
MASSACHUSETTS BOARD OF REGENTS OF HIGHER EDUCATION AND MASSACHUSETTS SOCIETY OF PROFESSORS/FACULTY STAFF UNION/MAT/NEA, AO-8 (7/14/83). ADVISORY OPINION.

54.5711 agency service fee
54.8 mandatory subjects
72.3 agency service fee
96. Advisory Opinion

Commissioners participating:

Paul T. Edgar, Chairman
Gary D. Altman, Commissioner

ADVISORY OPINION

The Massachusetts Society of Professors/Faculty Staff Union/MTA/NEA (hereinafter the "Union") has filed a petition for an advisory ruling with the Massachusetts Labor Relations Commission (hereinafter the "Commission") pursuant to 402 CMR 16.06. The Union requests that the Commission render an advisory opinion addressing the negotiability of a proposal submitted by the University of Massachusetts on behalf of the Massachusetts Board of Regents of Higher Education (hereinafter the "Board of Regents") during contract negotiations between the Union and the Board of Regents. The disputed proposal seeks to amend the agency fee article in the parties' collective bargaining agreement¹ by substituting suspension for termination as the ultimate penalty for nonpayment of an agency service fee. The specific proposal at issue provides as follows:

The employer proposes to amend Article VII, in such a way as to eliminate termination as the ultimate penalty for refusal to pay the agency fee under this Article.

The employer proposed that the Union, in dealing with agency fee non-payers, file once each year a policy grievance with the President's Office. This policy grievance will identify all agency fee non-payers and demand that those so named be suspended without

¹The agency fee article in the parties' expiring collective bargaining agreement provides, in relevant part:

7.6 Disputes between the parties concerning this Article shall be resolved in accordance with the grievance procedure contained in this Agreement. In the event such a dispute is submitted to arbitration, the arbitrator shall have no power or authority to order the Employer to pay such service fee on behalf of any bargaining unit member.

If the arbitrator decides that the bargaining unit member has failed to pay or authorize the payment of the service fee in accordance with this Article, the only remedy shall be the termination of the employment of such unit member if the unit member continues to refuse to pay or authorize payment of the required service fee after having sufficient time to do so. (emphasis supplied)



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pay for a specified period of time not to exceed two weeks. Further, that the President's Office conduct an expedited investigatory hearing in which all of the non-payers as well as the Union would be invited to put in evidence with regard to their respective positions. The hearing would result in a determination by the University with regard to the appropriateness or inappropriateness of the demand for suspension without pay filed by the Union. In instances where the University refuses or fails to act upon its own decision at the President's level, or in instances where a dispute continues, the parties shall move to an expedited arbitration procedure designed for and limited to this Article; the entire arbitration procedure to take not more than thirty (30) days. Prior to the execution of this agreement the parties shall agree upon a single arbitrator who will hear any cases brought to arbitration under the process described above.

In the expedited arbitration proceeding, the arbitrator will be limited in the remedy that he or she can provide. The sole remedy which may be afforded by the arbitrator is suspension without pay for one week for refusal to pay the agency fee. Amounts equal to those not paid to individuals which exceed the amount of the agency fee shall be deposited into the Student Scholarship Fund after payment of the determined agency fee is made to the Union.²

The Union's position is that G.L. c.150E, Section 12 and 402 CMR 17.16 mandate termination as the sole remedy for failure to pay an agency service fee. It contends that the language in Section 12, which provides that an employer shall require the payment of a service fee "as a condition of employment" during the life of a collective bargaining agreement providing for a service fee, precludes other

²On March 24, 1983, the day after the Union filed its petition in this matter, the Board of Regents substituted the following language for its original agency service fee proposal:

Disputes between the parties concerning this Article shall be resolved in accordance with the grievance procedure contained in this Agreement. In the event such a dispute is submitted to arbitration, the arbitrator shall have no power or authority to order the Employer to pay such service fee on behalf of any bargaining unit member.

If the arbitrator decides that the bargaining unit member has failed to pay or authorize the payment of the service fee in accordance with this Article, the only remedy shall be the suspension of the bargaining unit member for two weeks without pay if the unit member continues to refuse to pay or authorize payment of the required service fee after having sufficient time to do so. (emphasis supplied)



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remedies, such as suspension. In support of its position, the Union also directs our attention to the repeated references to termination in 402 CMR 17.16. In effect, therefore, the Union asserts that the board of Regents' proposal is an illegal subject of bargaining because it includes a penalty other than termination for nonpayment of an agency service fee.

Asserting that the penalty for nonpayment is as much a term or condition of employment as the fee itself, the Board of Regents argues that its proposal constitutes a permissive, if not a mandatory, subject of bargaining. Accordingly, the Regents ask us to construe the language of G.L. c.150E, Section 12 and 402 CMR 17.16 to include suspension as a lawful sanction for nonpayment of a service fee.

The issue raised by the Union's petition - whether a union and a public employer may lawfully negotiate a penalty other than termination for an employer's failure to pay an agency service fee - is one we have never squarely addressed. The resolution of this issue turns on the appropriate statutory construction of G.L. c.150E Section 12. Section 12 provides, in relevant part, that:

The Commonwealth or any other employer shall require as a condition of employment during the life of a collective bargaining agreement so providing, the payment...of a service fee to the employee organization which...is duly recognized by the employer or designated by the Commission as the exclusive bargaining agent ... (emphasis supplied)

The focus of our inquiry, therefore, is whether the language "as a condition of employment" mandates termination and precludes bargaining over remedies for nonpayment of a service fee.

It is our opinion that Section 12 of G.L. c.150E does not prescribe termination as the exclusive remedy that may be imposed on a delinquent service fee payor. We do not read the language "as a condition of employment" as a substantive limitation on the remedies that may be negotiated for nonpayment of a service fee. Rather, we construe the operative language in Section 12 to place agency service fees on the same footing as any other term or condition of employment for purposes of collective bargaining.

It is well settled that agency service fees constitute a mandatory subject of bargaining and that "[t]he substantive provisions regarding the agency fee are left to the parties to negotiate." Leominster School Secretaries Association, 7 MLC 1953, 1955 (1981). See also, Gloucester Teachers Association, 6 MLC 1739 (1980). We have observed, moreover, that the substantive elements of an agency service fee include its retroactive application and the amount of the fee. Leominster School Secretaries Association, *supra*. Similarly, we believe that the penalty for nonpayment of an agency fee is one of the substantive elements of the fee committed to the collective bargaining process.

Section 12 merely expresses the outer limits on the scope of negotiations over agency service fees and does not mandate specific service fee provisions. For



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example, the language of that section restricts the amount of a service fee to the amount of union dues and the service fee payors' proportional share of the cost of collective bargaining and contract administration. Yet nothing in Section 12 prevents the negotiation of a service fee less than that amount. See, Leominster School Secretaries Association, supra at 1953. Likewise, we conclude that Section 12 makes termination the maximum penalty for nonpayment of a service fee, but does not prevent the negotiation of a less severe penalty.

In support of its argument that termination is the sole remedy that may be imposed on a recalcitrant service fee payor, the Association also directs our attention to 402 CMR 17.16.³ A careful reading of that section demonstrates only that termination is an appropriate remedy for nonpayment of an agency fee if it is imposed pursuant to a collective bargaining agreement providing for such a remedy. Section 17.16 does not, however, indicate that termination is the exclusive sanction that can be negotiated. Further, the definition of a "service fee" in Section 17.02 of our regulations essentially restates the language of G.L. c.150E, Section 12.⁴ Thus, the reading of the statute we have articulated above is equally applicable to the language contained in our regulations.

Our construction of G.L. c.150E, Section 12 and our service fee regulations is supported by case law from other jurisdictions. See, e.g., San Lorenzo Education Association v. Wilson, 654 P.2d 202 (1983); Eastern Michigan University v. Morgan, 298 N.W.2d 886 (1980); Dauphin County Technical School Education Association v. Dauphin County Area Vocational-Technical School Board, 398 A.2d 168 (1978).⁵

³402 CMR 17.16 provides, in part:

(1) If an employee, after demand by the bargaining agent, refuses to pay the service fee in accordance with the requirements of a collective bargaining agreement, the bargaining agent may request the employee's termination. The employer, after reasonable notice to the employee, shall terminate the employee pursuant to the collective bargaining agreement; provided, however, that no employee shall be terminated who has tendered the required service fee prior to the decision to terminate...

⁴402 CMR 17.02 defines a "service fee" as "a sum of money which an employee is required as a condition of employment to pay to a bargaining agent pursuant to a collective bargaining agreement as provided in M.G.L. c.150E, Section 12."

⁵In an analogous line of cases, the National Labor Relations Board (NLRB) determined that union shop clauses in collective bargaining agreements providing for sanctions in addition to termination unlawfully discriminated against those who were not union members in violation of the National Labor Relations Act, 29 USC Section 158(a)(1) and (3) and (b)(1) and (2). See, e.g., Krambo Food Stores, Inc., 106 NLRB 870 (1953); Association of Western Pulp & Paper Workers, 170 NLRB 49 (1968); enforced 431 F.2d 1206 (9th Cir., 1970). However, in both Krambo and Western Pulp, the NLRB implied that a penalty less severe than discharge would be permissible.



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Particularly illustrative is the recent decision of the California Supreme Court in San Lorenzo Education Association, *supra*. There, the union, a party to a collective bargaining agreement requiring employees to either join the union or pay an agency service fee, sought damages in small claims court against an employee who failed to pay the fee. Construing a statutory scheme containing language similar to G.L. c.150E, Section 12,⁶ the California court held that the statute did not limit the remedies available to a union to termination. Rather, the Court noted that "the remedy chosen should be a proper subject left to the bargaining table, unless the Legislature indicates otherwise in the future." *Id.* at 208. Termination, the Court concluded, is "simply the outer limit of acceptable agency shop provisions." *Id.* at 206. Therefore, enforcement of the negotiated service fee requirement through the small claims process was a lawful alternative to termination.

Our reading of G.L. c.150E, Section 12 also demonstrates our concern for fostering a harmonious labor climate. Termination is a drastic measure which, in many circumstances, may not be in the interest of the union, the public employer or the affected employee. A union may be reluctant to seek termination when its primary concern is collecting the fee to which it is entitled. A public employer might prefer a less cumbersome method of enforcing an agency fee provision in a collective bargaining agreement. Moreover, all parties may wish to avoid the potential disruption and instability in the workplace that often accompanies the discharge of an employee. Therefore, a construction of the relevant statute and regulations which permits the parties to negotiate a penalty other than termination for nonpayment of a service fee will, we believe, promote sound labor relations.

For the reasons set forth above, we hereby advise the Board of Regents and the Association that the penalty for nonpayment of a service fee, like other aspects of the fee, is a mandatory subject of bargaining, with termination being the maximum penalty. Therefore, the parties may lawfully bargain an agency service fee provision in their collective bargaining agreement that substitutes suspension for termination as the penalty for nonpayment of an agency service fee.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, Chairman
GARY D. ALTMAN, Commissioner

⁶The relevant provision of the California Educational Employment Relations Act, Section 3540.1(i)(2) defines an agency fee provision as:

"[a]n arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee..." (emphasis supplied)

