it a mandatory subject of collective bargaining pursuant to sections 4002 (e) and (p)?

We affirm the decision of the Executive Director for the reasons stated below.

Decision

The first issue to be addressed is whether the proposed language, as the Executive Director held, is illegal in that it violates Delaware law. We must answer yes.

The Executive Director construed the Wage Payment and Collection Act, 19 Del.C. Ch. 11, specifically section 1107, as prohibiting the mandatory withholding of a service fee. Section 1107, in relevant part, prohibits an employer from withholding or diverting any portion of an employee's wages unless:

1. The Employer is required or empowered to do so by state or federal law;

2. The deductions are for health care or services; or

3. The employee has authorized the deduction.

It is readily apparent that the proposed language does not fall into the category of a fee for health care service. Nor has it been argued that the employee have authorized the deduction through their union representative or that it provides a mechanism by which an

employee's authorization must be obtained and can be withdrawn if that employee so desires. If it is to be declared legitimate, the employer must be empowered to do so by virtue of a state or federal law.

The Petitioner argues, and the Respondent disagrees, that the Respondent is so empowered by the passage of the PSERA which allowed the parties to enter into a collective bargaining agreement containing such a provision. More specifically, the Petitioner states at page 8 of its opening brief dated February 19, 1990,:

> ... an employer can be "empowered" to deduct a service fee by the passage of a law, such as the Public School Employment Relations Act, which simply allows the parties to enter into a negotiated agreement on the subject, as the Executive Director's decision has held can be done here... There is no statutory reservation of the ability to withhold an agreed upon service fee from wages. Thus, the new bargaining law mad available the possibility of a contractually negotiated service fee. A School Board that assents to such a provision is "empowered" by the bargaining law to deduct the service fees agreed on through bargaining...

The Petitioner is in error.

No authority on point for this proposition has been offered. Moreover, the Petitioner's argument, if adopted, could lead to results that would clearly contradict the intent and specific language of the Act.

To be more precise, to accept the Petitioner's argument would permit the Petitioner to avoid the prohibition contained in section

4003(1) of the PSERA, which states that dues, fees or assessments of any kind may not be made a condition of employment. If the proposed language were made a part of a collective bargaining agreement, the only way an employee could avoid its reach would be to quit his or her job. That would amount to a "de facto" condition of employment. Stated differently, it becomes a condition of employment in that it would be a fixed obligation/duty over which an employee would have no control and which would affect the compensation paid to that employee for services rendered.

The Petitioner argues that it is not a condition of employment, but if it is not, one must ask how can it be avoided without the termination of employment. Furthermore, the cases cited in the Petitioner's brief, do not pass on the viability of a mandatory deduction of service fees, but only whether a service fee may be properly charged to nonunion employees. The collection of such a fee is not an issue.

Furthermore, the proposed language would, in violation of section 4007 (a)(1) and (b)(1), encourage membership in the union or discriminate against nonunionn members by virtue of their lack of membership in the union. Simply put, union members could not be subjected to the mandatory deduction. Consequently, the proposal would encourage employees to join the union to avoid the mandatory assessment and would discriminate against those who refused to do so by imposing a penalty on them that could not be collected from union members without their permission. These is no basis for such disparate treatment.

Consequently, not only is the Respondent not empowered to withhold wages by virtue of the Wage Payment and Collection Act, he would be in

violation of the PSERA. The wording of the former, specifically section 1107, is clear -- unless the proposed language falls within one of the exceptions, an employer may not withhold any portion of an employee's wages. The Petitioner's argument that the PSERA's general grant of authority to enter into a collective bargaining agreement concerning service fees, empowers an employer to withhold the same, is simply not persuasive. Again, the PSERA, by its mere passage, does not grant the parties the authority to disregard its specific provisions.

As indicated above, the Executive Director also held that while the specific proposal could not be the subject of collective bargaining or included in a collective bargaining agreement, the parties could engage in collective bargaining over the subject of a service fee. He also held that it was not a mandatory subject of collective bargaining as defined by sections 4002 (e) and (p). The Petitioner appealed the latter, while the Respondent contested the former.

In terms of whether the inclusion of language relating to the assessment and/or collection of a service fee generally is illegal or permissible, the Board agrees with the decision of the Executive Director, i.e., that it would not be illegal to engage in collective bargaining on the subject of a service fee under the PSERA. We further agree with the Executive Director's decision that it is not a mandatory subject over which the parties must bargain collectively pursuant to the Act.[1] However, because no additional language was proposed, the

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[1] The Board does not differ with, and in fact adopts, the analysis and reasoning of the Executive Director below without repeating the same.

Board can do no more than hold, as the Executive Director did, that the subject can be discussed, and if agreement can be reached, appropriate language can be included in the collective bargaining agreement as long as it does not violate any other applicable law. Unfortunately, it is not possible to say more, particularly in light of the limited scope of the petition which sought a determination that the proposed language was both legal and negotiable.

IT IS SO ORDERED.

The Public Employment

Relations Board

BY: Arthur A. Sloane

Arthur A. Sloane

R. Robert Currie, Jr.

Dated: 6/11/90