STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STEPHANIE ABERNATHY, CAROLYN G. LEM, XIAOQING QU, Charging Parties, v. UPTE, CWA LOCAL 9119, Respondent.	Case Nos. LA-CO-123-H, LA-CO-152-H, LA-CO-168-H PERB Decision No. 1784-H December 1, 2005

Appearances: Werner Witke, Representative, for Stephanie Abernathy, Carolyn G. Lem and Xiaoqing Qu; Leonard Carder by Margot Rosenberg, Attorney, for UPTE, CWA Local 9119.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Stephanie Abernathy, Carolyn G. Lem and Xiaoqing Qu (Abernathy[1] or Charging Parties) of a Board agent's dismissal of their unfair practice charges. The charges are the same in a number of cases filed by Werner Witke (Witke) on behalf of numerous individuals. In each case the charge is the same and these cases have been addressed together by the Office of the General Counsel and the parties. We therefore have addressed these cases as noted in the caption. The charges allege that UPTE, CWA Local 9119 (UPTE) violated the Higher Education Employer-Employee Relations Act (HEERA).[2]

[1]Abernathy is indicated in this decision as the party for brevity and clarity but the decision applies to all cases indicated in the caption, above.

[2]HEERA is codified at Government Code section 3560, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Abernathy alleges that UPTE has violated HEERA by collecting agency fees prior to providing Hudson[3] notices to nonmembers and benefiting from an interest free loan at the expense of Charging Parties for the period between collection and refund of the challenged agency fees. Abernathy alleges this is a violation of PERB Regulation 32992[4] which requires written notice to be sent/distributed to nonmembers at least 30 days prior to collection of agency fees and that fees subject to objection shall be placed in an escrow account as set forth in PERB Regulation 32995.

The Board agent dismissed the unfair practice charges for lack of standing based on the Board decision in California Nurses Association (O'Malley) (2004) PERB Decision No. 1673-H (CNA (O'Malley)).

We have reviewed the complete record in this case, including, but not limited to, the initial unfair practice charges, the warning and dismissal letters, the appeal and the response to the appeal. We find that the Board agent's dismissal was based on a misreading of CNA (O'Malley) a case not applicable to this set of facts. The charging party in that case, Robert J. O'Malley (O'Malley), is not an agency fee payer. The Charging Parties here are agency fee payers and therefore have standing. The essential facts alleged must be taken as true. This case is referred to the Office of the General Counsel for a complaint to issue immediately, as set forth below.

DISCUSSION

Abernathy is an agency fee payer in UPTE at the University of California, San Diego. Her charge, filed October 4, 2004, stated that UPTE had not sent her notice as required under

[3]Chicago Teachers Union. Local No. 1 v. Hudson (1986) 475 U.S. 292 [121 LRRM 2793] (Hudson).

[4]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

the U.S. Supreme Court ruling in Hudson as specified in PERB Regulation 32992(c)(1).[5] Under that section, the notice must be sent at least 30 days prior to the collection of the agency fee, after which the exclusive representative shall place those fees subject to objection in escrow pursuant to Section 32995 of these regulations.

Abernathy points to a Declaration of Lindey Cloud (Cloud) that was prepared by UPTE in response to a request for injunctive relief by Witke, another UPTE agency fee payer. The declaration is dated August 10, 2004. In it, Cloud states that there was a delay by UPTE in sending the Hudson notices and that UPTE expected to have them out by August 20, 2004. They were not sent by that date.

Abernathy alleges UPTE was in violation of PERB Regulation 32992 because UPTE did not give written notice of the amount of the agency fee (expressed as a percentage of the annual dues per member) based on the chargeable expenditures identified in the notice and send it 30 days prior to taking the deduction. Further, the procedure for appealing must also be included in the notice and the calculations are to be made based on an independent audit that shall also be made available to nonmembers.[6] Abernathy also states that UPTE has made the deductions, not only prior to sending the Hudson notice, but using an advance reduction method. She states this method was found to be unconstitutional by the U.S. Supreme Court in the decision of Ellis v. Railway Clerks (1984) 466 U.S. 435 [116 LRRM 2001] (Ellis).

The Board agent determined that the Charging Parties had no standing. She acknowledged that agency fees were deducted in July, August and September before the

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[5]PERB Regulation 32992(c)(1) states:

> Such written notice shall be sent/distributed to the nonmember . .. [a]t least 30 days prior to collection of the agency fee, after which the exclusive representative shall place those fees subject to objection in escrow, pursuant to Section 32995 ....

[6]PERB Regulation 32992.

Hudson notices were sent on September 3 and 7, 2004. Abernathy was later sent a check to cover the amount equal to the agency fees deducted for the payroll period from July 1, 2004 through September 7, 2004, plus 7 percent interest. The Board agent has therefore acknowledged there has been a violation of PERB Regulation 32992 by the taking of the money prior to a Hudson notice. She finds no harm because the money was returned. She ignores that the allegation must be taken at face value under PERB case law and the ruling of Hudson by the U.S. Supreme Court.

The Board agent accepts as true the argument put forth by UPTE. UPTE argues that because the money was returned with interest there was no harm. Thus, it acknowledges doing the actions of which the Charging Parties complain. The Board agent cites the CNA (O'Malley) case as a basis for the lack of standing. O'Malley is not an agency fee payer. The California Nurses Association (CNA) accepts no fees from O'Malley.[7]

In this case, the Charging Parties are agency fee payers. In violation of PERB regulations, fees were collected for three months prior to UPTE sending them a Hudson notice. UPTE returned fees collected prior to the Hudson notice but continued to collect and use fees after sending the notice. Because UPTE continues to collect fees from the Charging Parties, they are agency fee payers entitled to the rights and protections provided in both case law and PERB regulation.

The Board agent in this case ignored the intent and letter of Hudson and the requirement of Golden Plains Unified School District (2002) PERB Decision No. 1489 (Golden Plains') that the essential facts alleged are to be taken as true. UPTE agrees that the

[7]In CNA (O'Malley), it is noted that CNA has informed O'Malley it will accept no agency fees from him. CNA has asked the University of California (UC) not to collect agency fees from him. Because UC did not stop collecting fees from him when it collected fees from the bargaining unit, CNA sent O'Malley reimbursements for the fees collected from him. CNA also began sending advances to O'Malley because UC continued to make the deductions. As a result, O'Malley is not an agency fee payer.

money was taken. A complaint must issue to determine if UPTE followed Hudson in the taking of the money and Ellis in the manner in which the agency fees were deducted.

In the appeal of the dismissal, Abernathy notes that additional refund checks from UPTE were sent to agency fee payers later. Abernathy also alleges in the appeal that because the entire year of agency fees was not sent from the alleged escrow account, UPTE has the use of funds from November onwards to use for anything, including non-chargeable expenses. We need not reach that issue here. Even if UPTE had returned all of the fees at one time there would still be a problem with the procedure used.

The harm happens when the statute is violated. It may well be that by returning the money with interest there is no financial harm but the agency fee payer has been harmed because Hudson is not being followed. If there is no consequence for this harm then there is no incentive for any union to follow Hudson.

There is an argument made by UPTE that because there is no harm there is no remedy owed the agency fee payer. We disagree. As indicated above, the harm is the initial taking of the money without sending the Hudson notice first. Under Hudson there is standing and under Golden Plains a complaint must issue.

Standing

In Hudson the U.S. Supreme Court held that there must be prior notice to agency fee payers before agency fees are collected so that only the correct amount is collected. Saying that there is no harm to the agency fee payers when the letter of the law in Hudson is violated is wrong.

The Court in Hudson said:

> The question presented in this case is whether the procedure used by the Chicago Teachers Union and approved by the Chicago Board of Education adequately protects the basic distinction

drawn in Abood.[8] "[T]he objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." Id., at 237, 97 S.Ct., at 1800.

Procedural safeguards are necessary to achieve this objective for two reasons. First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement. Second, 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.

. . . . . .

[A] remedy which merely offers dissenters the possibility of a rebate does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose. "[T]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." Abood, 431 U.S., at 244, 97 S.Ct., at 1804 (concurring opinion). The amount at stake for each individual dissenter does not does not diminish this concern. For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In Abood, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves." A forced exaction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections. [Fns. omitted.]

That is exactly the issue before us in this agency fee case. There is a forced extraction followed by a rebate equal to the amount improperly expended.

[8] Abood v. Detroit Board of Education (1977) 431 U.S. 209 [95 LRRM 2411].

In Paso Robles Public Educators (Andrus. et al.) (2004) PERB Decision No. 1589, the Board noted that Hudson must be followed. There, it was held that the Paso Robles Educators Association did violate PERB Regulation 32992 and the Hudson decision by collecting agency fees without providing the required Hudson notice thirty days prior. That is what UPTE has done here. Here, the money and 7 percent interest has been returned but the bell cannot be unrung. The harm occurred when the regulation and Hudson were violated.[9]

Essential Facts

> To determine whether a charge alleges a prima facie case, the Board must assume that the essential facts alleged in the charge are true. (San Juan Unified School District (1977) EERB Decision No. 12.[10]) It is not the function of the Board agent to judge the merits of the charging party's dispute. (Saddleback Community College District (1984) PERB Decision No. 433; Lake Tahoe Unified School District (1993) PERB Decision No. 994.) Disputed facts or conflicting theories of law should be resolved in other proceedings after a complaint has been issued. (Eastside Union School District (1984) PERB Decision No. 466, pp. 6-7.)
> (Golden Plains at p. 6.)

In this case, determining whether or not the tenants of Hudson have been met must go through the appropriate process following the issuance of a complaint. Because we find there is standing, the charge that the requirements of Hudson have not been met must be examined. It must be left to the Board's hearing process to determine if the evidence supports the allegations.

The essential facts alleged must be taken as true and the Charging Parties have standing under Hudson and PERB Regulation. Based on the forgoing findings of fact and conclusions of law, and the entire record in this case, it is found that a complaint should be issued.

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[9]PERB Regulation 32997 states, "It shall be an unfair practice for an exclusive representative to collect agency fees in violation of these regulations."

[10]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

ORDER

The Public Employment Relations Board REMANDS the unfair practice charges in Case Nos. LA-CO-123-H, LA-CO-152-H and LA-CO-168-H to the Office of the General Counsel and ORDERS that a complaint issue.

Member Whitehead joined in this Decision.

Member Shek's concurrence begins on page 9.

SHEK, Member, concurring: I agree with the majority opinion that the Public Employment Relations Board (PERB or Board) agent's dismissal, based on her interpretation of California Nurses Association (O'Malley) (2004) PERB Decision No. 1673-H (CNA (O'Malley)), was in error. In the CNA (O'Malley) case, the California Nurses Association had exempted Robert J. O'Malley (O'Malley) from payment of any agency fees. Accordingly, O'Malley was determined not to be an agency fee payer and the Board agency fee regulations had no applicability to him. Here, Stephanie Abernathy, Carolyn G. Lem and Xiaoqing Qu are agency fee payers, despite the refund by UPTE, CWA Local 9119 of three months of fees as an attempt to remedy a possible violation of the PERB regulations. Their unfair practice charges should be remanded to the Office of the General Counsel.