LEOMINSTER SCHOOL SECRETARIES ASSOCIATION AND WANDA BARLOW, ET AL., MUPL-2290 (3/23/81). Decision on Appeal of Hearing Officer's Decision.

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Commissioners participating:

Phillips Axten, Chairman
Gary D. Altman, Commissioner

Appearances:

Sandra C. Quinn - Counsel for the Leominster School Secretaries Association

Bruce N. Cameron - Counsel for the Charging Parties

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On January 24, 1980 Hearing Officer Jean Strauten Driscoll issued her decision in the above-captioned matter dismissing a charge of prohibited practice filed by Wanda Barlow, Joan Carter, Gloria DePaolo, Dorothy Erdmann, Helen Nathan, Mary Tate, and Sandra Quirk (Charging Parties) against the Leominster School Secretaries Association (Association). Leominster School Secretaries Assn., 6 MLC 1809 (1980). The hearing officer held that agency fee payers in a bargaining unit represented by the Association may be required to pay the fee retroactively to the effective date of the collective bargaining agreement. Such a requirement, she concluddd, would not violate Section 10(b)(1) of G.L. c.150E (the Law). The Charging Parties requested review[1] of that decision. All parties have filed supplementary statements

[1]The parties have treated this case as if it arose under the povisions of Section 11 of the Law and the provisions of the Commission's Rules dealing with appeal of hearing officer decisions. MLRC Rules, 402 CMR 13.13. We have some doubts that this case presents an issue for appeal under those provisions. The precise issue submitted to the hearing officer was substantially beyond the scope of the original charge and the Complaint issued by the Commission. Although the hearing officer answered the issue submitted, this action may have been gratuitous. No investigation has been made of the issue submitted, and no Complaint issued as required by the Commission's Rules in prohibited practice cases. MLRC Rules, 402 CMR 15.04. As no party has objected to review, and as the case presents an issue of importance, we have decided to "review" the decision of the hearing officer. Harrison v. Labor Relations Commission, 363 Mass. 548, 296 N.E.2d 196 (1973).

which we have considered. On the basis of the record on review we render the following opinion affirming the hearing officer's decision.

The Charging Parties are members of a bargaining unit represented by the Association. The Association negotiated a collective bargaining agreement covering the unit with an effective date of July 1, 1979. Ratification meetings were held on February 14, 1979 and April 30, 1979 but the membership votes accepting the contract were challenged by the Charging Parties on the grounds that notice was inadequate. When, in August, 1979 the Association demanded payment of the fee, the Charging Parties filed charges with the Commission. On September 12, the Commission issued a Complaint against the Association alleging that:

> Prior to the ratification meetings (on February 14, 1979 and April 30, 1979) the Association gave no notice to the charging parties (1) of the time and place of the ratification meeting; (2) that the proposed agreement, if ratified, would require payment of a service fee as a condition of employment; (3) of the amount of the service fee; (4) that the meeting was open to all regardless of membership in the Association; (5) that all employees represented by the Association were eligible to vote; or (6) that the Association's most recent financial report in the form of a balance sheet and operating statements listing all receipts and disbursements of the previous fiscal year was available for inspection.

An Expedited Hearing was held on October 5. At that time the parties submitted the following issue to the hearing officer for resolution, stating that all other matters had been settled:

> Assuming a valid ratification of a collective bargaining agreement containing an agency fee clause on October 30, 1979; are the agency fee payers in the bargaining unit required to pay $83.00 (the July 1, 1979-June 30, 1980 yearly fee), or a fee that is less than $83.00 based on a monthly pro rata share of the agency fee.

After examining Section 12 of the Law and relevant Commission precedent, the hearing officer concluded that the Association could impose on non-members an agency fee retroactive to the effective date of the contract. From that determination the Charging Parties have appealed.

Opinion

Section 12 of the Law reads:

> 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 on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, of a service fee to the employee organization which in accordance with the provisions of this chapter, is duly recognized by the employer or designated by the commission as the exclusive bargaining agent for the unit in which such employee

> is employed; provided, however, that such service fee shall not be imposed unless the collective bargaining agreement requiring its payment as a condition of employment has been formally executed, pursuant to a vote of a majority of all employees in such bargaining unit present and voting.
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> Prior to the vote, the exclusive bargaining agent shall make reasonable efforts to notify all employees in the unit of the time and place of the meeting at which the ratification vote is to be held, or any other method which will be used to conduct the ratification vote. The amount of such service fee shall be equal to the amount required to become a member and remain a member in good standing of the exclusive bargaining agent and its affiliates to or from which membership dues or per capita fees are paid or received.

The Charging Parties argue that this language permits only prospective application of an agency service fee following ratification. They contend that if ratification occurs after the effective date of the contract, the full costs of collective bargaining and contract administration may not be charged. Rather, the Charging Parties assert, the costs must be pro-rated, and agency fee payments required only for the period following ratification. The hearing officer concluded otherwise, and we affirm her determination.

It is clear that, pursuant to Section 12 of the Law, ratification by the bargaining unit is a prerequisite to the imposition of a lawful service fee. It does not follow from this, however, that a fee lawfully imposed may not have some retroactive application. No such restriction is found in the express language of Section 12. The Charging Parties argue that the limitation on retroactive application should be read into Section 12 because of the requirement of ratification, but we decline to make such an inference.

The requirement of ratification is plainly a procedural provision intended to give non-union members a voice in a matter that will affect them: the requirement of an agency fee payment. There is no evidence that the Legislature intended the requirement of ratification to restrict the amount of an agency fee which might legitimately be charged. The only restriction placed on the amount of such fees is that they be not more than the costs of becoming and remaining a union member, and that they reflect the costs of collective bargaining and contract administration. The substantive provisions regarding the agency fee are left to the parties to negotiate. Agency service fees are plainly a mandatory subject of bargaining. Gloucester Teachers Association, 6 MLC 1739 (1980). Retroactivity is one of those substantive elements on which the parties must agree, whether the provision deals with an agency service fee, wages, or seniority. We find no basis in the statutory language for distinguishing between retroactive application of agency fee provisions and retroactive effect of other contract terms. Indeed, Section 12 states that a fee may be imposed "during the life of a collective bargaining contract...." (emphasis added).

Other courts and agencies have adopted the same view. The Wisconsin Supreme Court held in a similar case:

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> The Commission recognized that retroactivity is a way of life in labor negotiations. We, too, have recognized this concept. The petitioner's argument that retroactive application of a fair-share agreement will legislate (procedural protections) out of existence is unpersuasive. The right of employees to refrain from any organized labor activities is expressly qualified in that section by the permissible imposition of fair-share dues. That it is done retroactively is no less in keeping with the overall objective of fair-share agreements. Berns v. Wisconsin Employment Relations Commission, Wis. 1979-80 PBC, para.37, 111 (1980).

Absent compelling justification to do otherwise, agency fee provisions must be treated as any other subject of bargaining with respect to the validity of retroactive application. Similar views have been expressed by the New York Public Employee Relations Board. Westbury Union Free School District and Westbury Teachers Association v. Handy, 12 PERB 4638 (1979).

Neither Commission nor National Labor Relations Board (NLRB) precedent requires a different result. The Charging Parties point to cases under the National Labor Relations Act holding that an employee may not be required to pay periodic dues for any period which includes the thirty-day grace period defined by 29 U.S.C. §158(a)(3). NLRB v. Cadillac Wire Corp., 290 F.2d 261, 263, 48 LRRM 2849, 2151 (2d Cir. 1961); Western Building Maintenance, 162 NLRB 778, 789, 790, 793, 64 LRRM 1120 (1967), aff'd. NLRB v. Western Building Maintenance, 64 LRRM 2623, 402 F.2d 775 (9th Cir. 1968). G.L. Chapter 150E has a similar provision permitting new employees a thirty-day period before they may be charged an agency fee as a condition of employment. We note, however, that this case involves no issue of any attempt to assess new employees for any agency fee for a period including the thirty-day grace period. The policies involved in such a case might differ from those we examine today. For example, a new employee would not have enjoyed the full retroactive benefits of a contract, and might not be liable for a full retroactive agency fee. New employees might not have had any opportunity to vote on the contract imposing the fee thus justifying an exemption for at least the grace period. We need not resolve the issue at this time. Rather, we will await the time when this issue is presented and argued to us and is factually ripe for decision.

The NLRB has held that under the statute it administers, back dues or initiation fees may not be required as a condition of employment for a period of time prior to the execution of the contract requiring their payment. In such cases, the NLRB has looked to the date of execution rather than the effective date of the contract. See, e.g., Local 25, International Brotherhood of Teamsters, 220 NLRB 76 (1975). The Charging Parties would have us apply the NLRB doctrine, but substitute the date of ratification of the service fee for the execution date of the contract to determine the validity of any retroactive application. The logic of such a substitution eludes us. In addition, we note, as did the hearing officer, the fact that the relevant provision of the National Labor Relations Act speaks in terms of "periodic dues and assessments." Language requiring periodicity is significantly omitted from Section 12 of our Law. Lack of any language on periodicity strengthens the argument that the Legislature did not intend to prohibit retroactive application of the agency fee provisions. Moreover, we note that under the NLRB cases the union could require employees to become members of the union, and pay

an amount equal to the dues (as opposed to the cost of collective bargaining). The more onerous requirement might justify more stringent application of the statutory language.

Finally, the Charging Parties point to the decisions of the Commission in Massachusetts Law Enforcement Council and Prioli, et al., 6 MLC 1148 (H.O. 1979) and O'Brien et al. and Lawrence School Custodians Assn. and Lawrence School Committee, 5 MLC 1678 (1979) in support of their position. In each of those cases the union seeking to colelct the agency service fee had been found guilty of a prohibited practice for failing to properly ratify the fee. As a remedial device, the employee organizations were prohibited from seeking the discharge of the employees for failure to pay the fee during the period in which the fee was found not to be in effect. Such remedial action is clearly within the discretion of the Commission. Neither of those cases held that in the absence of any prohibited practice retroactive payment of an agency fee could not be sought following a proper ratification. There has been no finding of a prior prohibited practice in this case. Thus, the cases are not similar on their facts.

Because of the narrow issue presented to us we need not and do not reach other issues suggested by the Charging Parties. We agree, for example, that it is generally desirable to have the agency fee ratification vote in some proximity to the execution of the contract or agreement at the bargaining table. Some limits might, therefore, be placed on the extent of permissible retroactivity. We decline, however, to examine these potential limits in this context. Similarly, we leave open the issue of whether an agency fee might be retroactive to a previous fiscal year of the union. We need not adopt or reject the hearing officer's speculations on this point. 6 MLC at 1812, n.5. Nor do we rule here on the validity of any attempt to collect an agency fee for the period between an invalid ratification and a curative vote. We hold only that assuming a valid ratification on October 30, 1979, Section 12 of the Law does not prohibit imposition of the full agency fee for the fiscal year from July 1, 1979 through June 30, 1980.[2]

Conclusions

The Decision of the hearing officer is free from material error and is affirmed.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman
GARY D. ALTMAN, Commissioner

[2]Our holding, of course, presumes that union members were obligated to pay their respective dues for the full fiscal year as well. There is no suggestion in the record to the contrary.