72.3 agency service fee
76.6 furnishing information by union
82.12 other affirmative action

Commissioners participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

Brian A. Riley, Esq. - Representing the Malden Education Association

James P. O'Connell - Pro Se

DECISION

Statement of the Case

At issue in this case is the amount and kind of information a public employee union must make available to agency service fee payers when it demands payment of service fees.

On January 28, 1986, James P. O'Connell (O'Connell), a teacher employed in the Malden public schools, filed a charge with the Labor Relations Commission (Commission) alleging that the Malden Education Association (Association) had violated Section 10(b)(1) of the Law by making an invalid demand for an agency service fee. Following an investigation, the Commission issued a complaint of prohibited practice, alleging that the Association violated Section 10(b)(1) of the Law by failing to provide O'Connell with adequate, audited financial information about the basis of the agency service fee it had demanded of him.

Commission hearing officer Judith Neumann conducted a formal hearing on the complaint on November 17, 1986. Both parties appeared and had a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to offer argument. Both parties filed briefs, which we have considered along with the record in this case.

Facts[1]

The Association is an employee organization representing teaching personnel in the City of Malden. The Association and the Malden School Committee are parties

[1] Neither party contests the jurisdiction of the Commission in this matter.

to a collective bargaining agreement (Agreement) effective from May 1985 to June 1987. That Agreement set the terms of employment for a bargaining unit of teaches employed in the Malden schools, including O'Connell. Article 29 of the Agreement specified that all bargaining unit members who were not members of the Association must pay the Association an agency service fee as a condition of continued employment.

O'Connell was not a member of the Association during the 1985-86 school year. Therefore, he was required by Article 29 of the parties' Agreement to pay an agency service fee for that period of time.

On October 2, 1985, the Association filed Forms 1 and 2 with the Commission pursuant to Sections 13 and 14 of the Law.[2] Form 2 contained information about the Association's finances, including: the Association's assets, aggregate receipts and certain categories of disbursements for the most recent fiscal year, membership dues, and officer stipends. Prior to filing those forms, Association Treasurer Donald Brunelli had the Association's financial records reviewed by a certified public accountant, Stephen Hoover. Hoover, a member of Brunelli's family, received no compensation for that review and never provided Brunelli or the Association with a written certification that the records were accurate.

The Association wrote to O'Connell n January 10, 1986 and demanded that he pay an agency service fee in the amount of $281.00 for the 1985-86 school year. The demand indicated that the fee was allocated among the Association and its state and national affiliates as follows:

Malden Education Association	$ 37.00
Massachusetts Teachers Association	178.00
National Education Association	66.00
	$ 281.00

The Association appended the complete text of 456 CMR 17.00, the Commission's agency service fee regulations, to its January 10 demand.

There is no evidence in the record that the Association provided to O'Connell any financial information concerning the basis for the 1985-86 service

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2 Sections 13 and 14 of the Law require employee organizations to file with the Commission information about the organization and its finances. The financial report required by Section 14 must be filed annually within 60 days after the end of the union's fiscal year. For the convenience of employee organizations, the Commission has devised two forms, captioned Form 1 and Form 2, that employee organizations can file with the Commission to comply with Sections 13 and 14 of the Law. 456 CMR 16.06.

The financial report filed by the Association on Form 2 on October 2, 1985 covered the fiscal year ending June 30, 1985.

fee at the time it made the demand for the fee although its Forms 1 and 2 were on file with the Commission. Similarly, the record reveals no evidence that the Association provided O'Connell with any information relating to that portion of the fee allocated to the Massachusetts Teachers Association or the National Education Association. However, O'Connell never requested an opportunity to review any of the Association's financial books and records.

Opinion

Under G.L. c.150E, Section 12, public employers and public employee unions may enter into collective bargaining agreements requiring employees who are not union members to pay an agency service fee as a condition of employment. Section 12 does, however, contain explicit statutory limitations on a union's ability to collect an agency service fee. For example, that section provides that a union may levy an agency fee only if the collective bargaining agreement requiring the fee is ratified by a majority of bargaining unit members present and voting at a ratification vote. Similarly, Section 12 clearly requires a union seeking to collect an agency fee to establish and maintain a rebate procedure for objecting employees. Section 12 must also be construed and applied in a manner that avoids infringing on constitutional rights. See, School Committee of Greenfield v. Greenfield Education Association, 385 Mass. 70, 79-86 (1982).

In 1977, the United States Supreme Court issued its decision in Abood v. Detroit Board of Education, 431 U.S. 209 (1977), holding that nonunion employees had a constitutional right to prevent a union representing public sector employees from "spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive collective bargaining representative." Id. at 234.[3] the Abood Court also determined that objecting fee payers are only required to make a general objection about the amount of the fee and that the burden of justifying the fee rests with the assessing union. Id. at 239-40, n.. 40.

Relying on Abood, the Greenfield court construed Section 12 to prohibit a union from assessing an agency fee in excess of an employee's proportional share of collective bargaining, contract administration, and grievance adjustment expenses and announced that any violation of Section 12 would be a prohibited practice under G.L. c.150E, Section 10(b)(1). Greenfield at 76. The Greenfield court's holding that the agency fee payers in that case could not be required to resort to a rebate procedure controlled exclusively by the union[4] was also based upon the

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[3] In response to Abood, the Massachusetts General Court amended Section 12 to address these constitutional concerns. St. 1977, c.903. See School Committee of Greenfield, 385 Mass. at 80.

[4] All aspects of the rebate procedure considered by the Greenfield court, including the selection of an arbitrator to establish the amount of any rebate, where exclusively controlled by the union.

constitutional principles in Abood. The court in Greenfield reasoned that the burden on the union to justify the permissibility of the fee, as dictated by Abood, could be meaningful only if it occurred before a neutral tribunal and was subject to judicial review. 385 Mass. at 82. Similarly, the Greenfield court relied on constitutional principles in holding that a dissenting employee could not be required to pay any disputed part of a fee to a union pending determination of the permissible amount of the fee. Citing to Abood, the court noted that, although dissenting employees may constitutionally be required to pay the disputed fee into an escrow account, they could not be required to pay any of the amount to the union and thus to suffer an interim constitutional deprivation while the amount of the fee is being litigated. 385 Mass. at 84-85. The court in Greenfield directed the Commission to adopt appropriate procedures for adjudicating agency fee challenges. 385 Mass. at 85, n.9.

Following the Greenfield court's observation that Section 12 must be construed and applied constitutionally, the Commission developed procedures for adjudicating agency fee challenges consistent with the constitutional principle articulated in Abood and Greenfield. For example, Section 17.04 of the Commission's agency fee regulations defines the particular costs that a union may or may not include constitutionally in computing a service fee. The regulations also specify that a nonmember who challenges a fee must deposit the disputed amount of the fee in an escrow account pending a determination of the permissible amount of the fee. 456 CMR 17.07. The escrow requirement protects an employee's constitutional interest in ensuring that no portion of the disputed amount of the fee be payable to the union pending a neutral adjudication, while preserving the union's ability to collect the permissible portion of the disputed fee. See Greenfield, 385 Mass. at 85. The Commission's decisions and regulations reflect the constitutional requirement in Abood that a union demanding a fee has the burden of demonstrating the amount of the fee that is permissible. 456 CMR 17.15(2). The Commission's enforcement of Section 12, whether by regulation or decision, must be undertaken consistent with the constitutional rights of agency fee payers.[5] Malden Education Association, 15 MLC 1121, 1122 (1988).

Consistent with our practice of applying Section 12 constitutionally, the decision of the United States Supreme Court in Chicago Teachers Union Local 1 AFT, AFL-CIO v. Hudson, 475 U.S. 292 (1986) guides our construction of Section 12.

The issue in Hudson was whether the internal rebate procedure used by the union for resolving the objections to its agency fee was constitutional. Nonmembers

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[5] This is not to suggest that all constitutional claims arising out of agency fee disputes are properly brought before the Commission. The Commission has noted that "the Commission's complaints allege only violations of the statutes that the Commission administers rather than violations of the United States Constitution or cases interpreting it." Malden Education Association, 15 MLC 1121 (1988) (declining to consider purely constitutional claims in the absence of an alleged violation of G.L. c.150E).

could object to the agency fee after it had been deducted from their wages[6] by writing the union president and initiating a three-step process: 1) the union executive committee would consider the objection, and notify the objector within 30 days of its decision; 2) the objector could appeal that decision to the union's executive board within 30 days; and 3) the objector would appeal the union executive board decision to an arbitrator selected and paid exclusively by the union. If the union committees or the union-selected arbitrator sustained the objection at any level, the objector could receive a rebate and a reduction of future deduction. The Hudson Court held that the union's procedure was constitutionally defective because it failed to provide nonmembers with: 1) an adequate explanation of the basis for the fee demanded; 2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker; and 3) an assurance that an objector's funds would not be used temporarily while the objection was pending in the union rebate procedure. 475 U.S. at 304-309. The Court's dual rationale for requiring these procedural safeguards was to minimize the infringement of the agency shop arrangement on nonunion employees' First Amendment rights, and to afford them a fair opportunity to assess any potential infringement on their rights and to assert meritorious First Amendment claims. Id. at 302-303.

G.L. c.150E, Section 12 clearly specified that a union cannot collect an agency service fee unless it maintains "a procedure by which any employee so demanding may obtain a rebate of that part of said employee's service payment" that is based on impermissible expenses. Greenfield construed Section 12 in light of Abood to require neutral adjudication of agency fee disputes with an opportunity for full judicial review. On the record before it, the Greenfield court reasoned that reliance upon a rebate procedure under the exclusive control of the union as the only method by which an employee could challenge the fee would undermine the burden Abood had placed on unions to justify their agency fees. The Greenfield court noted that those arbitration decisions would only be subject to limited direct judicial review under G.L. c.150E. Greenfield at 82. Accordingly, the court read Section 12 to empower the Commission to adjudicate agency fee objections.

In light of Hudson, we respectfully suggest that the Supreme Judicial Court now would find that requiring that objecting fee payers challenge the fee through a constitutionally adequate union rebate procedure pursuant to Section 12 would protect their constitutional rights. Section 12 mandates that unions seeking agency fees maintain a rebate procedure, and Hudson holds that a rebate procedure meets constitutional muster if it: 1) provides for a prompt adjudication before a neutral decisionmaker not chosen exclusively by the union; and 2) provides for an escrow of disputed fees or otherwise ensures that objecting employees' fees will

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[6] We note that a critical defect in union's rebate procedure considered in Hudson was that the service fees were involuntarily deducted from nonmember employees' pay and, as a consequence, the union had full use and exclusive control of the fees during the pendency of the dispute. Hudson, 475 U.S. at 304-306.

not be used even temporarily for impermissible purposes. Id. at 310. As the Hudson Court observed, a full-dress administrative hearing is not necessary; rather, an expeditious arbitration could satisfy the constitutional concerns as long as the union does not have exclusive control over the arbitrator's selection. Id. at 308, n.21. Further, the Hudson Court noted that the Courts remain available as the ultimate protectors of constitutional rights.[7] Id. at 308, n.21.

Accordingly, we conclude that the union-established rebate procedure required by Section 12 must provide: 1)a prompt adjudication before an arbitrator not chosen exclusively by the union; and 2) an escrow or equivalent arrangement that guarantees that an objecting fee payer's agency fee will not be used even temporarily for impermissible purposes. Failure by a union to maintain such a constitutionally adequate rebate procedure, and to notify the fee payer in writing at the time the fee is demanded of his or her opportunity to challenge the fee through the rebate procedure, will violate Section 12 and will preclude the union's collection of an agency service fee. Although the Commission's administrative procedures are available to review whether a union has overstepped the bounds of Section 12, the Commission's procedures are not a substitute for the union's statutory obligation to maintain a constitutionally adequate rebate procedure.

When we consider the amount and kind of information that Section 12 requires public employee unions to provide to agency fee payers when demanding payment of their agency service fees, we necessarily are guided by Hudson. In light of Hudson, we believe that section 12 can only be construed constitutionally if unions seeking to collect agency fees under that section are required to provide fee payers with an adequate explanation of the basis for the fee when the fee is demanded. In a decision issued prior to Hudson, we recognized that fee payers need access to information when an agency fee is demanded of them to permit them to make an informed judgment about whether to pay or to challenge the fee. Malden Education Association, 11 MLC 1500, 1505 (1985). The Hudson decision emphasized that sufficient information must be given to potential objectors (i.e. before they object) to permit them to gauge the propriety of the union's fee. Hudson at 306. To avoid the constitutional infirmities identified by the Hudson Court, however, we believe that a union demanding an agency fee under Section 12 must satisfy the "adequate explanation" requirement described in Hudson.

Having determined that Section 12 obligates a public employee union to provide to its nonmembers an adequate explanation of the basis for the service fee at the time the fee is demanded, we must consider whether compliance with Sections 13 and 14 of the Law satisfies that requirement.[8]

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[7] Assuming a union rebate procedure is constitutionally adequate, the Commission could defer pursuant to 456 CMR 17.08 adjudication of a fee payer's charge that the amount of the fee demanded was impermissible under section 12 until the fee payer has exhausted the rebate procedure, and then review the results of that procedure, including the impartial arbitrator's decision as to the permissible amount of the fee, for compliance with Section 12.

(8, see page 1435)

The Hudson court held that potential service fee challengers must be given sufficient information to gauge the propriety of the fees being demanded of them. 475 U.S. at 307, n. 18. Recognizing that absolute precision in the calculation of a service fee is not required, the Court observed that a union need not provide nonmembers with an exhaustive and detailed list of all expenditures. Id. Nevertheless, the Hudson Court suggested that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." Id.

At the minimum, we believe that Hudson requires a public employee union to provide for the fiscal year preceding the period for which the fee is demanded[9] a copy of an independent auditor's financial statement of revenue and expenses[10] as well as a list of "the major categories of [the union's] expenses," including "a showing that none of [the expenses for a listed category] was used to subsidize

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8 (from page 1434)

In Malden Education Association, we held that a union that failed to comply with Sections 13 and 14 of the Law as mandated by 456 CMR 17.03(5)(f) and (g) and 17.05(3) violated Section 10(b)(1) of the Law. In light of Hudson, we now consider whether our holding in Malden should be extended to require a union to do more than comply with Sections 13 and 14.

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As the Hudson Court noted, a union "cannot be faulted for calculating its fee on the basis of its expenses during the preceding year." 475 U.S. at 307 n.18.

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Although this case does not concern the scope of the verification requirement described in Hudson, we have previously noted that the information on which a union relies to justify its expenses should be audited or have some other indication of reliability. See, e.g., Woburn at 1564. We recognize that small unions may find the expense of an audit very burdensome. Therefore, we conclude that, in lieu of an auditor's report, a small local can satisfy that informational requirement of Section 12 by supplying to fee payers at the time of demand a sworn affidavit of a responsible union officer with personal knowledge of the accuracy of the figures upon which the union's calculation of the fee are based. An affidavit attesting to the accuracy of figures on which the union's calculation of the fee are based must be accompanied with the written assurance that the fee payer, upon request, either can obtain from the union a list of all expenditures or, at the fee payer's option, can examine the union's financial receipts and record of expenses (i.e. receipts, check stubs, etc.) at a mutually convenient time. In authorizing this substitute for an audit, we recognize that an audited financial statement is an accounting and not a legal determination. Thus it does not verify the Union's allocation of expenses into permissible/impermissible categories. Rather, we believe that the purpose of Hudson's requirement for an audited financial statement is to verify that a union spent its monies for the purposes listed on the financial statement. See Andrews v. Education Association of Cheshire, 829 F.2d 335, 340 (2d Cir. 1987). If the fee payer is offered access to a small union's books and records, the fee payer will have the opportunity personally to verify the expenses, thus fulfilling the purpose of the audit.

[nonchargeable activities], or an explanation of the share that was so used."[11] Hudson, 475 U.S. at 307, n. 18. Further, consistent with the constitutional requirements articulated in Hudson, we conclude that Section 12 should be read to require unions to provide directly to employees the requisite financial information either before or at the time of demand.

Here the Association's filings under Section 13 and 14 of the Law do not satisfy the informational requirement as we have interpreted it. First, the Association's forms were not given to O'Connell at the time of demand. Second, the "disbursements" listed on the Form 2 offer insufficient information about the major categories of the Association's expenses for permissible activities, and no audit or sworn affidavit verifying the expenses was given to O'Connell. See n. 10 above. Accordingly, we hold that the Association did not satisfy its statutory obligation to provide O'Connell with an adequate explanation of the amount of the agency service fee merely by having filed Forms 1 and 2 with the Commission.[12] Because the information supplied by the Union with the demand was inadequate to inform O'Connell of the expenses for which he was being asked to pay, the Union's demand for payment is invalid.

As we consistently have held in other cases, a union that violates Section 12 of the Law or the rules implementing that Section commits a prohibited labor practice within the meaning of Section 10(b)(1) of the Law. See, e.g., Woburn Teachers Association, 13 MLC 1555 (1987); Weymouth Teachers Association, 12 MLC 1789 (1986); Malden Education Association, 11 MLC 1500 (1985). Similarly, a union that fails to meet the constitutionally necessary informational requirement

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[11] We do not suggest that there is only one method of complying with Hudson. A union may organize its "major categories of expenses," for example, either into activity- or function-based categories of expenses (such as those found in Commission Regulation 456 CMR 17.04, or any other categories describing the union's major activities, functions or programs such as legal services or political lobbying) or into object-based categories (such as salaries, rent, printing, telephone, travel, etc.), and should identify the total amount of the permissible expenses it claims in each category. Unless the description used for a category of expenses already clearly indicates this (e.g., expenses for grievance arbitration), the union should also briefly explain why it claims any of the expenses in the category are permissible. The union's obligation in this latter respect may be satisfied by a union statement that the expenses claimed as permissible in the category were incurred in connection with one or more activities described in 456 CMR 17.04(2).

[12] We do not mean to suggest that the information included in a union's filing under Section 13 and 14 of the Law if given directly to agency fee payers is per se inadequate. Some unions file their LM-1 and LM-2 forms, the financial disclosure forms unions representing private sector employees are required to file with the Federal government, with the Commission or otherwise supplement their Form 1 and 2 filings. However, the particular information on the forms here did not satisfy the minimum requirements we believe must be met.

described above violates Section 10(b)(1) of the Law.[13] Accordingly, we shall order the Association to cease and desist from attempting to collect a fee based on the demand of January 10, 1986.

ORDER

WHEREFORE, based on the foregoing, IT IS HEREBY ORDERED that the Malden Education Association shall:

1. Cease and desist from attempting to collect an agency service fee from James O'Connell for the 1985-86 school year based on the Association's demand of January 10, 1986 or in any like manner interfering with, restraining or coercing O'Connell in violation of Section 10(b)(1) of the Law.

2. Take the following affirmative action that will effectuate the purposes of the Law:

   a. Refrain from attempting to collect an agency service fee from O'Connell for the 1985-86 school year based on the Association's demand of January 10, 1986.

   b. Post in conspicuous places where employees usually congregate and where notices to employees are usually posted, and maintain for a period of thirty (30) days thereafter copies of the attached Notice to Employees; reasonable steps shall be taken to ensure that those notices are not altered, defaced, or covered by any other material.

   c. Notify the Commission in writing of the steps taken to comply with this decision within thirty (30) days after receipt of the decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

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[13] We note that this result is consistent with post-Hudson decisions from labor relations agencies in other jurisdictions. See, e.g., Dugoin Education Association, IEA-NEA, et al. III ELRB.No. 85-FS-0002-S (April 8, 1988); Brewster School District, WA, PERC No. 6849-C1-87-1380 (September 30, 1987). United University Professions, NY PERB No. U-8347 (July 8, 1987); Milwaukee Board of School Directors, et al., WI ERC No. 18408-G (April 24, 1987); District 65, UAW, AFL-CIO, NJ PERC No. CI-85-70-153 (December 23, 1986).

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing at which all parties had the opportunity to present evidence, the Massachusetts Labor Relations Commission has determined that the Malden Education Association violated Section 10(b)(1) of G.L. c.150E by failing to provide James P. O'Connell with an adequate explanation of the amount of the 1985-86 agency service fee prior to demanding that he pay that fee.

WE WILL NOT do anything that interferes with, restrains or coerces any employee in the exercise of their rights guaranteed under G.L. c.150E.

WE WILL NOT attempt to collect an agency service fee from James P. O'Connell for the 1985-86 school year based on our January 10, 1986 demand that he pay an agency service fee for that year.

When we make a demand for payment of an agency service fee, WE WILL provide an adequate explanation of the amount of the fee demanded.

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President
Malden Education Association