STATE OF MAINE

MAINE LABOR RELATIONS BOARD
Case No. 14-29
Issued: March 20, 2015

Andrew D. Martin, Complainant, v. AFSCME Council 93, Respondent.	ORDER

The Complaint in this matter was filed by Andrew D. Martin on May 20, 2014, alleging that AFSCME Council 93 violated 26 M.R.S.A. §964(2)(A) as well as article 4.2.1 of the collective bargaining agreement between AFSCME and the City of Portland. The Complainant charges that the Union interfered with his rights under the Municipal Public Employees Labor Relations Act (the "Act") by refusing to reinstate his membership in the Union and making him pay an agency service fee without his consent.

At the prehearing conference on October 2, 2014, the Complainant represented himself and Joseph E. DeLorey, Esq., represented the Respondent, AFSCME Council 93. Also present was Ms. Sylvia Hebert, Staff Representative for the Union. During the prehearing conference, the parties summarized their respective positions and agreed that there did not appear to be any material facts in dispute. Both parties were interested in resolving the matter without having a full evidentiary hearing before the Board. Accordingly, the parties agreed to have the Prehearing Officer issue a recommended order based on the

parties' written submissions, including the prohibited practice complaint, the Union's response, and both parties' pre-hearing submissions. The parties would be given the opportunity to respond to or comment on the Recommended Order prior to it being presented to the Board. The Prehearing Officer's Recommended Order was issued on October 29, 2014. The Complainant timely requested that the matter be reviewed by the full Board. No further written briefs were filed, but the parties presented oral argument to the Board on January 20, 2015.

JURISDICTION

Andrew D. Martin is a public employee within the meaning of 26 M.R.S.A. §962(6) and AFSCME Council 93 is the bargaining agent within the meaning of 26 M.R.S.A. §962(2). The Board's jurisdiction to hear this case lies in 26 M.R.S.A. §968(5).

FINDINGS OF FACT

1. The Complainant, Andrew D. Martin, works for the City of Portland in a job classification that is included in a bargaining unit of city employees. The Union, AFSCME Local 1373, is the exclusive bargaining representative for this unit and has been at all times relevant to this complaint.

2. In 2010, Mr. Martin was expelled from the Union for reasons that are not relevant to the complaint before us.

3. After his expulsion from AFSCME, and until March of 2014, neither union dues nor fair share fees were deducted from Mr. Martin's paycheck.

4. On March 21, 2014, Mr. Martin first noticed that his paycheck had a deduction of $5.90 with a notation saying "CEBA Dues Fair Sha". He called the payroll person who indicated that Tom Caiazzo in Human Resources had instructed her to start the deductions. Mr. Martin called Mr. Caiazzo who told him that the fair share fee deduction had been started at the request of AFSCME. In response to his question as to why he did not receive any notice of the deduction, Mr. Caiazzo told him that Sylvia Hebert, the AFSCME Staff Representative, had said that she was going to mail a letter to Mr. Martin.

5. Mr. Martin called Ms. Hebert and she indicated that there was some confusion as to whether the address they had was the proper mailing address for him. He confirmed that the address they had was his correct address.

6. The letter Ms. Hebert sent to Mr. Martin, although dated March 5, 2014, was not mailed to him until March 21, 2014, at the earliest. The letter to Mr. Martin stated:

> March 5, 2014
>
> Andrew Martin
> P.O. Box 11611
> Portland, ME 04104
>
> Dear Mr. Martin:
>
> Enclosed please find letter sent this date to the City of Portland with regard to your payment of fair share fees per the collective bargaining agreement.
>
> If you have any questions, please feel free to contact me.

Sincerely,

Sylvia Hebert
AFSCME Staff Representative
shebert@afscmecouncil93.org
207-620-3910 (office direct)
SH/lb
Enc.

7. The letter from Ms. Hebert to Mr. Caiazzo, stated:

March 5, 2014

Tom Caiazzo
Employee Relations Manager
City of Portland
389 Congress Street
Portland, ME 04101

Dear Mr. Caiazzo:

It has come to my attention that Andrew Martin is not paying a fair share fee as required in the Collective Bargaining Agreement with AFSCME Council 93.

Andrew Martin was expelled from AFSCME membership but that does not preclude him from paying Fair Share as a member of the bargaining unit in accordance with Section 4.2.1 of the Collective Bargaining Agreement.

I am requesting that the Fair Share Fee be deducted from his paycheck each pay period.

Thank you for your attention to this matter.

Sincerely,

Sylvia Hebert
AFSCME Staff Representative

shebert@afscmecouncil93.org
207-620-3910 (office direct)
207-212-9396 (cell)

SH/lb

8. Section 4.2.1 of the Collective Bargaining Agreement between AFSCME and the City of Portland states:

> 4.2 Fair Share Fees
>
> 4.2.1 For employees hired into a permanent position on or after March 1, 1985, it shall be a condition of employment that said employees either (1) join the Union, or (2) agree to pay their fair share toward the Union's cost of collective bargaining, contract administration, and the adjustment of grievances through payroll deductions as outlined in this Article. The Union shall establish said fair share annually not to exceed 80% of full Union dues and shall notify the City promptly as to the percentage and dollar amount of said fair share. Said employees shall have 10 days after completion of their probationary period within which to join the Union or agree to pay the fair share amount.
>
> 4.2.2 The Union agrees to establish a bona fide internal Union procedure to allow non-member employees in the unit to challenge the level of the fair share deduction established hereunder. In the event of any challenge to the fair share provision, the City shall not be required to discharge any employee(s) for failure to comply with this provision until after the employee(s) have exhausted their internal Union remedies and so long as there is any litigation pending. After such exhaustion and in the absence of any pending litigation, the City shall provide any employee who has not elected to join the Union or to pay their fair share with written notice that the employee has 30 days to make such election or be

discharged from service. Any discharge under this provision is reviewable only in Court and is not grievable or arbitrable. The Union agrees to comply with the procedures established by the U.S. Supreme Court's decision of Chicago Teachers Union Local No. 1, AFT, AFL-CIO, et al. v. Annie Lee Hudson et al. decided March 4, 1986 for handling of fair share fee claims.

4.2.3 Upon receipt of a written authorization card from the employee, the City shall deduct either the full Union dues or the fair share fee as indicated. The City has no obligation to pay the Union any dues or fee payment for an employee if the employee has not signed said authorization card.

9. On March 26, 2014, Mr. Martin emailed AFSCME Council 93 asking that he be made a full member of AFSCME Local 1373 again. His request was denied.

DISCUSSION

Section 964(2)(A) of the Act prohibits pubic employees, public employee organizations and their members and agents from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 963." Section 963, in turn, provides a broad protection of the right of public employees to join and participate in union activities or to refrain from doing so. Section 963 states:

§963. RIGHT OF PUBLIC EMPLOYEES TO JOIN OR REFRAIN FROM JOINING LABOR ORGANIZATIONS

A person may not directly or indirectly interfere with, intimidate, restrain, coerce or discriminate against a public employee or a group of public

employees in the free exercise of their rights, given by this section, to voluntarily:

1. Join a union. Join, form and participate in the activities of organizations of their own choosing for the purposes of representation and collective bargaining or in the free exercise of any other right under this chapter; or

2. Not join a union. Refrain from joining or participating in the activities of organizations for the purposes of representation and collective bargaining, except that an employee may be required to pay to the organization that is the bargaining agent for the employee a service fee that represents the employee's pro rata share of those expenditures that are germane to the organization's representational activities.

Public Law 2007, chapter 415, entitled "An Act to Protect Fair Share Workers from Termination", made several changes to various sections of Title 26 that are relevant to the issue at hand. Section 963 was repealed and replaced[1] with the provision quoted above having two distinct subsections reflecting the long-standing principle that §963 protects both the right to join a union and the right to refrain from joining a union. See, e.g., Churchill v. SAD #49 Teachers Association, 380 A.2d 186, 192 (1977).

Public Law 2007, chapter 415 also added the last clause of §963, sub-§ 2 that "an employee may be required to pay [to the

---

[1] Until this change, § 963, as enacted in 1969, stated:

§963 Right of public employees to join labor organizations
No one shall directly or indirectly interfere with, intimidate, restrain, coerce or discriminate against public employees or a group of public employees in the free exercise of their rights, hereby given, voluntarily to join, form and participate in the activities of organizations of their own choosing for purposes of representation and collective bargaining, or in the free exercise of any other right under this chapter.

union] a service fee that represents the employee's pro rata share of those expenditures that are germane to the organization's representational activities." P.L. 2007, c. 415, §2.[2] This new clause does not by itself require the payment of a service fee, but simply codifies the existing case law that allowed parties to negotiate mandatory payment of service fees. See, e.g., Council 74, AFSCME v. City of Bangor, No. 80-50 at 5 (Sept. 22, 1980).

Public Law 2007, chapter 415 also enacted two other provisions that are important in this case. The first is the enactment of §964(1)(H), prohibiting an employer from "terminating or disciplining an employee for not paying union dues or fees of any type."[3] The second is the enactment of a new provision in Chapter 7 of Title 26 addressing Employment Practices. Section 629,[4] entitled "Unfair Agreements," limits the employer's ability to withhold funds from an employee's paycheck without the authorization of the employee, except in the specific instances identified. Public Law 2007, chapter 415 amended section 629 to add the following subsection:

> 4. Deduction of service fees. Public employers may deduct service fees owed by an employee to a collective bargaining agent from the employee's pay, without signed authorization from the employee, and remit those fees to the bargaining agent, as long as:
>
> > A. The fee obligation arises from a lawfully executed and implemented collective bargaining agreement; and

---

[2] P.L. 2007, ch. 415, §§6, 10, and 15 made the same change to the State Employees Labor Relations Act, the University of Maine System Act, and the Judicial Employees Labor Relations Act.

[3] Identical provisions were added to the various collective bargaining acts covering other public sector employers and employees.

[4] In Title 26, Chapter 7, sub-chapter 2, "Wages and Medium of Payment."

> B. In the event a fee payor owes any arrears on the payor's fee obligations, the deduction authorized under this subsection may include an installment on a payment plan to reimburse all arrears, but may not exceed in each pay period 10% of the gross pay owed.

Again, like the change to §963, the enactment of §629(4) does not require agency fees or require payroll deduction of agency fees; it simply sets the conditions under which an employer lawfully can deduct agency fees from an employee's paycheck without that employee's written authorization.

Turning to the case at hand, the Complainant alleges a §964(2)(A) violation.[5] Thus, the question is whether the conduct of the Union can reasonably be viewed as interference, restraint or coercion with respect to his rights under §963. Mr. Martin argues that he would like to join AFSCME, but is precluded from doing so because of his expulsion in 2010. He argues that by not allowing him to join the union and by causing the employer to deduct fair share fees from his paycheck without his consent, the Union has interfered with the rights guaranteed by §963, thereby violating §964(2)(A).

Section 963, subsection 2 explicitly refers to the possibility that an employee may be required to pay a service fee. Subsection 2 establishes an employee's right to refrain from joining a union, "except that an employee may be required to pay to the [bargaining agent] a service fee that represents the employee's pro rata share of those expenditures that are

---

[5] The Complainant also alleges a violation of the collective bargaining agreement. That charge must be dismissed, as the Board has no jurisdiction to hear grievances. State of Maine v. MSEA, 499 A.2d 1228, 1239 (Oct. 29, 1985).

germane to the organization's representational activities." The source of any such service fee requirement is the collective bargaining agreement that the bargaining agent negotiates with the employer. Given the individual interests involved, we conclude that the bargaining agent has an obligation to comply with the essential terms of the agreement giving rise to the requirement to pay the service fee permitted under §963(2). A failure to do so could constitute a violation of §964(2)(A).

Here, as Mr. Martin argues, the terms of the collective bargaining agreement present the employee with the option of either joining the union or agreeing to pay the fair share fee. Article 4.2.1 of the agreement states that employees must "either (1) join the union, or (2) agree to pay their fair share toward the Union's cost of collective bargaining, contract administration, and the adjustment of grievances through payroll deductions as outlined in this Article."[6] The same article states that new employees have 10 days after completion of their probationary period "to join the Union or to agree to pay the fair share amount." Mr. Martin has not agreed to pay the fair share fee, but he would like to join the Union. The option of joining has been denied to him, however, insofar as the Union has declined to readmit him. Thus, Mr. Martin does not have the choice contemplated by the collective bargaining agreement. By insisting that Mr. Martin pay the fair share fee when he has not agreed to do so and is willing to join the Union, the Union failed to comply with an essential term of the agreement. This failure on the Union's part constitutes a violation of §964(2)(A)

[6] The agreement purports to make the payment of dues or the fair share fee a condition of continued employment. At the pre-hearing conference, the Union's staff representative indicated that they knew the provision was inconsistent with current law, and they were in the process of negotiating substantial changes in the successor agreement.

as it interfered with the rights guaranteed to Mr. Martin in §963.

Furthermore, even if the imposition of the service fee in this instance was not a violation of the contract, it has failed to comply with Constitutional and statutory procedural requirements. There is significance to the wording of §963 referring to a service fee "that represents the employee's pro rata share of those expenditures that are germane to the organization's representational activities." A charge that the Union interfered, restrained or coerced Mr. Martin in the exercise of rights guaranteed by §963 in violation of §964(2)(A) must therefore encompass the right to ensure that the service fee does not exceed the statutory limitation.

This language in §963 limiting the fee amount "to those expenditures that are germane to the organization's representational activities" was clearly intended to incorporate the First Amendment limitations on agency fees as defined by the United States Supreme Court. In 1986, the U.S. Supreme Court issued Chicago Teachers Union v. Hudson, in which it affirmed the holding of Abood that a public sector union may not require nonmembers to pay for costs "not germane to its duties as collective-bargaining agent." 475 U.S. 292, 294, quoting Abood v. Detroit Board of Education, 431 U.S. 209 (1977). The Supreme Court further identified the minimum procedural safeguards a public sector union must employ to protect nonmembers' First Amendment rights. The Hudson Court held that,

> [T]he constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee

> before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986). We recognize that the U.S. Supreme Court's most recent discussion of agency fees in Harris v. Quinn called into question the constitutional foundation of agency fees in the public sector. 573 U.S.___, 134 S. Ct. 2618 (2014). The Supreme Court has not overruled Hudson, however, so Hudson continues to be the law we must apply.

After nearly four years without having any dues or fair share fees deducted from Mr. Martin's paycheck, the Union caused the agency fee amount to be deducted by the employer without providing Mr. Martin advance notice, much less an "adequate explanation of the basis of the fee" or a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker. Even if the Union's existing procedures might have provided sufficient notice to probationary employees about to be subject to the agency fee requirement, that procedure would not be sufficient for Mr. Martin, as he would have had no reason to think that the Union would change its position on requiring fees from him.

We conclude, therefore, that the Union violated §964(2)(A) by failing to comply with the collective bargaining agreement's requirements for collecting a service fee and by causing a regular deduction from Mr. Martin's paycheck for fair share fees without giving him the procedural protections required by Hudson.

ORDER

On the basis of the foregoing facts and discussion, and by virtue of and pursuant to the powers granted to the Maine Labor Relations Board by the provisions of 26 M.R.S.A. §968(5), it is hereby ORDERED:

That AFSCME Council 93 and its representatives and agents shall:

1. Notify the City of Portland that the agency fee or 'fair share' deductions from Mr. Martin's paycheck must be stopped until the such deductions can be implemented consistent with the terms of the collective bargaining agreement and Mr. Martin has been provided with the procedural protections specified in Chicago Teachers Union v. Hudson, and

2. Reimburse Mr. Martin of the full amount of agency fees deducted from his paycheck from April 2014 until the present, plus interest of 3.13%.[7]

Dated at Augusta, Maine, this 20th day of March, 2015.

MAINE LABOR RELATIONS BOARD

Katharine I. Rand
Chair

Robert W. Bower, Jr.
Employer Representative

Amie M. Parker
Employee Representative

The parties are advised of their right to seek review of this decision and order by the Superior Court by filing a complaint pursuant 26 M.R.S.A. § 968(4) and in accordance with Rule 80C of the Rules of Civil Procedure within 15 days of the date of this decision.

[7] This is the pre-judgment interest rate used in Maine's state courts for claims filed in 2014. See www.courts.maine.gov/attorneys/writ-pre.html .