STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID W. LINK, Charging Party, v. ANTIOCH UNIFIED SCHOOL DISTRICT; ANTIOCH EDUCATION ASSOCIATION and NATIONAL EDUCATION ASSOCIATION, Respondents.	SF-CE-494 SF-CO-134
ALTA GRACE TOWNLEY, ET AL., Charging Parties, v. MT. DIABLO UNIFIED SCHOOL DISTRICT; MT. DIABLO EDUCATION ASSOCIATION, CTA/NEA, Respondents.	SF-CE-605 SF-CO-159 PERB Order No. IR-47 March 22, 1985
HOWARD W. NEELY, ET AL., Charging Parties, v. FREMONT UNIFIED SCHOOL DISTRICT; FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, Respondents.	SF-CE-612 SF-CO-163

Appearances; Haas & Najarian by A. Roger Jeanson and National Right to Work Legal Defense Foundation, Inc. by David T. Bryant,

Attorneys for Charging Parties; Kirsten Zerger, Attorney for Respondent Associations.*

Before Hesse, Chairperson; Jaeger, Morgenstern, and Burt, Members.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on a request for injunctive relief filed by: Lewis C. Disbrow against the Antioch Unified School District and the Antioch Education Association, CTA/NEA; Grace Townley against the Mt. Diablo Unified School District and the Mt. Diablo Education Association, CTA/NEA; Howard W. Neely and Ann Halligan against the Fremont Unified School District and the Fremont Unified District Teachers Association.[1] Charging Parties are teachers who have exercised their statutory right (Gov. Code sec. 3543) not to join the exclusive representative Association but, by force of the collective bargaining

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[1]The consolidated unfair practice charges were filed by: David W. Link against the Antioch Unified School District (SF-CE-494) as well as the Antioch District Teachers Association, CTA/NEA (SF-CO-134) on September 25, 1980; Howard W. Neely, et al., against the Fremont Unified School District (SF-CE-612) and the Fremont Unified District Teachers Association, CTA/NEA (SF-CO-163) on November 10, 1981; and Alta Grace Townley, Judith A. Mattson and Peter Margiotta against the Mt. Diablo Unified School District (SF-CE-605) and the Mt. Diablo Education Association, CTA/NEA (SF-CO-159) on October 16, 1981. "CTA" refers to the California Teachers Association and "NEA" refers to the National Education Association. CTA and NEA are affiliated with the local Associations in this case.

*Respondent Districts were not represented.

agreements in their respective school districts, are required to pay agency fees equivalent to the amount of dues. Charging Parties have objected to payment of the fees on the ground that a portion of the amount is directed by the organization to activities which are political and ideological and unrelated to performance of the representational function envisioned by the Educational Employment Relations Act (EERA or Act).[2] They filed unfair practice charges against the Districts and Associations alleging that the required fee exceeds the amount permissible under the United States Constitution and the EERA, and that the Districts and Associations, by interfering with the statutory "right not to participate,"[3] have thereby

[2]The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all references are to the Government Code.

[3]Section 3543 states:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to

violated sections 3543.5(a) and 3543.6(a) and (b) respectively.[4] Complaints were issued in the Fremont cases on February 4, 1982, the Mt. Diablo cases on February 4, 1982, and the Antioch

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> Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
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> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

[1]Sections 3543.5(a) makes it unlawful for the District to:

> 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.

Sections 3543.6(a) and (b) make it unlawful for the employee organization to:

> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

cases on December 4, 1980. They were consolidated for hearing on June 9, 1983 and, by order of the Administrative Law Judge to whom they are assigned, have been held in abeyance pending judicial review of the Board's decision in King City High School District Association (Cumero) (3/3/82) PERB Decision No. 197 (currently before the Court of Appeal of the State of California for the First Appellate District (Civ. No. A016723)).

On December 31, 1984, Charging Parties requested that the Board seek injunctive relief[5] requiring the Respondent CTA/NEA affiliates or the employer to escrow the entire amount of agency fees collected from Charging Parties so as to preclude improper use of such fees by the organization pending

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Charging Parties also allege that the Association violated section 3544.9. It states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[5]As discussed infra, section 3541.3(j) entitles the Board, "[U]pon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, . . . [to] petition the court for appropriate temporary relief or restraining order." Injunctive relief is appropriate when (1) "reasonable cause" exists to believe that an unfair practice has been committed, and (2) the relief sought is "just and proper." Public Employment Relations Board v. Modesto City Schools (1982) 136 Cal.App.3d 881, 895.

final determination of the rebatable amount.[6] The Board has reviewed the informatio General Counsel in its investigation of the request for injunction, and has analyzed the judicial and administrative decisions which have examined the constitutional sufficiency of various rebate procedures. We conclude that some of the Charging Parties were not accorded sufficient protection during specific periods in the past. Accordingly, there is reasonable cause to believe that the Districts and Associations unlawfully interfered with their statutory right not to participate in organizational activity in violation of sections 3543.5(a) and 3543.6(a) and (b), respectively. On the other hand, the advanced reduction and "escrow" mechanisms now operating on behalf of all Charging Parties appear to offer at least the minimum protections required by the United States Supreme Court in Ellis v. Railway Clerks (1984) 104 S.Ct. 1883 [116 LRRM 2001]. For the reasons that follow, we conclude that an injunction requiring escrow of 100 percent of the Charging Parties[1] agency fees is not "just and proper." (PERB v. Modesto City School District, supra.) We also conclude that an injunction requiring expansion of protections afforded Charging

[6] CTA uses the term "rebatable amount" to describe the proportion of each objecting nonmember's fees which are determined at year's end to have been spent on political and ideological activities unrelated to performance of the exclusive representative's EERA functions.

Parties by the procedures as currently implemented is not required to avoid frustration of the purposes of the Act, and therefore is not "just and proper" (ibid.).

FACTS

The General Counsel's investigation of the Request revealed the following.[7]

CTA has a formal mechanism for reducing in advance the agency fee required from objectors; setting aside, in an agency fee account, an amount which represents the estimated rebate; and determining and refunding the rebatable portion of the fee. While this mechanism was not invoked for some of the Charging Parties in some of the Districts here involved, its existence is relevant for the purpose of determining the appropriateness of prospective injunctive relief. We turn first to a discussion of the general contours of CTA's procedure. Thereafter, we discuss the status of agency fee payments in each of the Districts.

CTA's statewide agency fee procedure is triggered by objection from a nonmember agency fee payor. CTA presumes that unit members who objected in prior years have a continuing

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[7]The information set forth below was obtained in the course of the General Counsel's investigation of the injunctive relief request. Final factual determinations, of course, cannot be made until the conclusion of formal hearings of the underlying unfair practice complaints.

objection to expenditure of their agency fee monies for purposes deemed rebatable under Abood v. Detroit Board of Education (1977) 431 U.S. 209 [95 LRRM 2411] and King City, supra. First, the annual fee is reduced by the percentage of the fee found by CTA to be reimbursable in the previous year.[8] This process is termed "advance reduction."[9] Second, CTA has maintained since December 1981, an agency fee account[10] containing a "cushion" amount equalling or exceeding the amount estimated as the previous year's rebate. Third, the local Association, CTA and NEA determine the respective agency fee rebate upon conclusion of the fiscal

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[8]During previous years, the Association found the following percentages of the agency fee to be reimbursable: 7.42 percent in 1979/80, 5.8 percent in 1980/81, 6.4 percent in 1981/82, and 6.31 percent in 1982/83. Prior to hearing in this matter, PERB makes no finding as to the correctness of these figures.

[9]The process for making advance reductions relies, in part, upon the payroll department in the district involved. Through payroll codes, the district's payroll operation identifies those employees who, as objecting nonmembers, should have their fees reduced in accordance with the Association's advance reduction computation. For the first year in which a nonmember has objected to payment of the full amount of the fee, an advance reduction is given only if the objection has been made before the time that the District's payroll operation has entered agency fee codes.

[10]CTA refers to its agency fee account as an "escrow account." However, we use the designation "agency fee account" because we reserve judgment whether it is a true "escrow," given that its management continues to be in CTA's control.

year, and pay to the objecting nonmember the rebate amount plus interest at the rate of seven percent.[11]

Thus, objecting nonmembers who registered their objections early in the year are to receive advance reductions, and all objecting nonmembers are to have money placed in the agency fee account on their behalf to ensure that the Association will not spend the portion of the service fee which is ultimately determined to be reimbursable. If the advanced reduction falls short of the required refund, this difference is ultimately rebated, with interest, to objecting nonmembers. The amount currently in the agency fee account (and beyond CTA's use) covers 835 known objectors, and is in excess of $25,000.[12]

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[11] The amount of rebate may be challenged by the nonmember within fifteen days after receiving information from the Association of the refund it has determined to be owing. The objection by the nonmember is viewed as a request that an arbitrator from the American Arbitration Association determine the amount of rebate. Whatever rebate amount is determined will be paid with interest from September 30 of the appropriate school year to the date of payment.

[12] According to the Association, it established an escrow account containing $5,000 beginning December 1981. The $5,000 figure represented

> (a) the number of known objectors statewide (348),
>
> <u>multiplied by</u>
>
> (b) an estimated rebate figure of $14.26.

The $14.26 figure was based on the amount of rebate calculated by CTA for the previous year.

During 1982/83, rebates were paid from the CTA general fund, the $5,000 was not withdrawn, and no further sums were

For those objectors who receive advance reductions exceeding the rebatable amount, no rebate is paid from the agency fee account or the general fund.

For at least some period of time within the statutory period covered by these charges,[13] the Antioch and Mt. Diablo Charging Parties and five of the nine Fremont Charging Parties were not considered objectors by CTA and therefore the CTA advance reduction/agency fee account/rebate procedure was not triggered on their behalf.

However, the Antioch Charging Parties were plaintiffs in a lawsuit which was filed against CTA in 1978 and ultimately dismissed on January 24, 1984. During that period, the Association claims that an escrow account was established by the parties to the court suit.[14] For the duration of the suit, 25 percent of the service fee was deposited annually in

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deposited. However, during the 1983/84 year, additional sums were deposited. No withdrawals have been made throughout the fund's history.

[13]Section 3541.5(a) states:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

[14]This account was jointly managed by the attorneys representing the litigants in the suit.

the account on behalf of each charging party. Consequently, from March 1980 (six months before the charge was filed) until January 24, 1984, CTA was deprived of a sum that exceeded the percentage of service fee determined each year to be reimbursable.

The Mt. Diablo Charging Parties filed their unfair practice charge in October 1981. Notably, each of the Mt. Diablo Charging Parties declined, during at least one year, to pay the full amount of service fee.[15] The amount in arrears could ultimately be held to have exceeded the total reimbursable amount.[16]

In Fremont, nine of the fourteen Charging Parties were known as objectors to CTA. They were among the statewide group of objectors for whom the agency fee account was initiated in December 1981. Rebates were paid to these objectors annually out of the CTA general fund. Beginning in 1982/83, the advance deduction procedure was created and applied to them.

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[15]According to records provided to the General Counsel by the Mt. Diablo District and CTA (1980-83), none of the three Mt. Diablo teachers who are parties to the pending unfair practice complaints has paid the full amount of fees owing. Neither Margiotta nor Townley began to pay fees until April 1983. The Charging Parties have provided no information to the contrary. Charging parties were not paid a rebate for years during which they failed to meet their service fee obligations.

[16]The Mt. Diablo Charging Parties' election of a "self-help injunction" is relevant to the assessment of competing equities which underlies a determination whether injunctive relief is just and proper. See Dean v. Transworld Airlines, Inc. (9th Cir. CA 1983) 708 F.3d 486 [113 LRRM 3207].

However, the remaining five Fremont Charging Parties received no advance reduction or rebate between 1980 and 1983. Similarly, they were not specifically made part of the group of objectors on whose behalf the agency fee account was created.

Nevertheless, the Association argues that the agency fee account it created in 1980/81 — which now contains more than $25,000 — is sufficient to cover all Charging Parties. The Association explains that because of this fund, the organization deprived itself annually of the use of a sum exceeding that owed as rebates to all objecting nonmembers.

All Charging Parties' names now are recorded in the CTA system and they are regarded as continuing objectors. Beginning this year, CTA states, service fees are to be reduced on their behalf in advance by an amount equivalent to the estimate of the previous year's rebate, and sums identical to that amount will be deposited in the agency fee account on behalf of each individual. Thus, the amounts that are to be set aside are approximately double the amount deemed by CTA to be reimbursable.

Rebate checks were paid to Charging Parties by CTA in January 1985, reimbursing them for all preceding years, including compound interest.

Position of Charging Parties

Charging Parties allege that the Association admittedly directs funds collected from unit members to political and

ideological activities unrelated to collective bargaining. They complain that the method by which the exclusive representative determines the ultimate rebate figure, and therefore arrives at the estimates on which the advanced reduction and "escrow" amounts are based, lacks the elements of fairness present in an adversary judicial proceeding. Thus the results are inherently suspect and fall short of the amount which should be rebated.

Charging Parties also object that payment of the rebate is not made for over a year and they are deprived of the opportunity to use money owed to them for the entire period. In their view, the exclusive representative's purported use of the rebatable portion of objecting nonmembers' service fees forces them to extend an involuntary loan. In the absence of a reliable method for determining the correct rebate prior to the payment of service fees to the organization, Charging Parties ask that the organization be denied use of any portion of the fees collected until there is a final judicial determination.

Charging Parties also challenge the adequacy of the agency fee account. They point out that CTA has not bound itself in any way to continue such a procedure and that, unlike a true escrow arrangement, management remains in the exclusive control of the employee organization.

DISCUSSION

PERB's authority to seek injunctive relief is governed by

section 3541.3(j). That section empowers the Board:

> To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

An injunction is proper in circumstances mandating extraordinary relief. Thus, the charge must not only state a prima facie violation of the Act, but also (1) there must be "reasonable cause" to believe that an unfair practice has been committed, and (2) the relief sought must be "just and proper." Public Employment Relations Board v. Modesto City Schools, supra, 136 Cal.App.3d 881, 895.

Reasonable Cause

Compulsory contributions in the form of agency fees to some extent implicate the rights of association and free expression protected by the First Amendment of the United States Constitution. (Machinists v. Street (1960) 367 U.S. 740, 773 [48 LRRM 345]; Abood v. Detroit Bd. of Education (1977) 431 U.S. 209, 222 [95 LRRM 2411].) However, the United States Supreme Court has balanced the First Amendment rights of employees compelled to support financially the collective bargaining representative against the rights of the majority employees to associate for the purposes of advancing their interests and disseminating their ideas (Street, 367 U.S.

at 773; Abood, 431 U.S. at 238, 240-242). The dissenters' interests are also balanced against the legislative interest in establishing collective bargaining as a means of promoting stable employment relationships. (Street, 367 U.S. at 776, 778; Abood, 431 U.S. at 222; and Robinson v. State of New Jersey (3d Cir. 1984) 741 F.2d 598 [117 LRRM 2001, 2005] cert. den. (1985)_____U.S.____, 53 U.S.L.W. 3599.) The Court concluded that the burden imposed by agency fee obligations is a "tolerable infringement" on the objectors' constitutional rights, but that the proportion of the agency fee that the exclusive representative has spent on political and ideological activities unrelated to collective bargaining must be reimbursed to objecting nonmembers. (Abood, 431 U.S. at 222.)

PERB, in King City, supra, likewise held that the interference with the statutory right not to participate generated by the agency fee obligation:

> is justified by the California Legislature's assessment of the important contribution of organizational security arrangements to the system of employer-employee relations established in the EERA (King City, supra, at p. 10).

However, the Board required the employee organization to refund to the charging party that portion of the agency fee which was spent for purposes not germane to collective bargaining, and indicated that the "future agency fee requirement should be reduced accordingly." (King City, supra, at p. 32.)

In Ellis, supra, the Supreme Court elaborated further on the protection to be afforded objecting nonmembers. The Ellis Court held that a "pure rebate scheme" is unsatisfactory because it fails to assure sufficient protection against involuntary subsidization of union political and ideological expenditures. Instead, a "demand and return" system must be fashioned which accommodates objecting nonmembers[1] interests without burdening legitimate union functioning. The Ellis Court approved, as affording sufficient constitutional protection against improper expenditure, a system consisting of an advance reduction of dues and/or the placing of contested funds in an interest-bearing escrow account (80 L.Ed, at 438-439) . Either system, in the view of the Court, would avoid the prospect of objecting nonmembers being required to finance, through "involuntary loans," activities unrelated to the union's representational functions.

Here the Association's current procedures appear to satisfy the requirements of Ellis. The Antioch Charging Parties, although not formally considered a part of the statewide group of objectors until January 15, 1985, were covered by a 25-percent escrow account set up by the Association in connection with litigation in which the parties were involved. Between January 24, 1984 and January 15, 1985, Charging Parties were covered by CTA's agency fee account. The Association offers a reasonably convincing argument that the accumulated

sum contained in the organization's agency fee account, presently in excess of $25,000, represents monies of which it has deprived itself, and therefore the Charging Parties have been protected against being forced to make an "involuntary loan."

There are some periods in the past during which the protections afforded by CTA's procedure did not apply. Neither the Mt. Diablo objectors nor the five of the fourteen Charging Parties from Fremont were included in the Association's rebate procedure. Their sole protection against being forced to make an involuntary loan arose from the existence of the deposit accumulating in the organization's agency fee account. That account, however, did not protect these prior to December 1981. Thus, a cognizable injury apparently occurred in the past. These Charging Parties were forced to extend an involuntary loan to the Association. Thus, there is reasonable cause to believe that Charging Parties will prevail in their unfair practice complaints on the ground that the Association interfered with their right not to support political and ideological activities unrelated to the organization's performance of its representational function.[17]

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[17]There is, of course, a possibility that the amount in escrow, in addition to the amount of advance reduction, is less than the amount that PERB will ultimately find rebatable under the King City formula. In that event, the Charging Parties will have extended involuntary loans. However, at this

Apart from questions about the proper amount to be placed beyond CTA's use, Charging Parties — relying on a recent decision of the Seventh Circuit Court of Appeals in Hudson et al. v. Chicago Teachers Union Local 1 et al. (7th Cir. 1984) 743 F.2d 1187 [116 LRRM 2314] -- raise questions about other components of the CTA procedure. The Hudson court determined that the rebate procedure was inadequate protection of the objecting nonmembers' constitutional rights. It concluded that only a quasi-judicial hearing would yield a sufficiently precise rebate, and held that due process required that objecting nonmembers could not be deprived of any monies prior to such a hearing. The court required, inter alia, 100 percent of the service fee to be escrowed.[18]

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juncture, "reasonable cause" does not exist to believe that an unfair practice has been committed on this ground. The CTA procedures appear to be a good faith effort to meet the constitutional and statutory standard, and the escrow and advance reduction combination provide ample insulation against the prospect of an involuntary loan.

[18] There is one additional jurisdiction which required 100 percent of the agency fee be set aside in an escrow account. The New York Public Employment Relations Board, in United University Professions, Inc. and Thomas C. Barry (case nos. U-7449 and U-7482) (NY PERB Rptr. par. 17-3098 (9/84)) ordered, post-Ellis, that the charged party revise its agency shop refund procedure and that 100 percent of the fee be escrowed. The New York board resolved that the New York State public employee bargaining law affecting teachers (Taylor Law sec. 208.3) in combination with Ellis preclude use of an advanced fee reduction scheme. The advanced reduction scheme did not fit the New York law's definition of refund procedure. Therefore, of the two Ellis alternatives, only an escrow account can be utilized in New York. The New York board

First, Charging Parties argue that due process principles preclude the Association from collecting any of the fees of objecting nonmembers prior to a judicial determination of the rebatable amount. However, the Supreme Court has declined to require a hearing before collection of objector's fees; indeed, the Court has consistently suggested that internal union rebate procedures would be adequate. (Railway Clerks v. Allen (1963) 373 U.S. 113, 122 [53 LRRM 2128]; Abood, 431 U.S. at 240.) Plainly, the opinion of the Hudson court cannot override Ellis and other decisions holding that due process does not require a quasi-judicial hearing as a precondition to depriving persons, even temporarily, of their money. (Robinson, 117 LRRM at 2011 (cases cited and discussed).) Accordingly, we do not believe that the absence of a precollection hearing establishes "reasonable cause" to believe an unfair practice has occurred.

Second, the Charging Parties argue that, under Hudson, agency fee accounts must be controlled, and possibly managed, by a bank or trust company.[19] Removing control of the

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offered no justification of its requirement that the entire fee be escrowed.

[19]Hudson, suggests but does not hold, that management as well as custody is to be in the hands of a third party. (117 LRRM at 2321.) Further, Ellis does not define its use of the term "escrow account" and therefore it cannot be said that third party management of an agency fee account is constitutionally required. (80 L.Ed. 2d at 439.)

account from the exclusive representative is arguably necessary, in the view of the Hudson court, to ensure against use of account funds. Additionally, placing management responsibilities in the hands of a third party was seen as necessary to optimize the incentive for sound investment of the funds.

In the present case, CTA's agency fee account is with a bank; CTA, however, is responsible for its management, and may apparently withdraw the funds at any time. We believe that these characteristics of the CTA account could be viewed as insufficient to protect objecting nonmembers' interests.[20] While we do not decide, at this point in the proceeding, that these elements of the CTA account unquestionably present an unfair practice, CTA's control and/or management of the account do present "reasonable cause" to believe that an unfair practice has been committed.[21]

20Fo[20]For related reasons, it could be argued that the seven-percent interest rate involved in CTA's system is insufficient to protect objecting nonmembers[1] interests. (See State of California (Department of Transportation) (12/12/84) PERB Decision No. 459-S, where the Board awarded ten-percent interest as a part of the remedy for unfair practice conduct.) This conduct, in combination with the other possible deficiencies posed by CTA's management and control of its account may, after hearing, result in a finding that the EERA has been violated.

[21]It also could be argued, under Hudson, that the procedure utilized to adjudicate the Abood amount must culminate in review by either a neutral administrative agency or an arbitrator who is not subject to the control or influence of the exclusive representative. CTA's internal procedure,

Just and Proper

In Modesto City Schools, supra, at p. 902, the Court of Appeals, citing Agricultural Labor Relations Board v. Ruline Nursery Co. (1981) 115 Cal.App.3d 1005, 1015 [171 Cal.Rptr. 793) stated that an injunction is "just and proper,"

> where there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted . . . [or] the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless. . . . Preservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board.

Traditional equitable considerations apply during this part of the test. (See Modesto City Schools, supra, at p. 896, citing Agricultural Labor Relations Board v. California Coastal Farms, Inc. (1982) 31 Cal.3d 469, 479 [183 Cal.Rptr. 231].) If the

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relying on the American Arbitration Association to select an arbitrator, could be viewed as adequate even under Hudson. More fundamentally, however, the appropriateness of CTA's arbitration (and arbitrator selection) procedures is not relevant herein. In King City the Board held that objecting nonmembers need not exhaust internal rebate procedures as a precondition to filing a charge alleging that, despite the nonmember's objection, the exclusive representative has spent the objector's monies for impermissible purposes. The Board's decision not to require exhaustion permits the charging parties not to pursue rebate through CTA's procedures, and none of the charging parties did so. Accordingly, any flaws in the arbitration component of the CTA procedure are not in issue herein, and would not contribute toward a "reasonable cause" determination.

damage is easily ascertain able and a money judgment will afford adequate relief, an injunction should be denied. (See Witkin, 2 Cal. Procedure, Provisional Remedies, p. 1508 and cases cited therein.) However, injury to constitutional interests ultimately cannot be fully addressed by money damages. Hence, injunctive relief may be appropriate. (Op. Ait. at 1506.) Ellis has held that year-end payment of a rebate to objecting nonmembers does not protect adequately the First Amendment rights of objectors. Logically then, such a "pure rebate" scheme may be enjoined.

An injunction requiring escrowing of 100 percent of objecting nonmembers[1] service fees does not strike a proper balance between the competing interests involved. The Supreme Court has consistently held that injunctions against collection of all funds are inappropriate and exceed the minimum safeguards necessary to protect dissenters' constitutional rights. Street, 367 U.S. at 771, 722; Allen, supra, 373 U.S. at 119-120 [53 LRRM 2128]; Abood, 431 U.S. at 240-242. In Street, supra, the Court stated:

> Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the use to which some of their money is put. Moreover, restraining collection of the funds . . . might well interfere with the appellant union's performance of those functions and duties which . . . [legislation] places upon them to attain its goal of stability in industry. 367 U.S. 740 at 771.

The 100-percent escrow is disfavored because, like the injunction, it skews the balance unfairly in favor of the objector and undercuts the ability of the exclusive representative to function. (Poeppel et al. v. Board of Education, Clinton Community School (1984) Wise. E.R.C. Decision No. 20081-C (citing Browne v. Milwaukee Board of School Directors (1973) 33 Wis.2d 316). For these reasons, courts have refused objectors' requested remedies that would have prevented the exclusive representative from using all portions of the service fee. Kempner v. Dearborn Local 2077 (1983) 337 N.W. 2d 354 [114 LRRM 3024], appeal dismissed for want of a substantial federal question (1984)_____U.S.____, 53 U.S.I.W 3323; White Cloud Educational Association v. Board of Education of the White Cloud Public Schools (1980) 101 Mich.App. 309 [300 N.W. 2d 551], appeal dismissed sub nom Gibson v. White Cloud Education Association (1984)_____U.S.___, 53 U.S.L.W. 3268; Tierny v. City of Toledo (N.D. Ohio, 1984)______F.Supp._______[116 LRRM 3475].

Charging Parties have urged that the 7th Circuit Court of Appeals' decision in Hudson et al. v. Chicago Teachers Union Local 1 et al., supra, is a further refinement of the Supreme Court's analysis in Ellis and is therefore controlling in this case. However, the analysis and result reached by the Seventh Circuit Court of Appeals fails to follow that of the United States Supreme Court in Ellis. For several reasons, we believe

Hudson does not compel a conclusion that an injunction requiring escrow of 100 percent of the fees is appropriate.

First, in concluding that the objector must be protected against the "danger" that the amount of the advance reduction or escrow will fall short of the correct rebate, the Hudson court defined the objector's First Amendment rights more broadly than did the Supreme Court in Ellis. Ellis found the two alternatives to be sufficient protections of the objector's First Amendment interests[22] even though, prior to determination of the ultimate rebate, they are merely estimates and therefore do not eliminate all possibilities of forced loans. (See Robinson, supra, 117 LRRM at p. 2011, fn. 12.) The Supreme Court has not required "absolute precision in the calculations" of the reimbursable amount (Allen, 373 U.S. at p. 122; Abood, 431 U.S. at p. 239, fn. 40; Ellis, 80 L.Ed.2d at pp. 447-448, fn. 15). There is no reason to require precision at an earlier stage.

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[22]It is not significant that Ellis considered the First Amendment interests of private-sector employees whereas the Board must resolve a dispute among public sector employees. As the Supreme Court held in Abood;

> The differences between public and private sector collective bargaining simply do not translate into differences in First Amendment rights. (431 U.S. at 232.)

Second, unlike the Supreme Court, the Hudson court failed to balance the objector's First Amendment (albeit expanded) interests against competing interests. The Hudson court did not consider the legislative interest in stable labor relations (Ellis, 80 L.Ed.2d at pp. 446-447) and the competing First Amendment interests of the majority which selected the exclusive representative (Street, 367 U.S. at p. 773; Abood, 431 U.S. at p. 238).

We follow the Supreme Court's analysis and reach the same conclusions. The legislative purposes underlying the EERA are furthered by promoting stable labor relations. Enforcing the fair share requirement enhances the viability of collective bargaining (King City, supra). Were the entire agency fee to remain unavailable to the exclusive representative in a 100-percent escrow account, the members' dues would be diverted to support collective bargaining work on behalf of agency fee payors. Here, were the entire amount to be placed in escrow pending final determination of the rebate, the Association would have no access to that sizeable portion of the service fee spent on permissible purposes, generally in the 75-percent to 95-percent range, for months or even years (given the ordinary timelines involved in judicial review). This would burden unfairly the First Amendment rights of union members. The Ellis alternatives, in contrast, protect against

involuntary loans while placing "only the slightest additional burden, if any, on the union." (Ellis, 80 L.Ed.2d at p. 439.)

The Hudson court failed to give weight to other significant principles of law as well. Interim injunctive relief is designed to ensure the efficacy of the Board's final order (PERB v. Modesto City School District, supra). Additionally, equitable relief may not exceed that to which Charging Parties would be entitled on a permanent basis if they ultimately prevail on the merits (Poeppel, et al., supra).) Here, the Charging Parties do not claim that they are entitled to have the entire fee rebated, and they have made no showing that escrowing of 100 percent of their fees is necessary to prevent against the prospect of involuntary subsidization.[23] An injunction calling for escrow of 100 percent of the Charging Parties' fees is, accordingly, neither necessary, just, nor proper. For these reasons, the Board rejects Charging Parties' request for injunctive relief requiring escrow of 100 percent of objecting nonmembers' monies.

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[23]Charging Parties have not alleged that the entire amounts of their service fees are being used to finance reimbursable activities. They claim, however, that they should not be required to pay a fee to any entity but the exclusive representative, namely the local chapter, and that the CTA and NEA should not be entitled to collect monies from objecting nonmembers. This argument was rejected by the Board in King City, supra.

Neither do we find that an injunction requiring the Association to increase the amount of advance reductions and/or the amounts deposited in the agency fee account is appropriate. Robinson, supra, examined the rebate procedure of three different unions[24] which feature one or combine both of the Ellis alternatives. The Robinson court held that all three approaches contain "the principal protections required by Ellis and the . . . Due Process caselaw." (117 LRRM at p. 2012.) Also see Tierney, supra.

The Ninth Circuit Court of Appeals, in Champion v. State of California (9th Cir. 1984)______F.2d_______[117 LRRM 2030], cert. denied 2/20/85_______U.S.L.W.______[BNA Daily Labor Report (2/20/85), at p. A.-4) recently reviewed the sufficiency of an advanced-reduction-of-fees approach to protect objecting nonmembers. The court upheld the validity of the system adopted by the California State Employees Association (CSEA) in its capacity as exclusive representative of a unit of employees

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[24]Immediately after learning of a nonmember's objection, the National Education Association (NEA) escrows an amount equal to five percent over what an independent auditor determines was the amount spent the previous year on noncompulsory representation matters. The American Association of University Professors (AAUP) grants an "advanced rebate" equal to the anticipated rebate and one of its chapters also escrows 100 percent of the representation fee. The Communication Workers of America (CWA), upon receiving an objection letter, automatically places 40 percent of the agency fee into escrow. Agency fees, by statute in New Jersey, are 15 percent less than union dues. (117 LRRM at p. 2012.)

covered under The State Employer-Employee Relations Act (SEERA).[25] The lower court had been asked to enjoin the collection of the entire fee. Based on Street, Allen and Abood, the court denied that extreme form of injunction. (Champion, supra, 117 LRRM at 2033.) Significantly, it also considered but denied issuance of a more narrow injunction.

The Ninth Circuit was willing to defer to the process followed and result reached by the exclusive representative. Reviewing the pleadings and record of the request for preliminary injunction below, the court noted, and regarded as sufficient, CSEA's claim that it had

> eliminated that portion of the fair share which goes to "partisan political or ideological causes only incidentally related to the terms and conditions of employment".

The court stated:

> Thus the amount collected no longer includes amounts clearly subject to refund under the statute. (117 LRRM at 2033.)

The court was unwilling, at the pre-determination phase of the rebate procedure, to challenge the accuracy of CSEA's estimate. It referred to itself as facing the same problems cited by the Supreme Court in Street and Allen; it would not risk interfering with "the important functions of labor organizations." (117 LRRM, at 2033, quoting Allen, supra.)

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[25] The SEERA is codified at Government Code section 3512 et seq.

Ellis, in that court's view, is not authority for invalidating a rebate scheme at the predetermination phase of the proceedings:

> In contrast, Ellis was decided on a fully developed record and controls only the remedy after a final judgment on the merits. See Allen, supra, 373 U.S. at 120.

In Kempner, supra (114 LRRM at 3026), the Michigan Court reviewed the conclusion of the Michigan Employment Relations Commission (MERC) that: it was premature to assess the correctness of the labor organization's initial determination that a six percent advance reduction was adequate to protect objecting nonmembers; the objector was not entitled to insist on escrowing the entire fee instead of paying a reduced amount;[26] and the objector was required to exhaust internal union remedies, before obtaining judicial review, to determine the correct rebate. The court upheld the MERC conclusions as consistent with the Supreme Court's holdings in Street, Allen, and Abood. (114 LRRM at 3027-3028.) Plaintiffs appealed to the United States Supreme Court, which, subsequent to its

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[26]**Also** see Dean, ante at fn. 9, in which the Ninth Circuit Court of Appeals denied reinstatement of an employee who unilaterally decided to reduce his monthly payments to the union. The court characterized the refusal-to-pay approach by objecting nonmembers as "self-help injunction." The court stated: "If the court cannot enjoin the collection of union dues, then certainly an individual should not be permitted unilaterally to decide to reduce or stop dues payment." (113 LRRM 3208.)

decision in Ellis, dismissed the Kempner appeal for want of a substantial federal question.[27]

The Ninth and Third Circuit Courts of Appeal were asked in Champion and Robinson, respectively, to uphold utilization of injunctive powers by lower courts to modify the underlying "demand and return" systems. Both declined to do so. The underlying procedures involved were similar to the Association's rebate scheme in the present case: the rebate is determined by applying the Abood definition of reimbursable amount, and the advance reductions and escrow amounts are based on estimates of the eventual rebates. Both courts found that these procedures appeared to provide sufficient protection against impermissible expenditure; and, neither court was willing to rule the system to be inadequate in the absence of a fully developed record. In light of the foregoing, we believe that an injunction requiring increases of the advance reduction and/or rebate amount herein is neither constitutionally required, nor just and proper.

We have said above that the Association's maintaining sole control and management of its agency fee account might establish a violation of the Act. Injunctive relief requiring the Association to turn over management of the account to a

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[27]A dismissal of an appeal from a state court decision for want of a substantial federal question has the same precedential effect as a summary affirmance of a decision by a federal court of appeals. Serrano v. Priest (1971) 5 Cal.3d 584, 616, fn. 34.

third party, however, is not appropriate. There has been no showing of spending from the agency fee account, nor indeed of any withdrawals at all from that account. Absent such a showing, no constitutional injury requiring injunctive relief has occurred. Similarly under the statute, the possibility of misuse of the fund does not rise to the level of irreparable injury necessary to make it just and proper to seek an injunction.[28]

In summary, with regard to the question whether it is "just and proper" to seek injunctive relief to modify the Association's demand and return system, we are satisfied that rebates have been paid to all Charging Parties; all Charging Parties are now part of CTA's rebate system; monies are being set aside in the agency fee account on their behalf; and each Charging Party is receiving the required advance reduction. The advance reduction procedure, coupled with depositing and retaining sums in the agency fee account, further insulates the Charging Parties from the prospect of having extended involuntary loans to CTA and NEA. Thus, even though reasonable cause does exist to believe that certain elements in the

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[28]Nor would an injunction requiring the Association to invest the agency fee account funds at a higher interest rate be just and proper. If the amount of interest accruing for the small amount of funds involved is determined -- after hearing and full briefing — to be inadequate, this problem can be easily cured through a remedial order directing retrospective payment of an appropriate rate of interest.

Associations' procedures constitute unfair practices, we find no probability that the purposes of EERA will be frustrated, that the efficacy of the Board's final order may be nullified, or that the Board's procedures will be rendered meaningless unless temporary relief is granted. (Public Employment Relations Board v. Modesto City Schools District, 136 Cal.App.3d at 897 and 902.

ORDER

For the foregoing reasons, we DENY the request for injunctive relief filed by Charging Parties insofar as it seeks escrowing of either 100 percent, or a greater portion of service fee than is now being escrowed. We also DENY any implicit request to fashion a rebate procedure that is less extreme than a 100 percent service fee escrow but more rigorous than that currently followed by CTA. In the event that the underlying factual circumstances change, the Charging Parties may, of course, renew their request for injunctive relief.

By the BOARD