



AN ANALYSIS OF AN AGENCY SHOP PROVISION

As a result of a 1980 amendment to the PERC Law, agency shop became a mandatory topic of negotiations. At that time, the law required the parties to negotiate over the issue, but it did not mandate the inclusion of the provision in public sector contracts. In the summer of 2002, however, a new amendment to the PERC Law authorized local unions that were unsuccessful in their efforts to obtain an agency shop provision at the bargaining table to petition the Public Employment Relations Commission (PERC) to order public employers to implement the arrangement.

In its first exercise of its jurisdiction under the amended *N.J.S.A.* 34:13A-5.5, PERC rejected the employer's argument that the law was not retroactively applicable to negotiations that had been concluded prior to the enactment of the amendment. Finding that the union met the law's requirements, PERC ordered the immediate implementation of a payroll deduction for a representation fee for unit members who were not members of the union.¹ In subsequent decisions, PERC also found that the unions had met the criteria for obtaining an order to implement an agency shop arrangement even though the unions had not raised a proposal on the issue in their last round of negotiations.² Timely information of future developments in this area will continue to be posted on the "What's New" page of *The Negotiations Advisor Online*, an NJSBA subscription service.

While subsequent case-law may further clarify the interpretation of the amendment, boards of education may be called upon to deal with the question of representation fees. Understanding the current legal standards that govern negotiations of the provision and the components of a clause that are necessary to protect boards' interests can assist you to analyze an existing contractual clause, or a new union proposal, addressing an agency shop provision.

The Meaning of Agency Shop

A contractual agreement to an "Agency Shop" or "Representation Fee" provision establishes that members of the bargaining unit who have chosen to not join the union will pay a fee to the union for services performed on their behalf by their bargaining representative. While public employees have an individual statutory right to join, or not to join, a union, their inclusion in a bargaining unit is not an individual choice. The bargaining unit is defined in terms of the position and of the employee's job functions and not upon the individual's decision to support the union. Therefore, bargaining unit membership is not synonymous with union membership and it is not unusual for bargaining units to contain employees who do not belong to the union.

The terms of a negotiated agreement apply to all members of the bargaining unit, regardless of their union membership. Accordingly, a majority representative is statutorily required to provide equal representation to all members of the bargaining unit, regardless of their union membership. Similarly, the union must process non-union members' grievances in the same manner as that of union members; and all benefits negotiated by the union are equally available to non-union members who do not pay union dues and who do not support the union's activities.

The union's responsibility to provide equal representation to all unit members was the fundamental principle underlying the Legislature's support of an agency shop fee. The fee was seen as a payment for services rendered and as eliminating the "free ride" of individuals who otherwise benefit from the union's activities without providing concurrent support.

In adopting the 1980 amendment to the Act, the New Jersey Legislature also accepted the concept that this issue could best be resolved through local negotiations. However, the initial statute also established a strong structure, designed to balance the rights of the union with the rights of individual non-members. Subsequent court decisions, as well as the most recent 2002 amendment,

¹ *Hunterdon County and CWA Local 1034*, PERC No. 2003-24, Docket No. PD-2003-1, 28 *NJPER* 33159, aff'd Appellate Division, Dkt. No. A-1869-02T5, June 1, 2004, cert. denied, ___*N.J.*___, Oct. 4, 2004.

² See for example, *County of Hunterdon v. CWA Local 1034 (Supervisors)*, PDD No. 2004-8, 30 *NJPER* 15.

have expanded the legal requirements that regulate the administration and implementation of an appropriate agency shop provision.

The Components of the Law

Chapter 477, P.L. 1979, which became *N.J.S.A. 34A:13A-5.5 et seq.* authorized negotiations of agency shop provisions in New Jersey's public sector. The amendment also established an Appeal Board to hear and resolve disputes arising over the assessment and collection of a negotiated representation fee.

After a series of challenges, the constitutionality of New Jersey's statute was affirmed. The Third Circuit Court of Appeals reversed a lower court decision to affirm the constitutionality of the Law in *Robinson v. New Jersey* and *Olsen v. CWA*, 741 F. 2d 598 (3rd. Cir. 1984). The United States Supreme Court denied *certiorari*, 105 S. Ct. 1228, 84 L. Ed. 2d 366 (1985). The New Jersey Supreme Court also upheld the statute's constitutionality in *Boonton Board of Education and Kramer*, 99 N.J. 523 (1985). The U.S. Supreme Court again denied *certiorari*, 106 S. Ct. 1388 (1986).

The provisions of the Act, subsequent decisions, and the rules and regulations of the Appeal Board, govern negotiations and implementation of agency shop provisions and form the body of law affecting agency shop in New Jersey.

The Amount of the Fee The Act specifies that representation fees cannot exceed 85% of regular membership dues. In *Woodbridge Township Board of Education*, PERC No. 81-131, 7 *NJPER* 12147, PERC held that the amount of the fee is nonnegotiable; the determination of the fee rests with the union and the employer does not have a role in establishing the fee.

A series of later court decisions³ led to the formulation of judicial standards for computing the fee. In accordance with the standards expressed by the courts, New Jersey's Appeal Boards set regulations which require that the amount of the representation fee be computed annually. The fee cannot be based on a "pure rebate" system which automatically assesses non-members 85% of membership dues. Rather, the fee must be based upon the union's actual expenditures in the previous year for legitimate bargaining services. The fee may include the cost of lobbying activities relevant to the occupational interests of unit employees, but it cannot reflect expenditures which provide benefits to only union members or which are spent for ideological or political purposes unrelated to negotiations or contract administration. Under no circumstances, however, can the fee exceed 85% of union dues.

The Requirement for a Demand-and-Return System The Act requires that the union must first establish

and maintain a "demand-and-return system" before the employer can begin to deduct a representation fee from the paychecks of non-union members. A demand-and-return system is a procedure which provides non-members with the right to review the amount of the fee and to receive a refund of any portion of the fee which does not represent costs associated with collective negotiations.

Court decisions, such as *Ellis* and *Hudson*, have held that a valid demand-and-return system must provide a balance between the right of the union to be compensated for its efforts and the rights of individual non-members.

In accordance with court decisions, New Jersey's Appeal Board has established that a valid demand-and-return system must include the following components:

- prior to collecting the fee, unions must provide non-members with adequate, audited information explaining the fee's basis. Such notice must be provided annually and the non-member must be given sufficient time to register objections before the fee is collected;
- the union must provide non-members with notice of a demand-and-return system through which their objections can be filed. The demand-and-return system must provide a prompt, uncomplicated appeal procedure to contest the fee and cannot contain features which would inhibit its use. The burden of proof in these proceedings rests with the majority representative;
- the union must establish an escrow account for the amount of the fee that is reasonably in dispute; and
- unresolved disputes must, within a reasonable period of time, be submitted to the Appeal Boards for an impartial hearing.

In *District 65, UAW, AFL-CIO and County of Cumberland, Office on Aging*, PERC No. 87-72, 13 *NJPER* 18025, PERC held that a demand-and-return system established prior to the courts' decisions, which does not meet the judicial standards, is invalid. The insufficiency of the system does not constitute an unfair practice against the union, since the organization could not have anticipated the courts' requirements, but the union must cease to receive representation fees until a new and valid demand-and-return system is adopted.

Union Eligibility for Representation Fee The Act authorizes representation fees only for unions that avail membership to all unit employees on an equal basis. Any union that refuses membership to any eligible unit member would not have a statutory right to collect a representation fee.

In *City of Jersey City and Jersey City Supervisors Association*, PERC No. 83-32, 8 *NJPER* 13260, PERC held that the Supervisors Association violated the Act when it received representation fee payments from CETA employ-

³Boonton Board of Education, 99 N.J. 523, 1985; *Ellis v. Railway Clerks*, 104 S. Ct., 1883 (1984); *Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066 (1986).

ees. These unit members were temporary employees and the Association's Bylaws expressly barred temporary employees from holding union offices; PERC found that this situation did not meet the Act's specific requirement of membership on an "equal basis" and ordered the Association to refund, with interest, all fees collected by the Association.

Payment of Fee Once an agency shop arrangement is negotiated, the Act requires that all non-union members must pay the fee. It would thus appear that it would be illegal to negotiate a requirement that only certain non-union members in the unit pay the fee.

According to the Act, the fee payment is to occur through payroll deductions. The deduction does not require employee authorization.

The Act also specifies that new employees cannot be assessed a fee before the thirtieth day of employment. Employees returning to the bargaining unit have a statutory minimum of ten days before they can be assessed.

The Employer's Obligation In addition to requiring that a public employer negotiate in good faith over a proposal for agency shop, the statute mandates that such agreement, if any, be set in writing and the Act prohibits discrimination, by either the employer or the union, against fee paying non-members. Violations of these provisions are considered unfair labor practices and are reviewable by PERC.

While the Appeal Board has the authority to review the amount and the fairness of the fee, as well as the sufficiency of the established demand-and-return system, PERC has the jurisdiction to determine whether the statutory conditions have been observed by the parties. In this context, PERC has held that a public employer commits an unfair practice by deducting representation fees without first ascertaining that a demand-and-return system has been established and maintained by the Union.⁴

However, under the facts of *District 65*, PERC held that the employer did not have an obligation to insure the validity of the demand-and-return system and did not need to ascertain that the union provided notice to the employees of their demand-and-return rights. Yet, PERC significantly noted that it did not "rule out holding an employer liable if a demand-and-return system is so patently illusory that in effect it is no system or if the employer condones a refusal to provide any notice."

PERC's Authority to Order Deductions of Fees The 2002 Amendment to the PERC Law (P.L. 2002, c. 46, amending *N.J.S.A.* 34:13A-5.5) introduced a new wrinkle to the administration of agency shop provisions. Under this amendment, local unions that are unsuccessful in obtaining the public employer's agreement to a negotiated

agency shop provision may petition PERC to order the fee deduction. Before granting a union's request PERC must conduct an investigation to determine if: a majority of employees in the bargaining unit are dues paying member of the union; and the union maintains a demand and return system. If these conditions are met, then PERC is required to order the public employer (including school boards) to institute a payroll deduction of a representation fee from the salaries of employees in the unit who are not members of the union. In order to collect the fee ordered by PERC, a union must avail membership to all unit employees on an equal basis.

PERC's regulations governing its administration of the new law can be found at *N.J.A.C.* 6:19-3.1 et. seq. To remain aware of the latest developments in this new area of the law, please consult your labor relations resources, including postings of new information on the Labor Relations page of the NJSBA web site at www.njsba.org.

Case-Law Developments In its first application of its new authority, PERC found that the amendment could be applied retroactively. In *Hunterdon County and CWA Local 1034*, PERC No. 2003-24, 28 *NJPER* 33159, PERC processed a petition from a CWA local which requested an order from the Commission based on its inability to obtain a representation fee deduction in its last round of negotiations. These negotiations were concluded in June 2002, prior to the enactment of the new law. The County argued that PERC did not have jurisdiction in this matter as the law had not been intended to be applied retroactively. After conducting an investigation, PERC held that the CWA did not need to wait until the conclusion of the next round of negotiations to file its petition. Rather, PERC found that, under the circumstances of this case, the CWA had met the statutory criteria and ordered the County to immediately institute a deduction of representation fees from the salary of unit members who were not members of the CWA local.

(Note: the courts rejected the County's argument that the new Agency Shop Law was unconstitutional and upheld PERC's decision that applied the law retroactively.⁵)

In subsequent decisions, PERC has ordered the employer to institute a payroll deduction when the union met the statutory criteria even though: the employer had argued that an agreement had not been reached at the time the union filed its petition⁶ and that, while the issue had been raised in the past, the union had not introduced a proposal in the ongoing round of successor negotiations at which time the union filed its petition.⁷ PERC further ordered a payroll deduction when a union withdrew its agency shop proposal before the settlement had been reached. In that case, PERC held that the withdrawal of a proposal did not constitute a waiver of the union's right to

⁴ *Boonton Board of Education*, PERC No. 84-3, 9 *NJPER* 14199, aff'd. 99 *N.J.* 523, 1985.

⁵ *Hunterdon County and CWA Local 1034*, Appellate Division, Dkt. No. A-1869-02T5, June 1, 2004; cert. den

⁶ see, for example, *Ocean County College*, P.D.D. No. 2004-11, Feb. 2004; *Deptford Township Board of Education*, P.D.D. 2005-6, Nov. 2004

⁷ *County of Hunterdon and Local 1034 (Supervisors)*, P.D.D. No. 22004-8, Feb. 2004.

file a petition seeking a PERC order.⁸ This relatively new area of the law is expected to be marked by continuing clarification and interpretations. New developments will be posted on the NJSBA subscription service, The Negotiations Advisor Online and on the Labor Relations Page of the Association's web site at www.njsba.org.

Components of an Agency Shop Provision

The components necessary to an Agency Shop provision are defined by the purpose of the clause: to collect a representation fee from members of the bargaining unit who are not members of the union. The components will therefore include the specifics of collection and will be designed to provide a benefit to the union. Boards should examine their existing provisions to assure that their agreement is in accordance with the current state of the law and protects the board's interest.

A clause-by-clause analysis of the NJEA's sample proposal on Agency Shop appears in Article XXVII of the NJEA's Sample Agreement in *The Negotiations Advisor Online Update*. This resource, available to school districts and subscribers to the *Advisor*, can be accessed by scrolling down the NJSBA home page at www.njsba.org to the *e-briefcase* category and clicking on the *Online Update* entry. To assure accordance with all aspects of the law and protection of districts' interests, specific attention should be given to the following aspects of the provision:

Amount of the Fee A contract, or a union proposal, which specifies that non-members shall pay a fee equal to 85% of membership dues, contradicts the Appeal Board Rules and Regulations (*N.J.A.C. 19:17-3.1 et seq.*). The regulations call for an annual calculation of the fee which is based on the actual cost of the previous year's permissible expenditures. Any other arrangement is invalid. Although the amount of the fee is not negotiable, boards can seek consistency with the law in this area.

Deduction and Transmission of the Fee Regardless of the language of the contract, a board may not deduct representation fees until it has received evidence of the existence of a demand-and-return system. A board does not seem to have a legal responsibility to assure that the system adopted by the union meets the standards of the Appeal Board, but since the statute requires that the demand-and-return system be maintained, a board may have the responsibility to annually receive evidence of the system's existence.

To prevent vulnerability to litigation under an agency shop provision, boards should examine their contractual clauses for the presence of a valid and complete indemnification component.

Indemnification Clause Indemnification language can protect the board and hold it harmless against any financial liability which may arise from claims against the implemen-

tation of the contractual representation fee clause. Such a clause may read as follows:

The union shall indemnify and hold the employer harmless against any and all claims, demands, suits and other forms of liability, including liability for reasonable counsel fees and other legal costs and expenses, that may arise out of, or by reason of any action taken or not taken by the employer in conformance with this provision.

Boards should avoid indemnification language which requires that the board surrenders its responsibility to defend itself in any suit which may arise.

Negotiating an Agency Shop Provision

The 2002 amendment to the PERC Law creates a new and rather unique wrinkle in public sector bargaining: it establishes the union's right to seek an administrative agency's order to obtain a benefit that the union failed to achieve at the bargaining table. Yet, this novel approach to a negotiable topic will have varied impact on local districts' bargaining. The disparate effect on local boards will be based on a number of factors, including: districts' negotiations history; the introduction of union proposals; boards' positions and bargaining goals as well as the union's particular circumstances.

Existing Contract Provisions Approximately 70% of N.J. teachers' 2002-2003 contracts contain an agency shop provision. PERC's authority to impose a representation fee deduction will have no impact on those districts. The amendment is clearly intended to apply only to those unions that failed to obtain the negotiated right to deduct a representation fee from the salary of non-union members. Thus, board proposals to change an existing agency shop provision will not trigger the union's right to petition PERC.

Boards whose contracts currently contain an Agency Shop provision should, as part of their preparation for negotiations, review their existing clauses to assure compliance with existing legal requirements and ease of administration. These boards should not hesitate to consider raising proposals for changes in these provisions, including the addition or clarification of an indemnification clauses, if such change would benefit the district. Board proposals in this area should be negotiated in the same manner as all other issues that have been placed on the bargaining table.

New Union Proposals for Representation Fee Deductions The new amendment may trigger a renewed union interest in bringing the Agency Shop issue to the bargaining table. However, this does not mean that all unions will raise a proposal in their next round of bargaining. Nevertheless, it is most advisable that all boards entering

⁸ Raritan Valley Community College, P.D.D. No. 2004-4, Sept. 2003.

negotiations with certificated, as well as noncertificated, bargaining units, be prepared to understand the implications of negotiating this issue.

Conceptual Acceptability to Boards Boards that expect to receive a union proposal on agency shop will want to determine their position on the issue. The absence of a current representation fee arrangement may reflect some school boards' and communities' firm philosophical opposition to the concept. Boards may have a strong belief that employees should have the right not to support an organization if they so desire, and that school boards should not enter into agreements that force their employees to contribute to those organizations. Boards may also conceptually object to agreeing to a contractual provision that essentially subsidizes the activities of their negotiations adversaries. These are justifiable and legitimate reasons for boards to refuse to agree to an agency shop.

The fact that the fee deduction may ultimately be ordered by PERC should not necessarily dilute these boards' resolve to oppose and reject the union's proposal at the bargaining table. After all, the amendment does not mandate boards' concessions on the issue—it simply provides another avenue for the union to achieve its goal. Further, there is no guarantee that the local union, or the NJEA, will automatically seek PERC's intervention. (See discussion on *The Importance to the Union*, later in this article.) However, boards with philosophical objections cannot ignore the possibility of a PERC-ordered fee deduction and must also consider whether it would be to the board's advantage to engage in negotiations. These negotiations could result in a provision that offers sufficient, acceptable protection for the board and increase the board's bargaining leverage on other issues. (See discussion on *Developing the Board's Bargaining Strategy*, later in this article.)

Other boards may not have strong philosophical objections to the concept and may be willing to consider acceptance of the proposal during the course of negotiations. However, before agreeing to the issue as proposed by the union, those boards should consider the importance of the proposal to the union and develop an appropriate bargaining strategy.

The Importance to the Union In assessing its position on the proposal, a board should keep in mind that agency shop is a benefit to the union: it provides the union with additional monies for services it must render to all unit members; the obligation to pay a fee, frequently convinces nonmembers that it may be worthwhile to become a full dues-paying members; and it can also discourage non-union members from paying dues to another union. Although the Appeal Board's requirements for an annual calculation of representation fees may be a burden or inconvenience for the local union, the provision nevertheless remains a benefit to the organization.

However, the importance of this benefit to the local union will vary from district to district and will need to be assessed by each local board. In districts where the local union is strong and there is a high percentage of union

members, the issue may be of no or low significance. This lack of local importance may be a primary reason that the district's contract does not yet include an agency shop. It may also be indicative of a continued basic local union indifference to a "throw away" proposal and of the local's subsequent disinterest in pursuing PERC's intervention.

In other districts, obtaining an agency shop provision may have a current high degree of importance. For example, a union may have a new interest in achieving a representation fee if it is experiencing declining membership as retiring long-time dedicated members are replaced with staff who are not inclined to join the union. Similarly, the issue may be of high interest to a union that has recently pursued a number of grievances and arbitration for discontented unit members who are not union members. Finally, a local union that has strong ties to the state organization and generally follows its advice, may have a high degree of interest in achieving a union security clause. Recognizing the value of the proposal to the local union, and the state organization, can help boards to develop their bargaining strategy.

Developing the Board's Bargaining Strategy Boards that are willing to consider a negotiated agreement to Agency Shop should treat the proposal like every other union item on the table: it is a bargaining chip that can be used as a "trade-off" to obtain the union's agreement to a board item. Boards should avoid the mindset that encourages a simple acceptance of the union's Agency Shop as proposed by the union since "PERC will give it to them anyway."

Clearly, the possibility of PERC's ultimate order for a fee deduction reduces the union's willingness to agree to a major concession on a board issue in return for the board's at-the-table agreement. In other words, boards cannot expect the union to agree to insurance "give backs" in return for the board's acceptance of an agency shop proposal. Nevertheless, the point remains that boards should try to "get" something in return for "giving" their agreement to the union's proposal. Boards should also keep in mind that a negotiated agreement may be less cumbersome than petitioning PERC and facing the Commission's scrutiny of the union's internal operations.

In addition to recognizing the potential trade-off value of an agency shop proposal, boards must also carefully consider the specifics of the union's proposals. They must assure that the agreed-upon clause reflects the state of the law, the requirement for a demand-and-return system, as well as the board's needs in the proposal. After analyzing the proposal, boards should be prepared to raise counterproposals which incorporate the district's interests. For example, boards may wish to extend the statute's minimum "grace" period and require more than 30 days before new employees can be assessed a representation fee. And, certainly, no board of education should agree to an agency shop provision that does not include good and thorough indemnification language that holds the board "safe-harmless" in litigation arising from the administration of the clause.

To date, PERC's orders to institute a representation fee

deduction have incorporated the statutory criteria, including the responsibility of the union to maintain a demand and return system. However, nor surprisingly, these orders have not included a requirement for an indemnification clause or other procedural or implementation details. It is presumed that all procedures remain negotiable. There is no question that the amendment to the PERC Law has added a new wrinkle to the negotiability of an agency shop provision. Nevertheless, a well-prepared negotiation strategy can provide boards with a provision that not only provides protection for the board but may also permit beneficial, if limited trade-off value at the bargaining table.