STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BARBARA C. ABBOT, Charging Party, v. SAN RAMON VALLEY EDUCATION ASSOCIATION, CTA/NEA, Respondent.	)	Case No. SF-CO-304 PERB Decision No. 802 March 29, 1990
YVONNE M. CAMERON, Charging Party, v. SAN RAMON VALLEY EDUCATION ASSOCIATION, CTA/NEA, Respondent.	)	Case No. SF-CO-309

Appearances: National Right to Work Legal Defense Foundation, Inc. by Milton L. Chappell, Attorney, for Barbara C. Abbot and Yvonne M. Cameron; California Teachers Association by Diane Ross, Attorney, for the San Ramon Valley Education Association, CTA/NEA.

Before Hesse, Chairperson; Craib, Shank, Camilli, and Cunningham, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Barbara C. Abbot (Abbot) and Yvonne M. Cameron (Cameron) to a proposed decision, issued by a PERB administrative law judge (ALJ). Abbot and Cameron filed two unfair practice charges against the San Ramon Valley Education Association, CTA/NEA

(SRVEA) alleging, inter alia, that SRVEA interfered with the right of Abbot and Cameron to refrain from organizational activity, thereby violating section 3543.6(b) of the Educational Employment Relations Act (EERA).[1] Specifically, SRVEA is alleged to have deducted agency fee payments from nonmembers without following the constitutional requirements set out by the United States Supreme Court in Chicago Teachers Union v. Hudson (1986) 475 U.S. 292 (Hudson).

The Board, based on a review of the entire record, including the stipulated issues, the exceptions filed by Abbot and Cameron and SRVEA's response thereto, affirms in part and reverses in part the proposed decision, in accordance with the discussion below.

SUMMARY OF THE FACTS

SRVEA is an affiliated local of California Teachers Association (CTA) and National Education Association (NEA), serving as the exclusive representative of certificated employees

---

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> . . . . . .
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

in the San Ramon Unified School District (District). As the result of a bargaining agreement between SRVEA and the District, SRVEA was permitted to collect nonmember, agency fees (or organizational security fees) through a payroll deduction mechanism.[2] For the 1986-87 school year, the time period for

---

[2]EERA section 3540.1(i)(1)(2) states:

> (i) "Organizational security" means either of the following:
>
> (1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his or her obligation to the employee organization within a period of 30 days following the expiration of a written agreement.
>
> (2) An 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 in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

California Education Code section 45061 states, in pertinent part:

> The governing board of each school district when drawing an order for the salary or wage payment due to a certificated employee of the district shall, with or without charge, reduce the order for the payment of service fees to the certified or recognized organization as required by an organizational

which the collection procedures are at issue, SRVEA collected agency fees from approximately 100 nonmembers. The agency fee amounts obtained through the payroll deductions were equal to SRVEA membership dues and amounted to $411 per person. SRVEA allocated the dues and fees as follows: (1) $90 per year to SRVEA; (2) $2 50 per year to CTA; and (3) $71 per year to NEA.

Following the United States Supreme Court decision in Hudson, CTA implemented new agency fee collection procedures, which provided for an annual notice to nonmembers describing: (1) an outline of CTA's collection and refund procedure; (2) the estimated amounts of chargeable and nonchargeable expenditures;[3]

> security arrangement between the exclusive representative and a public school employer as provided under Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code. However, the organizational security arrangement shall provide that any employee may pay service fees directly to the certified or recognized employee organization in lieu of having such service fees deducted from the salary or wage order.

[3] "Chargeable expenditures" are those fair-share fees that must be paid by public employees who decline to become members of their designated exclusive bargaining representative that

> . . . include not only the direct costs of negotiating and administering a collective bargaining contract and settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as the exclusive representative of employees in the bargaining unit.
> (Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575, 588, citing Ellis v. Railway Clerks (1984) 466 U.S. 435, 448.)

(3) the procedure for obtaining a reduction for the nonchargeable amounts; and (4) the procedure for challenging CTA's estimated amounts before a neutral arbitrator. The collection procedures also included an option for local affiliates to adopt CTA's chargeable percentages as their own. Any local that did not use the CTA chargeable percentage was required to provide its own notices and hearings relating to local fees. For the 1986-87 school year, SRVEA chose to use CTA's chargeable percentage as its own. Thus, CTA would provide for the entire hearing should any nonmember from the District challenge SRVEA's agency fee estimation. Additionally, the plan provided for 100 percent of the nonmember fees collected to be set aside in an independently managed, interest-bearing escrow account pending resolution of fee payers' objections by an impartial decision maker.

In order to comply with Hudson, CTA provided an audit report of its agency fee calculations. The audit performed by the accounting firm of Ernst & Whinney was a review based on CTA's own allocation of its estimated costs, which in turn was based upon staff activity reports using a computerized coding system. Staff timesheets were filled out and coded according to a list, predetermined by CTA, of staff's chargeable and nonchargeable activities. A separate calculation was made of expenditures for managerial, clerical and support operations because these functions generally served departments throughout CTA. These calculations were then allocated according to the percentages

within each department in proportion to the chargeable and nonchargeable categories as adopted by each department.

Prior to compiling the review of agency fee expenditures, CTA's underlying financial statements were also audited by Ernst & Whinney. However, even though sample reliability testing was performed by the auditors on the underlying activity reports submitted by CTA, a formal audit of the estimated chargeable expenditures was not accomplished. This was because of the many legal uncertainties regarding determination of what is chargeable and, thus, retainable by the exclusive representatives. The review, instead, determined whether or not the historical costs incurred by CTA, and the time-tracking information obtained from selected employees, provided a reasonable basis for CTA's calculation of the percentages of chargeable and nonchargeable expenditures.

On October 13, 1986, CTA distributed its notice and accompanying supporting documents to agency fee payers throughout the state. In that notice, agency fee payers were informed that all participating local CTA chapters would adopt the chargeable percentage figure (84.9%) of CTA as their own. The documentation included: (1) both CTA's and NEA's explanations of the method used for calculating chargeable and nonchargeable expenditures; (2) estimates of the budgets for the 1986-87 school year; and (3) copies of NEA's (but not CTA's) audited expenditures for the 1984-85 school year. SRVEA, in electing to utilize the local presumption option of CTA's procedures, provided no supporting

financial information of its own local expenditures. In mid-December 1986, CTA mailed the auditor's review of CTA's chargeable and nonchargeable expenditures for the 1985-86 year and the estimated expenditures for the 1986-87 year to fee payers who had requested arbitration.

Between November 13 and December 12, 1986, CTA sent a refund payment of approximately $73 to the majority of all those fee payers requesting a refund, but not arbitration. For the employees of the San Ramon Valley Unified School District, out of the $441 for the 1986-87 school year, the refund equated to approximately $14 from SRVEA, $43 from CTA, and $16 from NEA.[4] Fee payers, including Abbot and Cameron, who challenged the estimated percentage by requesting a refund and an arbitration hearing received no amount from CTA until the conclusion of the arbitration in June 1987. Although CTA deposited all fees collected in segregated bank accounts, these accounts were not independently managed. The accounts were controlled exclusively by CTA. Additionally, CTA withheld and deposited the fees designated for both itself and NEA. SRVEA utilized the same type of banking arrangement, but had merged its regular operational account with its agency fee account from August 1986 until February 1987. In February 1987, SRVEA established a separate fund at CTA's direction.

[4]These figures represented the amount of refund due an objecting fee payer for the entire school year. Thus, objectors were provided a future advanced reduction on monthly amounts yet to be collected.

The parties stipulated in the hearing before the ALJ that Abbot and Cameron had received the October 13 notice with accompanying materials, as well as the "audited" materials that were distributed in December. Abbot and Cameron had filed timely objections with CTA, and subsequently received notification of arbitration procedures and hearing schedules as outlined by the American Arbitration Association (AAA) Special Rules for Resolving Agency Fee Disputes. Abbot and Cameron did not participate in the arbitration hearing, however, such personal participation was not necessary under AAA rules.

Under the AAA rules, agency fee arbitrators were selected by AAA, but were paid by CTA. Other AAA rules permitted: (1) representation of individual objectors by counsel; (2) hearing date notices provided to all objectors; (3) the right to a stenographic record; and (4) the opportunity to challenge the arbitrator for bias. The arbitration, which consolidated all objections in a single hearing, was conducted over 13 days between January and April 1987. The arbitrator's decision issued in June 1987. Before and during the arbitration hearing, the participants raised objections to the hearing schedule, the arbitration location at CTA headquarters in Burlingame, and alleged bias of AAA in general.[5]

[5]The arbitrator eventually scheduled the entire hearing on normal workdays. He had attempted to get the parties to agree to some weekend and holiday hearing dates early in the process, but, due to a number of protests from some agency fee challengers, he was unsuccessful.

The arbitrator's decision included a review of chargeable expenditures for NEA, CTA,, and seven local affiliates, including SRVEA. In his decision, the arbitrator approved the procedures utilized by CTA and NEA, including the use of the local presumption. Even though the actual proof of SRVEA's expenditures showed a higher chargeable percentage than the percentage used by CTA, SRVEA was not permitted to use the higher figure later as that would, in the arbitrator's opinion, work as a penalty against objecting fee payers. However, he made slight adjustments to NEA's projected figures for 1986-87, from the 81.6 percent estimated chargeable expenses to 75.53 percent properly chargeable to objecting fee payers.

Prior to the presentation of evidence in the hearing before the ALJ, the parties stipulated to the issues to be tried in accordance with the complaints. The stipulated issues were outlined as follows:

A. Does the initial collection of agency fees in an amount equivalent to members' dues violate EERA?

B. Did SRVEA fail to provide adequate financial disclosure and supporting information to nonmember fee payers?

   1. Was there a lack of verification by an auditor?

   2. Were the categories for expenditures incorrect?

   3. Was CTA required to provide information as to the expenditures by CTA specifically for SRVEA?

   4. Was SRVEA required to provide financial information regarding its own local expenditures?

C. Was there a failure to provide for a prompt and impartial mechanism for objecting fee payers?

1. Does the use of AAA procedures meet the impartial standard?

2. Was the arbitration hearing held promptly?

D. Was there a failure to escrow agency fee monies into an independently managed escrow account?

The ALJ found that, with the exception of a temporary integration of fee payer funds into SRVEA's regular operational bank account, the procedures used complied with the Hudson requirements.[6] He concluded that: (1) It was not improper for CTA to adopt a procedure in which initial fee deductions were equal to member dues and then deposited in an escrow account; (2) the verification process utilized by CTA did not require an actual certified audit so long as the auditor's opinion was premised on an "independent verification"; (3) the documents provided to fee payers and the methodology used by CTA and NEA provided adequate disclosure as required by Hudson; (4) SRVEA's adoption of CTA's chargeable percentage figures based on a presumption that the local association's expenditures would be at least as great as, if not greater than, CTA's chargeable expenditures, was permissible; (5) the use of arbitrators selected by the AAA as impartial reviewers of objections filed by fee payers was proper; and (6) the failure of both CTA and SRVEA to establish escrow accounts under the independent management of a third party was not in violation of the requirements of Hudson.

[6]The ALJ addressed the merits of both CTA's and the NEA's procedures because SRVEA had adopted and utilized both procedures to collect those agency fee funds going to the state and national organizations, respectively.

DISCUSSION

Abbot and Cameron's Exceptions

Abbot and Cameron's main focus of concern was that SRVEA violated EERA because the procedures used to collect and retain money from agency fee payers did not meet the minimal due process protections as set forth in the Hudson decision. The exceptions filed by Abbot and Cameron can be summarized as follows:

A. SRVEA failed to provide notice of financial information prior to the initial deductions.

B. The financial information provided by SRVEA did not meet the Hudson criteria in that:

   1. There was no financial information relating to SRVEA;

   2. The CTA information was based on a review rather than a verification by an independent audit; and

   3. There was no verification by an independent auditor of the NEA information.

C. There was no advanced reduction based upon verification by an independent audit.

D. There was no independent escrow account.

E. There was no mechanism for a fair and prompt decision by an independent decision maker in that:

   1. CTA unilaterally selected AAA;

   2. AAA is biased against fee payers;

   3. AAA rules do not protect fee payers;

   4. The decision did not come until the end of the school year; and

   5. The location and timing of the hearing did not give Abbot and Cameron an opportunity to participate.

F. The cease and desist remedy is inadequate and, instead, the Board should grant restitution of all money taken

along with an order to prevent future collections until SRVEA institutes a constitutional procedure.

In sum, the issue before the Board in this case is whether SRVEA's procedures for the collection of agency fees meet the constitutional requirements as set forth in Hudson. There, the Supreme Court stated:

> The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities.
> (Hudson, supra. 475 U.S. 292, 302, citing Abood v. Detroit Board of Education (1977) 431 U.S. 209, p. 237.)

In Hudson, the Supreme Court enunciated a three-part constitutional test that must be satisfied by an exclusive representative in the collection of agency fees from nonmembers. The court required an adequate explanation of the bases for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending. (Id. at p. 310.)

The Board's review in this case is framed by not only the mandates set out in Hudson, but also by the litigated issues and the exceptions filed by Abbot and Cameron.[7] Other than the

[7]"It is a well established rule of administrative appellate procedure that a matter never raised before the trial judge is not properly reviewed by the appellate tribunal on appeal." (Colusa Unified School District (1983) PERB Decision No. 296, citing Fresno Unified School District (1982) PERB Decision No. 208, at p. 23. See, also, PERB Reg. 32300(c), which provides "an exception not specifically urged shall be waived." PERB

requirement that an agency fee arrangement must be agreed to by both the employer and the union and voted upon by all members of the bargaining unit (EERA, sec. 3546(a)), there were no PERB regulations in place to protect nonmembers' constitutional rights, at the time the proposed decision was issued.[8] As a result, this case was litigated on the basis of whether SRVEA's procedures (or CTA's procedures, as utilized by SRVEA) satisfy the standards established by Hudson, and whether the procedures violated section 3543.6(b) by interfering with, restraining or coercing employees with regard to their right to refrain from participation in the activities of employee organizations as set forth in section 3543. PERB agency fee regulations played no part in the litigation.

A. Did SRVEA Fail to Provide Adequate Notice Prior to Initial Deduction of Agency Fees?

In discussing whether or not the initial deduction of agency fees in an amount equal to union member dues was constitutionally improper, the ALJ noted that, even if it might be ideal to have the notice and objection period precede any fee deduction, the Hudson decision confirmed that a 100-percent escrow guarded against a problem of involuntary loans. Abbot and Cameron argue that this statement of the ALJ is a decision on the issue of

---

Regs. are codified at Cal. Admin. Code, tit. 8, sec. 31001 et seq.)

[8]On April 1, 1989, PERB regulations governing agency fee agreements were put into effect (32990 through .32997). These regulations set forth detailed requirements for exclusive representatives and appeal procedures for agency fee payers.

timing of the initial agency fee notice. We do not read that portion of the ALJ's proposed decision as a conclusion on the issue of timing of the notice. Further, that issue was not stipulated to by the parties at the inception of the hearing below.

The Board will entertain unalleged violations only when adequate notice and the opportunity to defend has been provided to respondent; where such acts are intimately related to the subject matter of the complaint; are part of the same course of conduct and have been fully litigated; and the parties have had an opportunity to examine and be cross-examined on the issue. (Santa Clara Unified School District (1979) PERB Decision No. 104, pp. 18-19.) In this case, timing of notice to nonmembers is, indeed, intimately related to the subject matter of the complaint, and is part of the same course of conduct. However, the Board stated in Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, at page 6, ". . . failure to meet any of the above-listed requirements will prevent the Board from considering unalleged conduct as violative of the Act [EERA]."

In this case, SRVEA could not have had adequate notice and an opportunity to defend, inasmuch as this issue was, neither stipulated to nor presented in the underlying complaint. The Board pointed out in Tahoe-Truckee, supra, that notice is required in all circumstances regardless of whether the unalleged violation is distinctly separate from the charged unfair

practice. (Id.. at p. 8.)[9] This issue is, therefore, not properly before the Board.

B. Did the Financial Information Supplied by SRVEA Meet the Hudson Criteria?

1. SRVEA's Financial Information

At the heart of the standards set forth by the Supreme Court in Hudson is the right of the nonunion employee to "have a fair opportunity to identify the impact of the governmental action on his interest. . . ." (Hudson, supra, at p. 303.) The court went on to state:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to

---

[9]Although we do not reach the question of the timing of notice to agency fee payers in connection with actual collection of agency fees, the subsequently enacted agency fee regulations, see footnote 8, do provide for time limitations with regard to notification of nonmembers. Regulation 32992 states, in pertinent part:

> . . . . . .
>
> (c) Such written notice shall be sent/distributed to the nonmember either:
>
> (1) At least 30 days prior to collection of the agency fee, after which the exclusive representative shall place those fees subject to objection in escrow, pursuant to section 32995 of these regulations; . . .

The agency fee regulations also provide for concurrent notice. The Board notes that the current agency fee regulations are subject to a ruling by the Sacramento County Superior Court as to the constitutionality of various portions of the regulations. (See the intended decision on Motion for Summary Judgment and Summary Adjudication of Issues in Johnson, et al v. Public Employment Relations Board (March 26, 1990) Sacramento Superior Court No. 507208.) The judgment is not yet final.

> gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee--and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in Abood.
> (Id. at p. 306; emphasis added.)

In Hudson, the court was dealing with a situation where the financial information provided by the union simply identified the amount that the union had expended for nonchargeable purposes, then divided this amount by the union's income, which produced a percentage figure that was rounded off to the nearest whole percent to "cushion" any inadvertent errors.

Both parties in the case before us rely on language in the footnote following the court's determination that the Chicago Teachers Union did not provide adequate disclosure of the reasons nonmembers were required to pay 95 percent of the union dues. The court states:

> We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." [Citations.] Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, . . . for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

(Hudson, supra, at p. 307, fn. 18.)

This language is the source of dispute over precisely what methods and to what extent unions must provide nonmembers information which would allow them to determine whether or not to object to the amount of fees collected. Several federal court decisions have interpreted Hudson's guidelines for adequacy of information.

In Andrews v. Education Association of Cheshire (D.Conn. 1987) 653 F.Sup. 1373, affirmed (2d Cir. 1987) 829 F.2d 335, the court approved the use of a statewide union's financial information to determine the percentage of the local unions' expenditures for chargeable activities. The court found that local associations are much less likely to engage in extensive political activities than the state and national organizations and, therefore, it is less likely that the monies they receive from fee payers will be used for those purposes. Andrews held that the unions' use of the evidentiary "local" presumption satisfied the constitutional requirement of Hudson even if, in rare instances, there may arise situations in which this presumption is incorrect.[10] Other courts have also upheld the

[10]Although the issue of the use of the presumption was not raised on appeal, Andrews v. Education Association of Cheshire, supra, 829 F.2d 335, 338 footnote 1, the Court of Appeal for the Second Circuit described an agency fee plan that " . . . provides a variety of information be given to nonmembers to allow them to determine the propriety of the fee that the union is seeking to charge. This information includes the end-of-year financial reports of each LEA(a collection of three local associations), CEA (Connecticut Education Association) and the NEA which show their actual expenses for the previous year verified by an independent auditor 'or authorized association representative.'"

use of the local presumption: Lowary v. Lexington Board of Education (N.D. Ohio 1988) 704 F.Supp. 1456; Gillespie v. Willard Board of Education (N.D. Ohio 1987) 700 F.Supp. 898; and Hohe v. Casey (M.D. Pa. 1988) 695 F.Supp. 814, aff'd. (3d Cir. 1989) 868 F.2d 69.

In the Hohe case, the nonmember plaintiffs argued that the local presumption is insufficient in that Hudson required detailed financial information be provided for each affiliate that received money. There, the district court agreed with the assessment in Andrews that:

> There is little basis for the conclusion that every document made part of every disclosure process employed by every union is to be subjected to an independent audit, regardless of the size of the union and the circumstances under which it operates. . . [W]hen considering the disclosure provisions of the plan as a whole, this court cannot find, on the basis of one clause, of one sentence, of one footnote in Hudson that the failure to provide an audit of the explanatory memorandum itself, or the failure to require independent audit for the [local unions'] expenditures, renders the proposed system constitutionally deficient. (Hohe, supra, at p. 819, citing Andrews, supra, 653 F.Supp. at 1377.)

However, even though the Hohe court was concerned, as was the court in Lowary, that it had no evidence that the local expenditures are in fact less than that of the statewide percentage, it approved the use of the local presumption in the initial notice to nonmembers. In the case before us, the arbitrator received evidence and made a determination that six of the seven local associations presenting evidence of their agency

fee expenditures, including SRVEA, had expenditures ranging from 92 to 98 percent chargeable fees.[11]

Therefore, the Board finds the utilization of a "local presumption" (adopting the statewide association's percentages) adequately protects nonmember fee payers when the fee payers are provided financial statements of the local association's yearly expenditures showing chargeable amounts incurred in performing SRVEA's representational obligations. The Board agrees with the arbitrator that once a local elects to use the presumption, a subsequent finding of a higher chargeable percentage than the statewide figure will not permit the local to then use the higher figure. In the agency fee plan before us, SRVEA had the burden of justifying and proving its yearly expenditures at the arbitration hearing.

In this case, SRVEA failed to supply potential objectors with any information regarding its own financial budget.[12] Although we agree that there are practical reasons that preclude

---

[11]Abbot and Cameron argue that they were not parties to the arbitration hearing. Nevertheless, it was stipulated that both Abbot and Cameron had requested the arbitration in the 1986-87 agency fee dispute, and there was testimony that Abbot and Cameron were aware they could be present at the arbitration and represented by counsel and, at all times, be fully informed of the hearing dates. The fairness of the appeal procedure provided by CTA is discussed, infra.

[12]The ALJ concluded, at footnote 47 of the proposed decision, that Abbot and Cameron abandoned the related issue of a lack of financial information regarding CTA's expenditures specifically for SRVEA. The ALJ is correct in his statement that the issue was not pursued in the post-hearing briefs. More importantly, Abbot and Cameron filed no exception regarding that determination. Therefore, that issue is not addressed in this decision. (See fn. 7, ante, p. 12.)

the requirement of a comprehensive, certified audit, failure of the exclusive representative to provide any information relating to the local association does not provide the necessary procedural safeguards. Thus, for the local presumption to be constitutionally permissible, SRVEA must provide, at a minimum, an end-of-year financial report in its notice to nonmembers showing chargeable expenditures incurred in performing its representational obligations.[13]

2. Is Ernst & Whinney's Review of CTA Information Acceptable as a Hudson Verification Requirement?

Abbot and Cameron assert that because of legal deficiencies in the "notice" materials provided to nonmembers in October 1986, it was impossible for the fee payers to make a preliminary assessment of chargeable and nonchargeable expenditures. Their primary concerns can be summarized as follows: (1) a nonmember could not make an assessment as to whether certain costs were chargeable or nonchargeable based on the documents supplied in the notice; (2) the review by Ernst & Whinney was not a verification as required by Hudson, i.e., it was not a certified audit; and (3) there was no audit of the "categories" of chargeable expenses as opposed to verification of the actual expenses themselves.

[13]The requirement of a financial report should not be an unduly burdensome requirement for the local exclusive representative in that section 3546.5 under EERA requires each organization to prepare its report annually.

We find that Abbot and Cameron's reliance on the Sixth Circuit Court of Appeal decision in Tierney v. City of Toledo (6th Cir. 1987) 824 F. 2d 1497, for the proposition that it is the function of the auditor to determine whether a union's calculation of what is chargeable, is misplaced. That same circuit court has recently rejected that argument in Gwirtz v. Ohio Education Association (6th Cir. 1989) 887 F.2d 678. There, the court, in reviewing an appeal by nonmember fee payers who claimed the union must use the "highest" level of audit service available, stated:

> On the question of "verification" by an auditor, we reject the plaintiffs' argument that the function of the independent auditor is to verify the union's calculation of the chargeable or nonchargeable nature of the major categories of union expenditures. Whether a union expenditure is "chargeable" or "nonchargeable" to nonmember employees is a legal determination that depends upon the type of union activity for which the expenditure is made.
> (Emphasis in original; id. at fn. 3, p. 681.)

The Board agrees with this conclusion.

The Second Circuit Court of Appeal, in Andrews, defined the scope of an auditor's function in agency fee reviews. The court stated:

> We believe, however, that Hudson's auditor requirement is only designed to insure that the usual function of an auditor is fulfilled. That usual function is to insure that the expenditures which the union claims it made for certain expenses were actually made for those expenses.
> (Andrews, supra. 829 F.2d 335,340.)

In the case before us, the Ernst & Whinney review was of the type that would insure that the expenditures that the Association claims it made for certain expenses were actually made. The process was adequately described in the December 12, 1986 Letter of Transmittal and Introduction provided to SRVEA's agency fee objectors. The document indicates there was an underlying certified audit for CTA, and that the calculations for the current year were prepared using historical costs. The letter also provided references to accompanying detailed lists of assumptions and a statement that the underlying assumptions provided a reasonable basis for the Association's determination of the percentage of retainable and "rebateable" expenditures.[14] The Board holds the Ernst & Whinney review of expenditures to be sufficient to allow fee payers to form a basis for objection.

We find some merit, however, in Abbot and Cameron's assertion that an agency fee payer was not able to discern from the documents provided either in mid-October or mid-December 1986, whether some costs were chargeable or nonchargeable. The supporting documents prepared by CTA and accompanied by the auditor's December cover letter provide a more detailed compilation of information than the October materials. Even when the two groups of documents are combined, or read in support of each other, they do not provide the nonmember with sufficient

[14]The terms "retainable" and "rebateable" are used interchangeably with "chargeable" and "nonchargeable" throughout the documents in evidence.

information to make a reasonable determination as to the propriety of the amounts charged.

In CTA's estimated retainable and "rebateable" expenditures for the 1986-87 school year, the total amounts spent are broken down by departments within CTA. In the "Calculation of Methodology in Schedule of Assumptions," CTA provided its determination of which categories of expenditures were chargeable and nonchargeable. Additionally, CTA provided a list of actual expenses (ending in August 1986). This document, however, listed only total expenses for programs in each department without any reference to chargeable or nonchargeable percentages.

An example of the difficulty in determining whether or not to object to expenditures is seen in the category of Field Service Departments. In the estimated expenditures for 1986-87, this department's expenditures were listed as follows:

> Field Service: This program involves the implementation of field services to CTA affiliates, including development of leadership, communications systems, identification and development of local issues, assistance with bargaining, including contract monitoring, grievance representation procedures and identification and processing of unfair practice charges and chapter recognition status $13,069,439
>
> Estimated retainable expenses . . . $12,128,440
>
> Estimated rebatable expenses. . . . $ 940,999

Some confusion lies in the fact that CTA, in its calculations and methodology explanation, described "Field Services" as a departmental budget category, and went on to describe services provided under that department as a chargeable

cost (retainable). From the estimated expenditures described above, it is impossible to ascertain which services were assigned to the chargeable categories and which services were assigned to nonchargeable categories. Although the Hudson decision did not require "absolute precision" in the calculations, the court did set forth the following standard:

> . . . either a showing that none of it was used to subsidize activities for which nonmembers may be charged, or an explanation of the share that was so used was surely required.
>
> (Hudson, supra. at p. 307, fn. 18.)

CTA/in response to the objectors' concerns, provided further documentation during the arbitration hearing. These documents were entitled "CTA Estimate of Rebatable Retainable Expenditures of Agency Fees for 1986-87." The documents included a multi-column list of the chargeable/nonchargeable expenses by each department from the previous year, and a corresponding projection of the total budget for each department by chargeable and nonchargeable categories for the forthcoming year. Furthermore, they provided a breakdown by department of each type of expenditure and an assignment of each service to either a chargeable or nonchargeable category. Testimony at the hearing before the ALJ showed that the information described above was compiled at the same time supporting documents for the audit were prepared. No evidence was presented as to why providing this type of information would be an unmanageable burden on SRVEA.

With the exception of not including the types of documents described immediately above, we find the type of review conducted

by Ernst & Whinny on behalf of CTA would provide an adequate explanation of the bases for the fee. This information, however, should have been sent with the initial notice to all fee payers. We disagree with the ALJ's finding that the initial October financial documents allowed for an intelligent objection by fee payers. Therefore, we find that the information provided by CTA in the October notice failed to comply with Hudson standards.

3. Was there Appropriate Verification of the Financial Information Supplied by NEA?

As stated earlier in this decision, the primary focus of this case is to determine whether or not the agency fee plan utilized by SRVEA provides a procedure that meets the constitutional requirements set forth in Hudson. The one significant difference between NEA's and CTA's procedure is that NEA did not provide a reliable indication that its expenditures were audited. Instead, NEA's estimation of chargeable and nonchargeable expenditures for the 1986-87 school year merely includes the statement that it will apply an arbitrator's analysis of its audited expenditures for the 1984-85 school year.

We note that the parties stipulated at the hearing below that NEA's 1985-86 school year financial statements were accurate and audited. The purpose for that stipulation is unclear. The agency fee payer receiving NEA's documents, however, received no statement signed by the auditor for NEA, nor from any individual serving as an independent auditor, indicating that the expenses were reviewed or otherwise verified as accurate.

As indicated in our discussion on CTA's audit procedure, the statement by the auditor must accompany the initial notice. Several federal courts, in reviewing the materials sent to agency fee payers, have recognized this requirement. In Andrews, supra, 829 F.2d 335, the union sent annual memoranda which included statements by the independent auditor verifying the union's reports. The District Court in Hudson v. Chicago Teachers Union (N.D. Ill. 1988) 699 F.Supp. 1334, in deciding whether to release agency fees deposited with the Clerk of the Court, reviewed revised union procedures which required notices to include the auditor's signed statement. The court found the auditor's typical function was " . . . attesting that a union actually spent its money in the manner represented by the fair share notice." (Id. at p. 1342; emphasis added.)

The ALJ's proposed decision did not adequately address the verification aspect of NEA's documents. In fact, the ALJ made only a finding that NEA's determination of chargeable expense categories was based on a "pre-Hudson" arbitration. Since the lack of verification by an auditor is one of the primary stipulated issues, we find there was not sufficient verification by an independent auditor of the NEA information.

C. Does the Advanced-Reduction Method Utilized by SRVEA Provide Adequate Constitutional Protections?

Abbot and Cameron object to the ALJ's finding that a 100-percent escrow of the amount collected from the nonmember fee payers provides adequate constitutional protection against

involuntary loans. They argue that there must be both advanced reduction and escrow if a plan is to survive constitutional scrutiny.

The first deduction of agency fees, in an amount equal to SRVEA monthly dues, occurred around the first part of October 1986. This same amount continued to be deduced on a monthly basis throughout the school year ending in June 1987. The plan required that the full amount of the fees be set aside in an "escrow" account.[15] The plan further provided that agency fee payers could request an immediate fee reduction by filing an objection no later than November 15, 1986. The immediate refund of the fees collected, however, was only available to those objecting fee payers that did not request an arbitration hearing. Those fee payers requesting arbitration had 100 percent of the collected fees deposited in the escrow account until the arbitration decision was issued.

We note, initially, that while other jurisdictions have statutes expressly prohibiting the collection of agency fees that are equal to the amount collected for dues, EERA does not.[16] The Hudson court indicated that the 100-percent escrow was not constitutionally required, but, with an adequate explanation of the bases of the fee and a reasonably prompt opportunity to

---

[15]The efficacy of the "escrow" plan is addressed infra at page 30.

[16]Section 3540.1(i)(2) provides that a nonmember employee may be required to pay a " . . . service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments. . . ."

challenge the amount of the fee, a union had only to escrow an amount reasonably in dispute while the challenges were pending, (Hudson, supra. 475 U.S. 292, at p. 310.) While not addressing the amount the union felt was clearly nonchargeable, i.e., the remaining five percent of dues, the court warned the union that, if it chose not to escrow the entire amount, it must carefully justify the limited escrow on the basis of an independent audit, and that the escrow figure must itself be independently verified, (Id, at fn. 23.)

Abbot and Cameron rely on Tierney v. City of Toledo, supra, (6th Cir. 1987) 824 F.2d 1497, for the proposition that SRVEA could not take an initial deduction in an amount equal to dues. However, although the Tierney court viewed Hudson's reference to 100-percent escrow as being the " . . . 100 percent of the remaining, non-clearly ideological proportion of the fee which the union may collect. . . .," the court also recognized that the union may collect fees equal to dues where there is no objection from a nonmember. The court stated:

> We do not believe that the language (referring to Hudson's 100-percent escrow protections) was intended to enable the union to compel a nonconsenting, nonunion member to have any sum collected . . . .
>
> . . . . . .
>
> Upon making their objections, dissenting nonmembers are entitled immediately to an advance reduction of that portion of their fees which an independent audit unquestionably indicates would be spent for ideological purposes.
> (Tierney, supra, at p. 1503; emphasis added.)

In its subsequent decision in Damiano v. Matish (6th Cir. 1:987) 830 F . 2d 1363 , • the Sixth Circuit reaffirmed this proposition, stating:

> The burden is upon the individual employee to object to expenditures by the union for political or ideological purposes, since "dissent is not to be presumed [citations] [0]nly employees who have affirmatively made known to the union their opposition to political uses of their funds are entitled to relief. . . .
> (Damiano, supra. at p. 1369, fn. 8; emphasis in original.)

This language necessarily implies that the court recognizes there must be a reasonable time for making an objection in the first instance, and that, once an objection is known, the objector must then receive an immediate reduction corresponding to the percentage of expenditures calculated by the union to be nonchargeable.

In the recently decided California Supreme Court case of Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575, a case dealing primarily with categories of properly chargeable union expenditures, the court recognized that a union may assess an initial agency fee amount equivalent to membership dues. The court noted:

> The fact that an expenditure of a union is for a purpose beyond its representational obligations and therefore not properly chargeable to nonmember service fee by no means precludes the expenditure altogether. The expenditure may well be an appropriate use of union funds received from members in the form of fees, dues, or assessments. If so, it may also be financed out of service fees paid by nonmembers who were sufficiently informed of the proposed expenditure and

> given the opportunity to object, but failed to do so.
>
> _____. __ __.
>
> (Cumero. supra. at p. 589.)

Therefore, we find that where a plan initially collects agency fees in an amount equal to membership dues and, upon receipt of an objection filed by a nonmember, issues an immediate refund, the plan is constitutionally permissible as to the amount that may be collected initially. Here, SRVEA's use of CTA's plan is flawed in that it penalizes those objectors who also request arbitration. Those nonmembers who do not request arbitration are given the benefit of an immediate refund and an equivalent advance reduction for the remaining months of the school year. Those nonmembers who challenge the union's calculations, however, are penalized by having the refund and future advanced reduction withheld pending the arbitrator's decision. The plan for collection of agency fees cannot allow continued collection at the fees-equal-dues rate after objection has been received.

D. Did the Segregated Savings Accounts Used by CTA and SRVEA Meet the Escrow Requirements of Hudson?

The ALJ found that the separate accounts utilized by CTA and SRVEA were not insufficient, and that the agency fee funds in those accounts had not been improperly used. While we agree this factual finding is accurate, we disagree with the ALJ's conclusion that these accounts conformed with Hudson's escrow requirement. Abbot and Cameron argue that Hudson requires that escrow accounts be independently controlled and interest-bearing.

Not only were CTA's and SRVEA's accounts controlled exclusively by the executive officers of the respective organizations, but, from August 1986 to February 1987, SRVEA merged its regular operational account with its agency fee monies.

Although the Hudson court did not specifically define the term "escrow," it did indicate, in reference to the requirement of a prompt decision by an impartial decision maker, that a procedure that is ". . . entirely controlled by the union . . ." is constitutionally inadequate to minimize the risk that nonmembers' fees might be used for impermissible purposes. (Hudson, supra, 475 U.S. 292, at page 308.) An account that is susceptible to use by the exclusive representative's or affiliate's executive officers, segregated or not, does not provide the necessary protections. The dictionary defines "escrow" as:

> . . . a bond or deed put in the care of the third party and not delivered or put in effect until certain conditions are fulfilled.
> (Webster's New World Dictionary (1982) 2d College Ed., p. 477.)

With regard to the nature of the escrow account utilized by SRVEA and CTA, we find that there was no independent escrow account. Such unrestricted access as was possible here does not sufficiently protect nonmember fee payers' constitutional rights. Nonmembers' rights must not be dependent upon the good will of the organization collecting agency fees. Therefore, an escrow account for the deposit of agency fee funds must not only be

independent but must also prevent the release of contested funds until the completion of the objection process.

E. Was there a Mechanism for a Fair and Prompt Decision by an Impartial Decision Maker?

The Supreme Court, in responding to the union's unrestricted choice of an arbitrator from a state list, stated:

> The nonunion employee, whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner. (Hudson, supra, 475 U.S. 292, at p. 307.)

The court did not, however, require that there be a "full-dress administrative hearing, with evidentiary safeguards" as part of the constitutional minimum required. (Id. at p. 309, fn. 21.)

Here, the agency fee collection plan provided for objections by agency fee payers to be heard under the AAA's Rules for Impartial Determination of Union Fees, effective June 1, 1986. In addition to these rules, the plan required that: (1) all requests for hearings be consolidated into a single hearing; (2) the hearing commence no later than December 15 of the fee year in question; (3) the arbitrator issue an award within 30 days following the close of the hearing; and (4) objectors be paid within 20 days of receipt of the arbitrator's determination.[17]

[17]In fact, the arbitration hearing at issue was originally scheduled for the first part of January 1987. Due to motions by objectors, challenges to the arbitrator, and challenges to the timing and location of the hearing, along with the need for more days than those originally scheduled, the hearings concluded in early April 1987, and, with time for closing written briefs filed by the parties, the decision did not issue until mid-June 1987.

Although Abbot and Cameron have alleged bias in the selection of the arbitrator by AAA, there was no evidence presented in the hearing below to support this claim. The arbitrator ruled on the generalized objections claiming prejudice under AAA Rule No. 4, with a finding that none of the objections stated any facts or specific grounds to challenge the arbitrator.

An argument was put forth in the case before the Board, as it was in Andrews v. Cheshire Education Association, supra, 829 F.2d 325 that the AAA procedure does not meet the Hudson requirements because union officials sit on the AAA board of directors. The Second Circuit found that that argument had no merit. (In accord, the Sixth Circuit in Damiano. supra. (6th Cir. 1987) 830 F.2d 1363.) Furthermore, the AAA procedures, as a whole, were approved by both courts. Accordingly, the Board finds that the arbitration procedures, as utilized in CTA's agency fee plan, are acceptable and not in violation of Hudson.

Given the number of days of hearing, the nature of objections filed regarding the days on which hearing should be held (i.e., workdays versus weekends or holidays), and the number of objectors and associations involved, the Board finds that a six-month period is not unreasonably protracted provided challenging objectors are given refunds immediately following the objection period and a form of advanced reduction thereafter.

With regard to the timing and location of the arbitration, the ALJ found that the process adopted by the arbitrator was sufficient. Specifically, he ruled that hearings held on

workdays were the most practical way to reconcile the needs and desires of a large number of fee payers and a reasonable means of reducing administrative inconvenience and expense for all concerned. The ALJ further found that, had the arbitrator responded to objecting fee payers' request to move the hearing from location to location throughout the state, the hearing would have been even further protracted. We agree with the ALJ's conclusion. In addition, attempts by the arbitrator to hold hearings on weekends or holidays met with resistance from other objecting fee payers. As a practical matter, the manner in which the hearing was conducted, with respect to timing and location was reasonable.[18]

REMEDY

We find that Abbot and Cameron's request for restitution of all money taken is inappropriate. Under EERA section 3541.5(c), the Board is given

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, . . . as will effectuate the policies of this chapter.

In the present case, it has been found that SRVEA has violated EERA by: (1) failing to provide any local financial information to potential nonmember objectors; (2) utilizing documentation from its state affiliate that did not, in its

---

[18] The complaints issued in these consolidated cases included an allegation of a violation of SRVEA's duty of fair representation under section 3544.9. The ALJ found no breach based on a failure to prove there was arbitrary, bad faith, or discriminatory conduct. This conclusion was not excepted to.

initial notice, provide sufficient supporting materials, including the auditor's verification, to enable a nonmember to make the determination as to whether or not to object; (3) failing to provide sufficient indication that its national affiliate's supporting financial statements were verified by an independent auditor; (4) not providing challenging objectors with an immediate refund and future advanced reduction; and (5) failing to establish an escrow account that would restrict the union's access to the challenged amount of agency fee funds prior to the impartial decision maker's determination of the appropriate percentages to be refunded to objecting nonmembers. These actions interfere with the right of nonmembers to refrain from participation in the activities of the exclusive representative in violation of section 3543.6(b).

In this case, Abbot and Cameron had the opportunity to object, did object and requested arbitration. Therefore, Abbot and Cameron are entitled to a return of any amounts, with interest, that should have been refunded upon the initial filing of objection with SRVEA or any of its agents. (Breaux, et al v. ALRB (1990) Cal.App.3d [90 Daily Journal D.A.R. 1281, 1287].) Additionally, there shall be a prohibition of future collections until the deficiencies found by this decision are corrected and proper procedures are in place.

ORDER

Upon the foregoing findings of fact and conclusion of law, and the entire record in this case, it is hereby ORDERED that the

San Ramon Valley Education Association, CTA/NEA, and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Failing to provide financial information concerning San Ramon Valley Education Association, CTA/NEA (SRVEA) to support use of a local presumption incorporating the California Teachers Association's (CTA) calculated percentage of chargeable and nonchargeable expenditures in its notice to nonmember agency fee payers.

2. Failing to provide nonmember agency fee payers with a copy of CTA's audited verification in the initial notice.

3. Failing to provide information supporting CTA's calculation, which describes both the chargeable and nonchargeable expenditures by major category within each department listed in its initial annual notice.

4. Failing to provide a statement by an independent auditor for the National Education Association's supporting documentation as to its chargeable and nonchargeable expenditures.

5. Failing to provide an immediate return and future advanced reduction to challenging agency fee payers upon receipt of objection.

6. Depositing agency fee funds into either its own or its affiliates' escrow accounts where those accounts do not provide for independent management and prevent the release of contested funds until the completion of the objection process.

7. Collecting agency fees from nonmembers until such time as the deficiencies outlined in subparagraphs 1 through 6 above are corrected.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Return to Barbara C. Abbot and Yvonne M. Cameron the fee amounts admittedly nonchargeable, with interest, that would have been due as a result of their initial notice of objection to SRVEA, less those amounts actually received after the arbitration as a result of the arbitrator's finding. The amount of interest due to Abbot and Cameron shall be at the rate of ten (10) percent per annum.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and other work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of SRVEA. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Members Shank, Camilli, and Cunningham joined in this Decision.

Member Craib's concurrence and dissent begins on page 38.

Member Craib, concurring and dissenting: I concur in the findings of the majority, with two exceptions.[1] One, it is inappropriate to address the issue of the lack of specificity in the California Teachers Association's (CTA) listing of chargeable and nonchargeable expenditures in the packet of information provided to agency fee payers, because, like the timing of the initial agency fee notice, this issue was not fully litigated. Two, I disagree with the majority that the information concerning the National Education Association's (NEA) expenditures did not adequately reflect that those expenditures had been audited.[2]

As noted by the majority, at the outset of the hearing, the parties stipulated to the issues in dispute. (Maj. Op., at pp. 3-4.) CTA's failure to specifically list which subcategories of expenditures it considered chargeable and nonchargeable was not one of those stipulated issues. The only stipulated issue that possibly could be construed to encompass this matter is the issue described as "incorrect categories for expenditures." However,

---

[1]I agree with the majority that the agency fee procedures at issue here were deficient because no information was provided concerning the San Ramon Valley Education Association's (SRVEA) expenditures. I agree because I believe some information was required so that an agency fee payer could make an informed decision on whether or not to challenge in arbitration the validity of the use of the local presumption. However, in other circumstances, it is possible that something other than a local's annual financial report would suffice, particularly where the use of the presumption has been upheld in previous adjudications involving the same unions.

[2]To the extent that the majority holds that the initial information concerning CTA that was sent to agency fee payers suffers from the same deficiency, for the reasons discussed infra. I also disagree with that finding.

from a review of the record, including the post-hearing briefs and the proposed decision, it is apparent that the above-quoted issue refers to the methodology used by CTA to determine its allocation of expenditures to chargeable and nonchargeable categories and, in particular, to the lack of an audit of that allocation.[3]

The majority correctly explains why it is inappropriate to address the issue of the timing of the agency fee notice. SRVEA could not have had adequate notice and an opportunity to defend that issue, because it was not one of those issues stipulated to and was instead raised for the first time on appeal. Similarly, the lack of specificity in CTA's listing of chargeable and nonchargeable expenditures was not a stipulated issue, was not mentioned in the charging parties' post-hearing brief, and was not addressed in the ALJ's proposed decision; instead, it was raised for the first time on appeal. Consequently, since the specificity of CTA's listing of chargeable and nonchargeable expenditures was not fully litigated, it is inappropriate to address the issue. (See Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, pp. 5-10.)

---

[3]The majority correctly rejects the charging parties' assertion that an audit of the allocation of expenditures is required. As noted by the majority, the courts have rejected this assertion, recognizing that such a determination is a legal one that is properly within the purview of the impartial decision maker and is beyond the expertise of an auditor. (See, e.g., Andrews v. Education Association of Cheshire (2d Cir. 1987) 829 F.2d 335 [127 LRRM 2929, 2933].)

I differ with the majority on the adequacy of the information on NEA provided in the agency fee notice, because I believe that the majority has added an unwarranted technical requirement to the contents of the notice. The information concerning NEA that was included in the agency fee notice sent to agency fee payers included three documents. One document reflected audited expenditures for the 1984-85 school year (the most recent year for which audited figures were then available), broken down into program areas with a chargeable and nonchargeable figure listed for each area.[4] The second document was an estimate of chargeable and nonchargeable expenditures for the 1986-87 school year, again broken down by program areas. The estimates were based on 1984-85 audited figures, which roughly mirrored the planned activities for the 1986-87 year. The third document explained how NEA calculates its agency fee by listing, based on an advisory opinion of an arbitrator, the kinds of expenditures considered chargeable and nonchargeable.

While the NEA information clearly states in several places that the expenditures listed were audited, the majority finds the information inadequate because there is no accompanying statement signed by an auditor attesting to the accuracy of the figures provided. While including a signed statement might be in a

[4]While the components of each program area are listed in some detail, it is not clear which components are considered chargeable and nonchargeable. Reading this document together with the others included in the information packet helps somewhat. In any event, for the reasons discussed above, this issue was not fully litigated and is, therefore, not properly before the Board.

union's interest because it would allay the suspicions of agency fee payers, I can find no authority that provides that a representation that chargeable and nonchargeable expenditures were audited is insufficient for the purposes of the initial agency fee notice.[5] The requirement that a union's expenditures be verified by an independent auditor, in my view, refers only to the fact that the expenditures must be subjected to the review of an auditor; that requirement does not prescribe any specific attestation that must be included in the notice. (Chicago Teachers Union v. Hudson (1986) 475 U.S. 292, 307, fn. 18 [106 S.Ct. 1066] (Hudson).)

It is important to remember that the purpose of the arbitration hearing (as well as subsequent unfair practice or

---

[5]In neither of the cases cited by the majority did the court make a statement that can be construed to require that a statement signed by the auditor be included in the initial agency fee notice. In Andrews v. Education Association of Cheshire, supra, 829 F.2d 335, the court, in recounting the underlying facts of the case, noted that the notice included financial reports of the exclusive representative and its affiliates, "together with statements for [sic] an independent auditor or authorized association representative verifying those reports." (Andrews, supra, at p. 338.) There is no further mention of the auditor's statement.

Similarly, in Hudson v. Chicago Teachers Union (N.D. I11. 1988) No. 83C2619 [130 LRRM 2112], the court discussed the proper role of the auditor in verifying the union's expenditures, but made no comment on the necessity of including a signed statement from the auditor in the initial notice. More pertinent is the court's rejection of the plaintiffs' argument that the notice cannot survive constitutional scrutiny unless it incorporates legally correct definitions of chargeable expenditures, and unless the calculations are based on sound methodology. As the court stated, this argument mistakenly equates the adequacy of the notice with the accuracy of the fee calculations, and would effectively eliminate the need for the impartial decision maker. (Hudson, supra. 130 LRRM at 2115.)

court hearings) is to prove or disprove the representations in the agency fee notice. The agency fee notice itself need not contain such proof. It need only contain information sufficient to allow an informed choice as to whether to challenge or accept the union's calculations. (Hudson, supra, 475 U.S. at 306 [106 S.Ct, at 1076].) If agency fee payers find reason to question the methodology used in verifying expenditures, they may have that issue adjudicated by filing a timely objection.

While there was extensive evidence in the unfair practice hearing concerning the methodology of the review of CTA expenditures, there was very little inquiry into the audit of NEA's expenditures. The charging parties repeatedly claim that there was no audit at all, nor even a "CTA-style review." However, the only testimony on the subject revealed that, though the underlying financial information was audited, the accounting firm retained by NEA did not attempt to audit the allocation of expenditures into chargeable and nonchargeable categories. This reflects no deficiency, for such a task, as the majority points out, is not properly within the purview of the auditor.

In sum, the information provided by NEA did indicate that it was audited, and the evidence introduced at the hearing gives no indication that this representation was false. I believe this satisfied the requirement of Hudson that the financial information be verified by an independent auditor.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CO-304, SF-CO-309, Barbara C. Abbot, et al. v. San Ramon Valley Education Association, CTA/NEA, in which all parties had the right to participate, it has been found that the San Ramon Valley Education Association, CTA/NEA (SRVEA) violated section 3543.6(b) of the Educational Employment Relations Act.

As a result of this conduct, SRVEA and its representatives have been ordered to post this notice, and they will:

A. CEASE AND DESIST FROM:

1. Failing to provide financial information concerning San Ramon Valley Education Association, CTA/NEA (SRVEA) to support use of a local presumption incorporating the California Teachers Association's (CTA) calculated percentage of chargeable and nonchargeable expenditures in its notice to nonmember agency fee payers.

2. Failing to provide nonmember agency fee payers with a copy of CTA's audited verification in the initial notice.

3. Failing to provide information supporting CTA's calculation, which describes both the chargeable and nonchargeable expenditures by major category within each department listed in its initial annual notice.

4. Failing to provide a statement by an independent auditor for the National Education Association's supporting documentation as to its chargeable and nonchargeable expenditures.

5. Failing to provide an immediate return and future advanced reduction to challenging agency fee payers upon receipt of objection.

6. Depositing agency fee funds into either its own or its affiliates' escrow accounts where those accounts do not provide for independent management and prevent the release of contested funds until the completion of the objection process.

7. Collecting agency fees from nonmembers until such time as the deficiencies outlined in subparagraphs 1 through 6 above are corrected.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Return to Barbara C. Abbot (Abbot) and Yvonne M. Cameron (Cameron) the fee amounts admittedly nonchargeable, with interest, that would have been due as a result of their initial notice of objection to SRVEA, less those amounts actually received after the arbitration as a result of the arbitrator's finding. The amount of interest due to Abbot and Cameron shall be at the rate of ten (10) percent per annum.

Dated: _____

SAN RAMON VALLEY EDUCATION ASSOCIATION, CTA/NEA

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.