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A Union Perspective

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Legal Problems in Administering Agency Shop Agreements— A Union Perspective

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Introduction

In 1977 the United States Supreme Court held in *Abood v. Detroit Board of Education*[1] that even though an agency shop fee may be viewed as interfering with the non-member's constitutional rights to freedom of expression and freedom to associate, such interference was justified by the "important contribution of the union shop to the system of labor relations."[2]

The Court in *Abood*, held that a union, under a duty of fair representation to all employees in the unit, could charge the non-member employees a fair share fee for the union's cost of collective bargaining, contract administration, and grievance adjustment. The fair share fee is a correlation of fair representation.[3]

The *Abood* Court also held that a union could not constitutionally require non-member employees to pay for political or ideological activities of the union unrelated to its duties as exclusive representative.[4] The Supreme Court settled the constitutional issues raised by the fair share arrangements in *Abood*, but left unanswered many questions in this area of public sector labor relations.

The problems facing public employee unions once they bargain fair share fee provisions in their collective bargaining contracts are many and potentially very serious. This article will address the more pressing problems currently facing public sector labor organizations.

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[1] 431 U.S. 209 (1977).

[2] *Id.* at 223.

[3] *Id.* at 222.

[4] *Id.* at 236-37.

The transcendent purpose for an agency shop or fair share provision is to permit a union to assess the costs of its efforts evenly upon all the beneficiaries of those efforts, i.e., to avoid free-riders. That underlying objective will necessarily be defeated if the method of making the assessment and collecting the fee from the erstwhile free-rider is made so expensive to the union that the economic advantage of receiving payment from all who benefit is outweighed by the economic cost of the collection process. In the long run, the cost of collecting the fare must not be made so high that the free-rider is permitted to continue his parasitic ways.

In the infancy of development of agency shop apportionment and collection processes in the public sector, the cost effectiveness consideration is clouded considerably by the presence of well-funded national organizations philosophically opposed to the central concept of collective bargaining as a method of dispute resolution in the public sector, as well as opposed to its corollary principle of agency shop. The demonstrated willingness of these organizations to expend legal resources far in excess of the expected economic return to the dissident employees, in reduced fair share fees or in a protracted enforcement mechanism, necessarily requires unions and their members to match excessive dollar for excessive dollar in judicial and administrative litigation, with attendant delays, appeals and complications.

Clearly, unions must take a long range rather than an immediate view of the cost-effectiveness of the allocation and collection process. Although the anti-union forces in the United States may be able to require unions to spend extremely high amounts to establish legal precedent guiding the allocation and collection process for agency shop fees, the long run benefit in requiring everyone to share in the cost of bargaining is apparent.

The issues to be addressed in this article are the apportionment dilemmas facing labor organizations as they attempt to draw the line between permissible and non-permissible uses of the fair share fee; the problems facing labor organizations in attempting to develop internal rebate procedures for employees who do not wish to contribute to political or ideological activities of the union; the problems facing labor organizations as they attempt to enforce fair share agreements; and the problem of possible conflict between state tenure laws and agency shop agreements which make payment of the service fee a condition of employment.

This article is not an exhaustive study of the areas addressed, but rather presents an overview of the many problems facing public sector labor organizations as they attempt to eliminate free-riders.

Apportionment Between Permissible and Non-permissible Uses of the Fair Share Fee

Many of the problems addressed in this article are closely interrelated. The first problem is how to apportion the fair share fee between allowable and prohibited uses. This issue has been addressed by various courts and state labor boards throughout the nation, yet no clear consensus has emerged. In many jurisdictions the union is forced to make an allocation with only the most general judicial guidelines available. The question to be answered is what part of the union's cost may be charged through the fair share fee to the non-member employee.

The Supreme Court in *Abood* set forth the general guidelines. A public sector labor organization may exact an agency shop or fair share fee from non-members to cover its expenses in collective bargaining, contract administration, and grievance processing. The public sector labor organization may not use a fair share or agency shop fee for political or ideological purposes unrelated to its role as exclusive representative.[5]

The Supreme Court, with an apparent sigh of relief, stated: "We have no occasion in this case, however, to try to define such a dividing line."[6] The Supreme Court did not attempt to determine specifically what expenditures were chargeable, leaving the breakdown between permissible and non-permissible uses to the lower courts.

In order to examine the appropriate uses for the fair share fee, one must first recognize that all public sector collective bargaining is political in the sense that it determines the government's relationship to its employees and the available governmental funds.[7] The dividing line between permissible and non-permissible use of the fair share fee is cloudy at best. Nevertheless, an examination of the lead cases in this area helps to clarify what is and is not a permissible use.

The Ninth Circuit Court of Appeals in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*,[8] set forth an extensive list of the allowable uses for a fair share fee, stating the test to be whether the expenditure challenged by the non-member employee is germane to the union's work in the realm of collective bargaining.[9] The court found support for this broad definition of allowable use in prior Supreme Court decisions defining, yet not drawing the line between those activities which

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[5] *Id.*

[6] *Id.* at 237.

[7] Note, *Public Sector Labor Relations: Union Security Agreements in the Public Sector Since Abood*, 33 S.C.L. REV. 521 (1982).

[8] 685 F.2d 1065 (9th Cir. 1982), *cert. granted* ___ U.S. ___, 103 S.Ct. 1767 (1983), arguments held Jan. 9, 1984.

[9] *Id.*

would be subject to the fee and those which would not. The Ninth Circuit stated that its formulation "respects and protects dissentor's rights, but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace."[10]

Proceeding through the list of expenditures which had been challenged, the *Ellis* court found the following expenses to be allowable: grand lodge conventions at which significant items of union business, including elections of officers, took place; grand lodge litigation including litigation to defend the union from protesting employees challenging their monetary obligations to the union; a strike fund set up to support both the local in question and other locals across the nation; publications which were a source of information to members concerning collective bargaining, contract administration and various employees' rights. (The fact that the publication also contained general and recreational materials did not exempt it from the fee.)[11]

The *Ellis* court also found that occasional social activities at which small expenditures were made for refreshments were important to the union's members because they brought about harmonious working relationships and therefore were proper for the expenditure of agency shop fees. The court determined that union-provided benefits were an allowable use for the agency shop fee in that the benefits had historically served as a key factor in organizing for the union and had brought in many members over the years.[12]

The final item considered by the *Ellis* court was the organizing efforts of the union. The court found that a union is "considerably strengthened if it eliminates competition from non-union employers and a strong union is unquestionably a more effective collective bargaining agent."[13] The court held that the use of the fee for organizing activities was proper.

Another comprehensive discussion of what is and is not an appropriate expenditure of the fair share fee can be found in a decision of the Public Employees Relations Board of California entitled *King City High School.*[14] In *King City*, the PERB discussed at length the types of expenditures the individual employee had challenged. The decision is on appeal, but its thoughtful and well-reasoned approach should be upheld.

The *King City* Board, applying the Supreme Court's *Abood* test,

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[10] *Id.* at 1072.

[11] *Id.* at 1073, 1074.

[12] *Id.* at 1074.

[13] *Id.*

[14] California Public Employee Relations Bd., Nos. SF-CO-5, SF-CO-72, SF-CO-73, SF-CO-74, slip. op. (March 3, 1982), GOV'T EMPL. REL. REP. (BNA) No. 962, at 14-16 [hereinafter cited as *King City*].

found that the fair share fee could not be used for an activity "whose ideological purpose is unrelated to the representational process."[15] With this broad definition of proper use, the Board then examined specific items.

The Board found that the use of the fee for lobbying and other political activity was proper so long as employee representation was the underlying purpose of the action. Use of the fee for lobbying for such items as school financing and teachers' employment conditions definitely was proper. Use of the fee to support individual candidates or political parties, however, was absolutely precluded. The areas between those two absolutes are indefinite at best and the *King City* Board determined that generally political activities wherein the action will come to the eventual benefit of the employees is a proper charge.[16]

The *King City* Board found that payments to affiliates, such as the state teachers organization and the National Education Association, were proper in that such payments inure to the benefit of the service fee payor in his employment relationship. The Board noted that affiliation allows a smaller organization to have legal assistance, training programs, research and other services which it would not have if it were not affiliated.[17]

The cost of publications used to inform members, build membership or disseminate information was also proper. The fee can be used to support a publication even though the same publication is also used for social or general information.[18]

Organizational activities are proper since a strong membership gives the service fee payor a strong organization for representation.[19] Rent, utilities, stationery, staff salaries and other general expenses of doing business are also proper uses for the service fee.[20]

Social activities, so long as some element of representation is an underlying factor, are also proper. The Board reasoned that these activities are often used for organization, or for training and workshops, and therefore are properly part of the service fee. The only type of social activities which are not appropriate are those held for the sole purpose of supporting a political candidate or those which have no underlying representational purpose.

Charitable activities such as a scholarship fund may or may not be an appropriate use of the service fee depending upon the purpose behind such a fund. If the fund is used to improve the public's perception of

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

teachers' concern for educational quality then the *King City* Board would find such use proper.[21]

The use of the fee for legal services, including the defense of the suit brought by the non-member regarding the fee, is a proper use of the fee. The only type of suit which the *King City* Board would not find appropriate would be the use of the service fee to defend the union against a charge of violation of the duty of fair representation, if such defense was frivolous or taken in bad faith.

The use of the fee for insurance programs which are available only to members would be improper. This is a clear case of charging the non-member for a service from which he derives no benefit.

Other items which are not allowable under the political versus collective bargaining analogy are any organizational activities which are unrelated to representational duties, such as developing a political action committee. Use of fees for political action on behalf of individual candidates or political parties is improper. Also, use of agency funds to train local teachers to work on local campaigns is improper.

A recent decision from the Hawaii Supreme Court[22] holds that the Hawaii State Teachers Association committed no willful violations of state law for spending money received under a fair share fee agreement for partisan political and union membership purposes.[23] In addition, the union's use of the fee to cover expenses for publication of political articles in the *Teacher Advocate* were permissible expenditures.[24]

The court, in upholding the use of the fee for various lobbying activities and for the publication of articles covering political news items, noted that "the task of separating allowable costs from the so-called union membership costs" was almost impossible.[25]

The Hawaii Supreme Court, in acknowledging the difficult problems involved in drawing the line between permissible and non-permissible uses, stated as follows:

> We would have to agree that the duty of allocation delegated to HPERB by the legislature is by no means simple and may be well-nigh impossible. For as the Supreme Court has observed, "There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining,

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[21] 685 F.2d 1065; *King City*, *supra* note 14: Browne v. Milwaukee Bd. of School Directors, No. 23535, slip on (Wisconsin Employment Relations Commission Decision, 18408 February 3, 1981) [hereinafter cited as *Browne*].

[22] Aio v. HSTA, No. 8663 (Hawaii Sup. Ct. June 3, 1983), 21 GOV'T EMPL. REL. REP. (BNA) No. 1025, at 1651 [hereinafter cited as *Aio*].

[23] *Id.*

[24] *Id.*

[25] *Id.*

for which such compulsion is prohibited."[26]

The Hawaii court drew the "difficult lines", while recognizing that the division between permissible and impermissible use of the service fee will not be clearly distinguished for some time.[27]

As public sector unions throughout the country struggle with the division between permissible and non-permissible uses of the service fee, guidance can be drawn from those courts which have addressed the problem and reached workable solutions.

A simple breakdown of what is and is not an allowable use of the fee is not possible. Each expenditure must be examined in its own circumstances and a determination made as to whether the expenditure is made for representational purposes or for purely political or ideological purposes. The union must justify the amount of funds retained. The local union must call upon its affiliates to justify their per capita fees.

Certain guidelines can be perceived from the decisions to date. The following expenses are generally considered to be subject to the fair share fee:

1. gathering information in preparation for and negotiating collective bargaining agreements,[28]
2. adjusting grievances and all work related to grievances,[29]
3. administering contracts,[30]
4. balloting and costs of ratifying a negotiated agreement,[31]
5. advertising the union's position on negotiations or other subjects relating to representation,[32]
6. books, periodicals, reports and other publications relating to negotiating, contract administration, processing grievances, lobbying efforts on behalf of new legislation for teachers' rights or lobbying for other educational related issues,[33]
7. paying staff members to assist in such areas as labor relations, economics, and other services used for the administration or negotiation of contracts or other activities identified as relating to representation,[34]
8. organizing activities and efforts to gain representation in units,[35]
9. defending the union against other unions or defending suits con-

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[26] *Id* at 1652.
[27] *Id.*
[28] 685 F.2d at 1065; *King City, supra* note 14; *Browne, supra* note 21.
[29] *Id.*
[30] *Browne, surpa* note 21.
[31] *Id.*
[32] 685 F.2d at 1065; *Browne, supra* note 21; *King City, supra* note 14.
[33] *Id.*
[34] *Browne, supra* note 21.
[35] 685 F.2d at 1065; *King City, supra* note 14; *Browne, supra* note 21.

cerning the legal rights of employees,[36]

10. efforts seeking recognition as an exclusive representative,[37]

11. efforts in serving as an exclusive representative,[38]

12. training employees in all areas governing representation, including lobbying for employees' rights and other employment-related legislation,[39]

13. payment of affiliation fees to other labor organizations,[40]

14. cost of membership meetings and conventions held in part to determine representational issues,[41]

15. all publications which in any way relate to representation of the employees.[42] (Some courts say the union must break down costs by column inch.),[43]

16. all efforts involving impasse procedures, fact finding, mediation and arbitration over provisions covered by collective bargaining agreements,[44]

17. costs related to strikes and work slowdowns, unless such activity is illegal by state law,[45]

18. prosecution or defense of all litigation regarding employees' rights or interpretation or enforcement of collective bargaining agreements,[46]

19. social and recreational activities which have an underlying basis in representation,[47]

20. payments for insurance, medical care, retirement disability, death and related benefit plans so long as the non-member may buy into the plan,[48]

21. costs of general business administration of the local union and its affiliates.[49]

Items which are apparently excluded from the use of the fair share fee by current authorities are the following:

1. efforts on behalf of individual political candidates or political parties,[50]

2. supporting and contributing to charitable organizations which

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[36] *Id.*

[37] *Browne, supra* note 21; *King City, supra* note 14.

[38] 685 F.2d at 1065; *Browne, supra* note 21; *King City, supra* note 14.

[39] *Id.*

[40] *Browne, supra* note 21; *King City, supra* note 14.

[41] 685 F.2d at 1065; *Browne, supra* note 14.

[42] 685 F.2d at 1065; *King City, supra* note 14.

[43] *Browne, supra* note 21.

[44] 685 F.2d at 1065; *King City, supra* note 14; *Browne, supra,* note 21.

[45] *Browne, supra* note 21.

[46] 685 F.2d at 1065; *Browne, supra* note 21; *King City, supra* note 14.

[47] *Id.*

[48] 685 F.2d at 1065.

[49] 685 F.2d at 1065; *Browne, supra* note 21; *King City, supra* note 14.

[50] *Id.*

have no employment related basis or benefit to the local organization,[51]

3. training sessions for individuals to work on local political campaigns,[52]

4. training in voter registration, get-out-the-vote and campaign techniques,[53]

5. political action committees and the staff and salary for such activities.[54]

Even though a list of specific items can be drawn, the general rule is that a service fee cannot be collected for any activity which does not relate to the representational interests in the collective bargaining process or to the administration of the collective bargaining agreement or to grievance processing.

Another consideration which must go into the apportionment of the fair share fee is the union's duty of fair representation to all employees in the unit. It can be argued that unless a union owes the duty of fair representation to the employee concerning the item in question, there is no right for the union to collect a fee for that service.

For example, a union owes no duty to lobby on behalf of non-members. Arguably a challenge could be raised as to that portion of the fair share fee used for lobbying based upon the lack of a duty of fair representation to the non-member. The question would be why should a union be able to collect for this service when it does not come within its duty to fairly represent all employees in the unit? The answer must be that the service rendered, i.e., lobbying for stronger employee due process rights, benefits all employees regardless of a duty to improve teacher rights.

Internal Rebate Procedures

As set forth above, there are some items for which a union can charge non-members and some items for which it cannot charge. Someone must determine, in the first instance, what are the allowable uses for the service fees. One method to determine the allowable uses is for the union to establish an internal rebate procedure for any employee who challenges the use of the fee.

The Supreme Court in *Abood* held that only those employees who objected to political use of their fair share fee are entitled to relief; however, a general declaration of opposition to any sort of ideological or

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[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

political expenditure is sufficient to entitle the employee to a rebate.[55] The burden is upon the union to prove that the compulsory fee is allocated for permissible expenditures.[56] That Court referred to its decision in *Railway Clerks v. Allen*[57] wherein it held that an appropriate remedy is a refund of part of the extracted fee in the same proportion that the union's political expenditures bore to its total outlays, together with a reduction of future exactions by the same percentage.[58] Thus, the Court found that the most *desirable* solution was for the union voluntarily to develop an internal rebate procedure embodying the concepts addressed by the Court.[59]

Significantly, the Supreme Court stated that a dissenting non-member employee *is aggrieved, not by the union's receipt of his money, but only by its impermissible use of that money.*[60] Until the employee makes a prima facie case concerning unauthorized use, there is no reason to deny the union control over the full fee.[61] Once impermissible use has been shown, then a court may enjoin the union from spending additional fees for such purpose and may even direct restitution of the pro rata share of such expenditure.[62] The court may not enjoin the *collection* of the objector's fee.[63] Any requirement that all or part of the fee be placed in escrow pending determination of the rebate constitutes a forbidden injunction against collection of the fee.[64] Indeed, the Supreme Court has set forth a clear mandate that a bargaining representative not be denied, even temporarily, the contribution to which it is entitled from each employee it represents.[65]

A recent New York case, *Haag v. Hogue*,[66] held that a provision of New York law allowing the union to take control over the entire fee, pending a refund, is in accord with the Supreme Court decision and would be upheld. The constitutional limitation is not upon the union's *receipt* of the funds, but rather upon the *use*.

A dissenting employee may have the decision as to the amount of the fee made by a neutral party. This could be a state employment relations board, a neutral provided under the union's rebate procedure, or possibly a court of law, depending upon local authority.

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[55] 431 U.S. at 238.
[56] *Id.*
[57] 373 U.S. 113 (1963).
[58] 431 U.S. at 240.
[59] *Id.*
[60] *Id.*; Machinist v. Street, 367 U.S. 740 (1961).
[61] Railway Employees' Department v. Hanson, 351 U.S. 225 (1956).
[62] *Id.*
[63] 431 U.S. at 237-41: Allen, 373 U.S. at 122; 685 F.2d at 1065.
[64] Haag v. Hogue, 116 Misc. 2d 935, 456 N.Y.S.2d 978 (1982).
[65] 373 U.S. 113.
[66] 116 Misc.2d 935, 456 N.Y.S.2d 978 (1982).

Some courts have held that an employee must exhaust the union's internal rebate procedure prior to seeking a remedy through either a court or a state labor board.[67] In the absence of an express statutory provision calling for exhaustion of the internal procedures, other courts have held that an employee is not required to use the internal procedure prior to filing with the court or labor board for a determination.[68] Such a ruling seems to contravene the express statement of the Supreme Court in *Abood* wherein the Court emphasized the need for a voluntary internal rebate procedure so that these matters would not be brought into the court system unnecessarily.[69]

This issue was expressly addressed in *School City of Greenfield v. Greenfield Education Association*,[70] a 1982 decision of the Massachusetts Supreme Court. The court held that to require use of the internal rebate procedure would add an additional constitutional problem in that the employee would be required to suffer "an interim constitutional deprivation, while the association is deprived only of funds to which it is entitled by statute and agreement."[71]

The Massachusetts court varied from the developing line of authority which had held that a union is entitled to the fee pending determination of the pro rata rebate. The court specifically held that a dissenting employee cannot be required to pay the disputed fee to the union pending a determination on the rebate.[72] The court also held that the employee has an option of bringing a complaint before the state labor commission or using the union's internal rebate procedures. By the court's analysis, this procedure places the burden squarely upon the union to justify the fee before even receiving it.[73]

Most courts which have faced the issue have determined that the use of either an escrow account or a procedure by which the employee does not pay until the pro rata share is determined, places too heavy a burden upon the union and encourages frivolous suits by non-members.[74]

However, in a recent New Jersey case,[75] the U.S. District Court held that, regardless of the union's good faith effort to create a workable rebate system, "no demand and return system can protect an objecting

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[67] Link v. Antioch Unified School Dist., 191 Cal. Rptr. 264 (Cal. App. 1st Dist. 1983); Leek v. Washington Unified School Dist., 124 Cal. App.3d 43, 177 Cal. Rptr. 196 (1981).

[68] School Committee of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982); Ball v. Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978).

[69] 431 U.S. at 209.

[70] 385 Mass. 70, 431 N.E.2d 180 (1982).

[71] *Id.* at 189.

[72] *Id.*

[73] *Id.*

[74] Browne v. Milwaukee Bd. of School Directors, 83 Wis.2d 316, 265 N.W.2d 559 (1978).

[75] Olsen v. Communications Workers of America, Nos. 82-1118, 82-1119, 82-3443, slip op. (D.N.J., June 15, 1983), 21 GOV'T EMPL. REL. REP. (BNA) No. 1024 at 1617.

non-member's First Amendment rights."[76] Demand and return is a system whereby the non-member must pay the full fee and then object to any political use of the fee and demand a rebate.

The New Jersey court held that the demand and return system was too cumbersome and impractical to protect the first amendment rights of the non-members. The court ordered the state to stop collecting the fee until the political expenditures were excluded up front or until the state provides for a hearing on the validity of the fee prior to payment to the union.[77]

The New Jersey decision and the decision from Massachusetts in *Greenfield* show a judicial concern for the non-member's constitutional right not to contribute to political activities of the union even though the employee would eventually have the funds returned through the rebate procedure. However, they offer little guidance and few alternatives to an honest union intent upon a fair but cost-efficient allocation of collectible versus noncollectible expenses.

All decisions to date hold that the union bears the burden of proof as to the allowable fair share fee. The employee need simply bring the issue before the union by challenging the use of the fee for ideological or unauthorized political purposes.

In New York, the PERB has held that a union procedure, whereby the employee is forced to engage in compulsory arbitration regarding the amount of the fee and must bear at least half the cost of the arbitration, makes the rebate procedure unreasonable.[78] If a union makes the refund procedure too cumbersome, a court is likely to rule that it is not reasonable, and the employee will have no obligation to attempt to exhaust the procedure.

A recent Seventh Circuit decision has illuminated some of the weaknesses of rebate procedures.[79] The court held that the union's rebate procedure was not sufficient and therefore the union was not entitled to collect the fee pending a judicial determination of the amount of the rebate.[80] The court reached this conclusion by noting that the Supreme Court had left that issue open in *Abood*, and that courts since *Abood* had found various rebate procedures sufficient to protect the employee's rights.[81] The Seventh Circuit noted that in order for an employee to be required to use the rebate procedure, the rebate system "must be fair,

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[76] *Id.*

[77] *Id.*

[78] United Univ. Professions, Inc., 11 PERB 4538 (N.Y. Public Employees Relations Board 1978).

[79] Perry v. Local Lodge 2569 of the Int'l Ass'n of Machinists and Aerospace Workers, 708 F.2d 1258 (7th Cir. 1983).

[80] *Id.*

[81] *Id.*

administered in good faith, and not cumbersome."[82]

The rebate procedure at issue was found to be "cumbersome, unfair and certainly not the least restrictive means of advancing legitimate government interests."[83] The protesting employee was required by the rebate procedure to send the objection by certified or registered mail to the union's general secretary and to the local lodge within fourteen days of union membership and within fourteen days of each anniversary. The employee was required to renew the objection each year. The objecting employee bore the burden of proving union error.[84] The court found that the "highly technical provisions"[85] of the rebate procedure coupled with the misplaced burden of proof, established that the employee had a reasonable likelihood of proving a violation of her constitutional rights.[86] The court ordered the employee, who had been discharged for failure to pay the fee, reinstated.[87]

Any cumbersome rebate procedure which *appears* to be designed to discourage employees will be rejected by the courts. Thus, rebate procedures must be relatively simple, capable of being understood without extensive research, and of such a nature that an employee can use the process without finding it unduly burdensome.

Unions will be forced, in preparing to justify the fair share amount, to set forth express and clear accounting procedures so that political expenditures actually appear on the books. Absent exact accounting procedures, a union, challenged by a dissenting employee regarding the fee, will face years of discovery and tremendous costs in staff and attorney time in attempting to justify the fair share amount. One solution is an accounting system whereby each department of the state or local union is budgeted separately and costs can easily be identified for future reference. Other states and localities provide for a system whereby a certain amount is automatically deducted before collection is sought.[88] This presumes all employees would protest the political or ideological aspects of the union's activities.

Each union will be developing its own rebate procedures. The ruling from the Seventh Circuit should put unions on notice that cumbersome procedures will not be tolerated. Procedures which tend to discourage employees from seeking their rebate will also be rejected by the courts.

[82] *Id.* at 1262.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Jefferson Area Teachers Association v. Lockwood, 69 Ohio St.2d 671, 433 N.E.2d 604 (1982). (The deduction of a set amount regardless of the amount actually expended on political or ideological activities creates potential constitutional problems since actually the amount expended may be larger than the percentage deducted.)

Enforcement of the Fair Share Fee Agreement

Many different approaches have been taken in an attempt to collect the fair share fee from non-members who refuse to pay. In those states which authorize agency shops, the employees face discharge if they fail to pay. However, in most states, unions are forced to collect the fee from the employees by less drastic methods.

One approach is individual suits in small claims court for the amount of the fee. This can lead to protracted litigation since the employees are certain to challenge the amount once the union attempts to collect the fee. The discovery process, as the employee examines the union's books for improper use of the fee, could take years. Another alternative is a suit naming multiple defendants in class action type litigation. The suit is not an actual class action, but rather one where multiple defendants, all non-paying non-members, are joined together in one suit.

A rapidly increasing number of states have held that the question of collection must go through the public employee relations board or commission.[89] This may prove to be an easier solution since labor relations commissions are generally set up for quicker movement of cases than the judiciary. By sending the claims through the administrative agency, the employee has a neutral forum yet the union is not strapped with large attorney's fees as it attempts to justify the fair share.

The Hawaii Supreme Court in *Aio*[90] deferred to the administrative expertise of its public employee relations board in upholding the union's use of the fee for lobbying activities and publication of articles expressing political views. In doing so, the Hawaii court recognized that great weight is customarily given to the construction of words and their meaning by the agency charged with the responsibility of administering the statute in question.[91] By recognizing the expertise of the agency in determining whether or not the fee was properly utilized by the union, the court found that the HPERB had acted in a reasonable and not clearly erroneous fashion. Such deferral to the expertise of administrative agencies will go a long way to simplify the process of enforcement of the agency fee provisions in collective bargaining contracts.

One of the most challenging current problems is whether failure to pay the agency fee constitutes cause for discharge under various tenure acts throughout the nation. Michigan has held that a tenured teacher may be discharged *solely* for failure to pay an agency shop fee even though the Teacher's Tenure Act in Michigan states that a discharge may only be

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[89] 191 Cal. Rptr. 264 (Cal. App. 1st Dist. 1983).
[90] *Aio; supra* note 22.
[91] *Id.*

upon reasonable and just cause.[92] Discharge in states with tenure acts which specify the employee may not be discharged for other than enumerated causes, such as insubordination or incompetency, will prove to be a more difficult problem.

The impact of the fair share fee or agency shop on existing statutory and contractual rights will undergo much analysis in the years to come. The general consensus is that a collective bargaining agreement, entered into pursuant to a bargaining statute, takes precedence over other statutory provisions governing the same type of conduct.

Conclusion

The foregoing has been a summary of the problems facing public sector labor organizations as they gain the right to charge non-members for services rendered and attempt to collect such fees from non-members. The principle of "no free riders" is strong among public sector employees, and given time, the individual employees may begin to recognize that the services rendered by the labor organization far outweigh any fair share fee they are required to pay. Until that time, labor organizations must apportion the costs of representational and collective bargaining activities versus political/ideological activities. The union then must create and fairly administer an internal rebate procedure whereby a protesting employee may gain a rebate of a proportionate share of the amount assessed.

Labor organizations are going to be faced with collection problems as they attempt to collect the fees from the non-complying employees. However, a union must recognize that if it does not attempt to collect from the employees this year, then those who do not pay will tend to think they will not have to pay next year.

None of the problems addressed in this article is insurmountable, but strict accounting procedures on the part of the unions and an honest effort to separate political from representational costs will go a long way in solving those which do exist.

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[92] Ball v. Detroit Bd. of Educ., 84 Mich. App. 383, 269 N.W.2d 607 (1978).