STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of JOSEPH FRANCIS GONSALVES, Petitioner, and HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO, Exclusive Representative.	CASE NO. PD-13-03 DECISION NO. 355 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On August 28, 1989, Petitioner JOSEPH FRANCIS GONSALVES (GONSALVES) filed a Petition for Review of Refunds with the Hawaii Labor Relations Board (Board). GONSALVES alleged that certain items payable to the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA) were not properly chargeable to fair share agency fee payers. GONSALVES requested that the Board review the amount of refunds to determine whether the amounts were proper.

At the prehearing conference held in this matter, GONSALVES withdrew several grounds for his objections to the amount to be refunded and narrowed the issue in this case to whether amounts spent by the HGEA's International Union, the American Federation of State, County, and Municipal Employees (AFSCME), for organizing activities are properly chargeable to a nonmember

employee. Specifically, GONSALVES objects to the following expenses:

> 10. Organizing other bargaining units;
>
> 11. Seeking to gain representation rights in units not represented by AFSCME including units where there is an existing designated representative;
>
> 12. Defending HGEA/AFSCME and AFSCME against efforts by other unions or organizing committees to gain representation rights in units represented by HGEA/AFSCME and AFSCME; . . .*

Board Exhibit (Ex.) 1.

After due notice, a hearing on this case was held on December 11, 1989. All parties had full opportunity to present evidence and argument to the Board. Thereafter, both parties filed briefs with the Board.

Based on the entire record and arguments, the Board makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

GONSALVES is included in bargaining unit 13 but is not a dues-paying member of the HGEA.

The HGEA is the exclusive representative of bargaining unit 13.

GONSALVES alleges that approximately $285.60 was deducted from his payroll as an amount equivalent to regular dues. On August 21, 1989, he received a refund check of $15.66 from the

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*Although Petitioner, in his Brief, argues that "Item 9- Organizing within the bargaining unit in which fair share agency fee payers are employed" expenditures are improper, we do not address this issue as it was not contained in his Petition for Review of Refunds nor was it raised during the proceedings.

HGEA. The refund was designated as "a refund of the portion of your HGEA, AFSCME, and Hawaii State AFL-CIO fair share agency fees calculated for political and ideological activities for the period 7/89 to 6/90." Board Ex. 1.

Petitioner was charged $58.80 for the period July 1, 1989 through June 30, 1990. Of this amount, $24.42 for the period July-December, 1989 and $22.32 for January-June, 1990 were designated as chargeable to collective bargaining and related activities. In addition, $4.98 for the period July-December, 1989 and $7.08 for January-June, 1990 were designated as nonchargeable expenditures and Petitioner was refunded $12.06. Petitioner also received a refund of $3.60 which represents a per capita fee of $.30 per month collectible by the AFL-CIO-State Federation of Labor. All of this money was designated as a nonchargeable expenditure. Therefore, Petitioner received a total refund of $15.66. Since no further breakdown was provided by the HGEA, at issue in this case is the remainder of the AFSCME per capita charge in the amount of $46.74.

The HGEA represented and the Board finds that the amounts contested by GONSALVES are monies which were expended by the International Union, AFSCME. Transcript (Tr.), pp. 13-25. According to the HGEA, 76.126% of the expenses of AFSCME during the year of 1988 were chargeable to agency fee payers. Tr., p. 65.

During the last two weeks of April and the first two weeks of May, 1989, HGEA distributed the Notice to Fair Share Agency Fee Payer in Collective Bargaining Units 02, 03, 04, 06, 08, 09 and 13 (Notice) to all agency fee payers within the designated units. See HGEA's Motion to Dismiss for Failure to File Objections

in a Timely Fashion. The Refund Challenge Procedure is described on pages 8 and 9 of the Notice. The Notice states in pertinent part:

> The fair share agency fee payer shall complete the HLRB-16(1-87) form provided by the Hawaii Labor Relations Board . . . and titled "Petition for Review of Refunds." The petition must be filed pursuant to rules and procedures adopted by the HLRB which requires that the petitioner must submit a notarized original and five copies to the HLRB which is located at 550 Halekauwila Street, Second Floor, Honolulu, Hawaii 96813. . . . The petition can be obtained at the HLRB office and must be filed within 15 days after receipt of the "Notice to Fair Share Agency Fee Payers" regarding the HGEA/AFSCME and AFSCME fair share agency fee refund determination procedure for collective bargaining units 02 (Blue collar supervisors), 03 (White collar personnel), 04 (Supervisory employees in white collar positions), 06 (Educational officers and other personnel of the department of education under the same salary schedule), 08 (Personnel of the University of Hawaii and the community college system, other than faculty), 09 (Registered professional nurses, and 13 (Professional and scientific employees, other than registered professional nurses).

DISCUSSION

On November 13, 1989, the HGEA filed a Motion to Dismiss for Failure to File Objections in a Timely Fashion. The HGEA alleges that it issued a Notice to all agency fee payers within the designated units which it represents during the last two weeks of April and the first two weeks of May 1989. Tr., p. 6. The Notice purports to provide public employees who are nonmembers of the Union an explanation of the basis for the agency fee and an opportunity to challenge the amount of the fee. The Notice indicates that any challenges must be filed with the Board within

15 days of its receipt. The HGEA argues that since GONSALVES filed his petition on August 28, 1989, he is well beyond the 15-day statute of limitations and accordingly, his petition should be dismissed.

GONSALVES indicates in his petition that the notice of refund was received on August 21, 1989 and a copy of a check issued to him for $15.66, dated August 11, 1989, is attached to the petition. GONSALVES contends that his filing of the petition is timely. He also states that he was told by a Board staff person that he was to include the amount to be refunded in the petition.

Section 89-4(a), Hawaii Revised Statutes (HRS), provides for the deduction of regular union dues from the payroll of every member employee and the deduction of a dues equivalent from the payroll of every nonmember employee. The statute also provides that the union must provide a procedure for determining the amount of refund to any employee who demands the return of any part of the deduction which represents the employees' pro rata share of expenditures made by the exclusive representative for activities of a political and ideological nature unrelated to terms and conditions of employment. The statute further provides, in part:

> If a nonmember employee objects to the amount to be refunded, the nonmember employee may petition the Board for review thereof within 15 days <u>after notice of the refund has been received</u>. [Emphasis added.]

Administrative Rules Section 12-42-137(a), provides:

> A nonmember employee who objects to the amount to be refunded by an exclusive representative may petition the Board for a review thereof within 15 days after receiving <u>notice of the amount of refund</u> from the exclusive representative. [Emphasis added.]

Subsection (C) of the foregoing rule describes the contents of the petition and indicates that the petition shall contain:

> (6) A statement of the amount to be refunded by the exclusive representative;

The Board's Petition for Review of Refunds thus provides, in part:

> 6. Specify the amount to be refunded by the exclusive representative.
>
> 7. Indicate the date which notice of refund was received.

The statute clearly states that the nonmember employee must petition the Board for a refund within 15 days after "notice of the refund has been received." The Board's duly promulgated Administrative Rules and its petition form specifically require the inclusion of the amount to be refunded.

HGEA contends that its Notice is the "notice" set forth in the statute and its receipt triggers the 15-day statute of limitations. While the Notice generally describes the categories of chargeable and nonchargeable expenses and contains a breakdown of budget items by general categories, it does not contain the specific amount of the refund. Upon receipt of the Notice, the employee does not know the amount he or she will be refunded. Since GONSALVES filed the instant petition within 15 days after receiving the refund check from HGEA, we conclude that the petition was filed in a timely manner. Accordingly, HGEA's motion to dismiss is denied.

As to the case-in-chief, Section 89-4, HRS, provides that a nonmember employee requesting a refund is entitled to amounts which represent the employee's pro rata share of expenditures made by an exclusive representative for activities of a political and ideological nature unrelated to terms and conditions of employment. GONSALVES objects here to the per capita dues paid to the HGEA's International Union which are used for organizing activities in other states.

GONSALVES contends that there is no compelling evidence that proves that expanding or maintaining the portion of employees that HGEA/AFSCME represents will result in better representation and the greater ability to win favorable contracts than would an independent representative. GONSALVES states that the goal of representing all public employees can best be characterized as ideological and any funds expended to achieve this goal should be considered ideological expenditures. The result of these expenditures must be classified as indirectly and potentially beneficial rather than germane to the work of collective bargaining.

GONSALVES relies upon Abood v. Detroit Board of Education, 431 U.S. 209 (1977), for the proposition that the sole legitimate expenditures of service fee money are for "collective bargaining, contract administration and grievance adjustment." GONSALVES contends that this excludes all other expenditures and therefore all other items must be considered nonchargeable.

Previously, the Board decided that assessments for the national affiliates of the local unions were allowable charges in

that the affiliates provide the strength, backing, support, expertise and experience which were directly related to the union's bargaining effectiveness. HGEA and Jordan, 1 HPERB 623 (1976).

The issue here is whether monies spent by the union affiliates for general organizing activities bear a reasonable relationship to the collective bargaining process so that the fee payer can be charged for the activity even though such activity might be considered "ideological".

According to Thomas Bowman, AFSCME auditor, the International Union's organizing activity benefits the employees in the State of Hawaii because there is "strength in numbers," and that what happens in collective bargaining in other states impacts upon issues and needs in the State of Hawaii. Tr., p. 69. In his opinion, "it's very necessary for us to organize in order to adequately represent the workers that we are attempting to represent." Tr., p. 71. Bowman stated that amounts spent to gain representation rights where there is an existing representative and defending efforts by other unions to gain representation rights of units represented by AFSCME are "extremely insignificant." Tr., p. 73.

In Brotherhood of Railway Clerks v. Allen, 373 U.S. 113, 53 LRRM 2128 (1963), the U.S. Supreme Court held that the union bears the burden of proving that the service fee amounts are properly chargeable. The Court discussed the burden of persuasion in cases where objecting nonmembers challenge the chargeable service fee:

> Since the Union possesses the facts and records from which the proportion of

> [nonchargeable] political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. And no decree would be proper which appeared likely to infringe the unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining and, as well, to expend nondissenters' such exactions in support of [nonchargeable] political activities.

Id. at p. 122.

In Lehnert v. Ferris Faculty Association, 500 U.S. 507, 137 LRRM 2321 (1991), the petitioner members of the faculty objected to certain uses by the union of their service fees. The respondent faculty association, an affiliate of the Michigan and National Education Associations, entered into an agency-shop arrangement with the college, a public institution, whereby bargaining unit employees who do not belong to the association are required to pay the union and its affiliates a service fee equivalent to a union member's dues.

The U.S. Supreme Court in Lehnert set forth guidelines to determine which activities a union may constitutionally charge to dissenting employees. The Court discussed its previous cases relating to the constitutionality of expenditures made by unions and stated:

> Thus, although the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations. Hanson and Street and their

> progeny teach that chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of any agency or union shop.

At p. 519.

With respect to the chargeability of expenditures for activities of the national or parent union, the Court stated:

> Petitioner's contention that they may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit presents a closer question. While we consistently have looked to whether nonideological expenses are "germane to collective bargaining," Hanson, 351 U.S., at 235, we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.
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> * * *
>
> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.
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> * * *
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> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. This conclusion, however, does not serve to grant a local union carte blanche to expend

> dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit. The union surely may not, for example, charge objecting employees for a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally. Further, a contribution by a local union to its parent that is not part of the local's responsibilities as an affiliate but is in the nature of a charitable donation would not be chargeable to dissenters. There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization. And, as always, the union bears the burden of proving the proportion of chargeable expenses to total expenses. Teachers v. Hudson, 475 U.S., at 306; Abood, 431 U.S., at 239-240, n. 40; Railway Clerks v. Allen, 373 U.S., at 122. We conclude merely that the union need not demonstrate a direct and tangible impact upon the dissenting employee's unit.

At pp. 522-524.

Utilizing this analysis, the U. S. Supreme Court held that unions could properly charge dissenting employees for their share of general collective bargaining costs of the state or national parent union. The Court noted that the District Court found the bulk of the National Education Association's (NEA) expenditures to be germane to collective bargaining and similar support services and properly chargeable to the members of the local affiliate. Hence, the Court did not disturb the lower court's findings. The Court, however, disallowed charges for extra-unit litigation and held that the First Amendment proscribes such assessments in the public sector.

In Crawford v. Air Line Pilots Association, 992 F.2d 1295, 143 LRRM 2186 (4th Cir. 1993), the Circuit Court of Appeals for the Fourth Circuit held that the pro rata share of a major

contingency fund was properly charged to objecting agency-fee payers under Lehnert because the fund contributes to the pool of resources potentially available to the local and is assessed for the bargaining unit's protection. The Court, relying on the findings of the District Court concluded that the purposes for the creation of the fund were germane to collective bargaining. The fund was designed to further the union's duty of representation. The Court did not believe that the burden on constitutional rights imposed by the permissible exaction of fees is heightened simply because the funds were assessed in advance rather than contemporaneously or afterwards.

The HGEA submits that organizing is the means by which a union gains the strength and resources necessary to successfully bargain the terms and conditions of employment that both its members and nonmembers enjoy. The HGEA argues that the activity is neither political nor ideological and that the larger and stronger a union is, the greater the resources it has available to assist its local affiliates in bargaining. In addition, the HGEA contends that contracts negotiated in one part of the country are a significant component in settling contracts elsewhere in the country. Also, comparative wage data may be considered in the resolution of impasses under Section 89-11, HRS, during the fact-finding process.

The HGEA contends that the offensive and defensive organizing costs at issue in this case satisfy the Lehnert criteria and are properly chargeable to dissenting employees. The HGEA argues that organizing is similar to the litigation of

jurisdictional disputes in that it preserves the union's ability to bargain effectively. The HGEA argues that the strength and resources of the national union are available to its affiliates and are therefore properly chargeable because they will directly benefit the objector's bargaining unit. As such, organizing is germane to the union's collective bargaining responsibilities.

With respect to the second prong of the Lehnert test, we must consider whether the government's interest in labor peace and avoiding free riders is implicated. The HGEA argues that the failure to charge for the costs of organizing presents a free rider problem since the objecting fee payers would also gain the advantage of wages and benefits.

As to the third prong of the test, we must determine whether organizing expands the infringement on an employee's First Amendment rights that are inherent in a service fee arrangement. The HGEA argues that organizing does not present an increased burden because organizing occurs in the workplace and not outside the traditional forum for dispute resolution. Secondly, the HGEA argues that the substantive issues in organizing are economic and not political nor ideological.

The HGEA also cites numerous arbitration decisions and state labor board decisions which held that organizing is a legitimate chargeable expense because there is a direct relationship on the union's ability to advance the interests of the employees it represents in the context of collective bargaining.

In Browne, et al. v. Milwaukee Board of School Directors, et al., Case XCIX, No. 23535 MP-892, Decision No. 18408, Wisconsin

Employment Relations Commission, (February 3, 1981), the Commission considered the propriety of the organizing expenditures at issue here. The Commission stated:

> The expenditures of the Respondent Union in organizing employees in the bargaining unit in which the Complainants are employed undeniably enhances the representative status of the Respondent Union involved in representing all employees in the unit. The more secure a union's majority status remains the more effectively it is able to carry out its responsibilities to those employees it represents in the unit involved.
>
> Organizing employees in other units, involving employees of the same employer, or employees of other employers, seeking recognition or certification as the exclusive collective bargaining representative of employees in said other units, and maintaining said status, also undeniably enhances a union's capacity to deal effectively with the employer of the instant bargaining unit employees. The competitive wages of the unorganized impinge intimately on the extent of benefits which can be successfully negotiated for the instant bargaining unit employees. Increasing the overall size of its organization enables a union to afford better representation in servicing the employees in the instant bargaining unit.
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> Since January 1, 1978 Sec. 111.70(4)(cm), MERA has provided for binding "final offer" arbitration in the event a municipal employer and a union representing its employees are at impasse in their bargaining on a collective bargaining agreement. Said statutory provision requires the mediator-arbitrator to issue a final and binding award to resolve such impasse, and among the criteria to be considered by the mediator-arbitrator, are the following:
>
> > Comparison of wages, hours and conditions of employment of municipal employees . . . with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public

> employment in the same community and in comparable communities and in private employment in the same community and in comparable communities.

Thus it is apparent that, particularly in municipal employment, wages, hours and working conditions applicable to other employees of the same employer, as well as wages, hours and working conditions of employees of other employers, agreed upon in collective bargaining, impact on the results obtained in collective bargaining for the employees in the unit involved herein, even prior to the enactment of the above statutory provision.

It is beyond cavil that defending itself against organizational activities by other labor organizations is essential if the majority representative is to be effective. Although Complainants understandably are offended to make proportionate payments in "civil war" strife between unions and between factions of employees within a unit, these disputes are a fact of life and the ability to exist is a condition precedent to the ability to represent effectively. Similarly, increasing its size by obtaining representation rights in other units enhances a union's ability to provide quality services to the employees it represents.

Participation in the AFL-CIO dispute resolution mechanisms reduces inter-union disputes and serves the objective of labor peace in public employment. The representation of employees in bargaining is big business, and it is sophisticated. It is simplistic to believe that the activity goes no farther than the bargaining table and includes no more than the bargaining unit employees involved herein, or a simple majority of them. The employees have conflicting interests and frequently assert them. The principle of exclusive representation itself is a jurisdictional dispute resolution: it commands the employer to deal only with the majority representative. Internal union dispute resolution devices within and among labor organizations serve the purpose of stabilizing labor relations. Thus, we conclude that expenditures for Respondent Union's activities relating to categories (9)

> through (14), and otherwise permissible expenditures relating to category (15), are properly chargeable to "fair-share" deductions. [Emphasis added.]

At pp. 28-29.

Thus, the Wisconsin Commission held that the organizing expenses were properly chargeable to the fair share agency fee payers.

In Ohio Civil Service Employees Association (December 12, 1988), Arbitrator Peter Florey conducted an arbitration initiated under the AFSCME Hudson procedure. In that case, the arbitrator found that the costs of organizing were properly chargeable and discussed the relationship of these costs to the collective bargaining process. Florey stated:

> In this proceeding the role of organizing is obvious. In Ohio, until quite recently, very few state employees were organized, and no union was recognized as the exclusive representative for any group of state employees. This is in stark contrast to the situation in the railroad industry at the time of the passage of the Amendments to the railway Labor Act which was considered in Ellis. In the last two to three years AFSCME has devoted considerable resources to organizing state employees, winning elections, building a union structure within the newly won bargaining units and negotiating initial agreements covering these employees. The existence of unorganized public sector jurisdictions inevitably affects the wages and working conditions of organized public employees.
>
> On the record of this proceeding, it is clear that the organizing efforts of AFSCME have a direct and tangible impact upon the collective bargaining process. Given this relationship between organizing and the collective bargaining process, it is appropriate that objecting fee payers

> contribute their fair share of the costs associated with organizing. [Emphasis added.]

At p. 3.

In OCSEA, Local 11 (November 20, 1989), Arbitrator David W. Stanton held that the union's theory that it gained strength in numbers was supported by the record in that case. He stated:

> [C]ertain organizing costs indeed increase the power of the Union by yielding benefits to nonmembers by making collective bargaining more effective. The Undersigned is of the opinion, as is supported by the Record, that the Union has met its Burden of Proof by a preponderance of the evidence in establishing, with the exceptions noted hereunder, its chargeable expenses.

At p. 38.

It is interesting to note that the Arbitrator gave deference to prior arbitration decisions where AFSCME International could not establish with "reasonable precision and detail" the basis for its chargeable expenditures since those payments were considered nonchargeable. The Arbitrator in that case, also adopted the "test" established in Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984). The Arbitrator determined that what was properly chargeable are not only those items directly related to collective bargaining but as stated in Abood, "those activities that are germane to the collective bargaining process." In this discussion, the Arbitrator stated that the duties of an exclusive representative are not to be narrowly construed. The Court stated in the Ellis case:

> where employees . . . object to being burden with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an

> exclusive representative of the employees in dealing with the employer on labor management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct cost of negotiating and administrating a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representation of the employees in the bargaining unit. 466 U.S. at 447.

At p. 37.

Hence, the Arbitrator held that the expenses must be given a broad spectrum of coverage when determining what items are indeed "germane to the collective bargaining process."

In another arbitration by Nicholas Duda, Jr., rendered on November 29, 1986 in Eileen Denham, et al. and AFSCME Council 31, the Arbitrator stated at page 31 of his opinion:

> Professor Getman in his testimony in this proceeding repeatedly emphasized the political nature of collective bargaining in the public sector. The critical distinction for Professor Getman, as for the Court in Abood, is not whether the union actively in question is ideological in character. Rather, in determining whether an objecting fee payer may be charged for the activity, a decision maker must determine whether the ideological activity has some reasonable relationship to the collective bargaining process or pursuing matters affecting wages, hours and other conditions of employment. If such a connection is made an onjecting (sic) fee payer can be charged for the activity even though such activity might be considered "ideological".

In the Denham arbitration, an employee challenged the inclusion of expenses associated with AFSCME's organizing activities in the calculation of his fair share fee. The employee relied upon Ellis v. Brotherhood of Railway Clerks, supra, and

213 Cal. Rptr. 326 (Cal. Ct. of Appeals 1985), appeal pending, 215 Cal. Rptr. 652 (Cal. S. Ct. 1985). The Arbitrator distinguished the Ellis case from the case under consideration on the basis that the Supreme Court based its determination that organizing expenses were not chargeable upon its analysis of the legislative history of the Railway Labor Act and not the First Amendment.

The railway industry at the time of the hearings on Railway Labor Act was substantially organized and as such, the union shop would not necessarily strengthen the industry-wide bargaining power. In Cumero, supra, the Court of Appeals held that the impact of organizing upon collective bargaining was too "speculative" to warrant the inclusion of expenses associated with that activity in the calculation of the agency fee. The Arbitrator considered the extensive evidence admitted in the Denham case, as bearing upon the relationship between organizing and collective bargaining in the public sector. Thus, the Arbitrator ruled based on the record of the proceeding, that organizing efforts of AFSCME have a direct and tangible impact upon the collective bargaining process in the public sector. The Arbitrator indicated that the testimonies of Professor Getman, AFSCME Public Policy Director Rob McGarrah, AFSCME Field Services Director Tom Ching, Research Director Linda Lampkin, and Women's Rights Director Diana Rock, supported the propriety of such expenditures.

Finally, in AFSCME Ohio Council 8 (April 14, 1989), Arbitrator Phyllis E. Florman indicated that there was a more direct connection between the activity of organizing and the performance of a statutory duty of the union "in the realm of

performance of a statutory duty of the union "in the realm of collective bargaining" in Ohio as compared with the railway industry. She stated:

> The Ellis Court considered organizing efforts "aimed toward a stronger union" to have only attenuated connection with collective bargaining. However, this is not to conclude that the efforts of a public sector union to be a more effective one are only attenuated. It has been demonstrated that organizing efforts, be they internal or external, defensive or offensive, have a direct impact on being effective, persuasive, and responsible with regard to the concern of the bargaining unit and the collective bargaining process. They are properly chargeable.

At p. 78.

Arbitrator Florman adopted AFSCME's position that the Browne case, supra, be controlling with regard to international organizing:

> expenditures . . . in organizing employees in the bargaining unit . . . undeniably enhances the representative status of the . . . union . . . for the more secure a union's majority status remains, the more effectively it is able to carry out its responsibilities . . . .
>
> With regard to external organizing, Browne stated:
>
> [it] . . . undeniably enhances a union's capacity to deal effectively with the employer of the instant . . . unit employees. The competitive wages of the unorganized impinge intimately on the extent of benefits which can be successfully negotiated for the instant bargaining unit employees increasing the overall size of its organization enables the union to afford better representation . . .

At p. 77.

Based upon the foregoing authorities, the Board majority finds that the costs for defensive and offensive organizing by

majority is persuaded that organizing efforts by AFSCME enure to the benefit of both members and nonmembers of HGEA because such organizing efforts result in increased strength and resources which are in turn available to assist the local affiliates in bargaining and the administration of the collective bargaining agreements.

The Board majority finds that organizing efforts undeniably enhance the union's capacity to deal effectively with the employer of the instant bargaining unit employees. Competitive wages of the unorganized directly affect the extent of benefits which can be successfully negotiated for the bargaining unit employees. In addition, increasing the size of the organization enables a union to afford better representation in servicing the employees of the instant bargaining unit.

Conversely, defending itself against organizational activities by other labor organizations is essential if the bargaining representative is to continue its effectiveness in representing the subject employees.

The Board majority further finds that such activity seeks to prevent a free rider situation where the members of the local union would reap the benefits of the international's success in winning contracts without paying their fair share of the expenses. Moreover, the government's interest in labor peace favors the stability of the relationships involved in defending organizing efforts or raids by other unions.

Lastly, the Board majority finds that charging dissenting nonmembers for organizing costs does not increase the burden upon the employee's First Amendment rights which are already inherent in

the employee's First Amendment rights which are already inherent in a service fee arrangement. The Board majority finds that the organizing efforts are neither political nor ideological in nature but rather are a necessary part of collective bargaining activities intended to strengthen the resources of the union.

Based upon the foregoing, the Board majority finds that the costs of organizing by AFSCME are germane to collective bargaining activity, avoids the free rider problem and does not unduly burden the First Amendment rights of objecting agency fee payers. As such, the Board majority finds that organizing is sufficiently related to terms and conditions of employment within the meaning of Subsection 89-4(a), HRS, to be chargeable to nonmember employees.

CONCLUSIONS OF LAW

The Board has jurisdiction over this petition pursuant to Section 89-4, HRS.

The Board concludes that the HGEA properly charged GONSALVES for expenditures by the International Union for organizing activities.

ORDER

The Board hereby denies the subject petition.

DATED: Honolulu, Hawaii, July 18, 1994.

HAWAII LABOR RELATIONS BOARD

RUSSELL T. HIGA, Board Member

Sandra H. Ebesu

SANDRA H. EBESU, Board Member

Dissenting Opinion

While I tend to agree that organizing efforts by HGEA's national or international affiliate contribute somewhat to building a stronger organization with resources to assist the local union, I cannot ignore the constitutional parameters set forth by the Courts in the authorities cited herein. Therefore, I respectfully dissent from the majority opinion. This is not merely a case involving the interpretation of a unique local statute. Rather, this case involves compliance with constitutional mandates affecting the rights of dissenting statutory dues payers. The following cases make clear that organizing costs of the national affiliate are not chargeable to dues paying nonmembers.

Notwithstanding the language of the Lehnert decision and the arbitration and administrative decisions submitted by the HGEA, every court which has been presented with this issue has denied the chargeability of organizing costs by a parent or national union.

The U.S. Supreme Court in a case decided under the Railway Labor Act found that organizing costs were not chargeable to nonmember employees. In Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984), the U.S. Supreme Court considered whether the challenged expenditures were necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. In holding that the amounts expended for organizing are not properly chargeable to service fees payers, the Court stated:

> The Court of Appeals found that organizing expenses could be charged to objecting employees because organizing efforts are aimed toward a stronger union, which in

turn would be more successful at the bargaining table. Despite this attenuated connection with collective bargaining, we think such expenditures are outside Congress' authorization. Several considerations support this conclusion.

First, the notion that Section 2, Eleventh would be a tool for the expansion of overall union power appears nowhere in the legislative history. To the contrary, BRAC's president expressly disclaimed that the union shop was sought in order to strengthen the bargaining power of unions. "Nor was any claim seriously advanced that the union shop was necessary to hold or increase union membership." Street, 367 U.S. __, at 763, n. 13. Thus, organizational efforts were not what Congress aimed to enhance by authorizing the union shop.

Second, where a union shop provision is in place and enforced, all employees in the relevant unit are already organized. By definition, therefore, organizing expenses are spent on employees outside the collective bargaining unit already represented. Using dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the most attenuated benefits to collective bargaining on behalf of the dues payer. Third, the free rider rationale does not extend this far. The image of the smug, self-satisfied nonmember, stirring up resentment by enjoying benefits earned through other employees' time and money, is completely out of place when it comes to the union's overall organizing efforts. If one accepts that what is good for the union is good for the employees, a proposition petitioners would strenuously deny, then it may be that employees will ultimately ride for free on the union's organizing efforts outside the bargaining unit. But the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Nonbargaining unit organizing is not directed at that employee. Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues. Any free-rider problem here is roughly comparable to that

> resulting from union contributions to prolabor political candidates. As we observed in Street, that is a far cry from the free-rider problem with which Congress was concerned. [Footnotes omitted.]

At pp. 451-452.

Thus, the Court held that the Railway Labor Act does not authorize the union to charge objecting union-shop employees for the union's general organizing efforts as the expenses were not incident to negotiating and administering the contracts or to settling grievances and disputes arising in the bargaining unit.

In Lehnert, the Court held that a public sector labor union in an agency shop arrangement may, consistent with the First Amendment, charge objecting nonmember employees for activities that are germane to collective bargaining activity; are justified by government's interests in labor peace and avoiding "free riders;" and do not add significantly to the burden on free speech that is inherent in an agency or union shop.

While the issue of the chargeability of organizing expenses was not presented on the union's appeal to the U.S. Supreme Court, the U.S. District Court in Lehnert v. Ferris Faculty Association-MEA-NEA, 643 F. Supp. 1360 (W.D. Mich. 1986), specifically held the union's expenditures for organizing were not chargeable to the objecting nonmembers. The union did not appeal the ruling to the Court of Appeals or to the U.S. Supreme Court.

The District Court stated:

> Another issue in contention is public sector organizing. As I have already discussed, the Supreme Court held in Ellis that expenditures related to organizing, both in and out of the bargaining unit, are nonchargeable under the [Railway Labor Act].

> The union defendants in the case at bar seek to distinguish Ellis on three grounds. First, they restate the importance of the distinction between public and private unions, and especially the inability of school employee unions in Michigan to engage in a lawful strike. These defendants argue that the relative strength of a public bargaining unit in this case is more directly connected to their ability to collectively bargain than in the Ellis, private sector union context because the threat of an illegal strike will be taken more seriously by the governmental employer if it knows that a greater percentage of the employees will support the strike. Secondly, the union defendants argue that the majority of the organizing conducted by them in 1981-1982 was aimed at school support personnel--not teachers. In other words, the unions were organizing within the bargaining unit but not attempting to convince objecting non-member teachers, such as the instant plaintiffs, to become members. Cf. Ellis, 466 U.S. at 451-52 & n.13. Lastly, the union defendants distinguish the Ellis decision on this point because the Court's holding with respect to organizing was made under the RLA, not under the Constitution.
>
> While the defendant's arguments regarding the differences between the organizing undertaken in the case at bar and that considered in Ellis are not entirely unpersuasive, this court is not convinced that the differences are so compelling as to justify a contrary conclusion. The Ellis Court stated, in an unambiguous language, that it considered organizing efforts "aimed toward a stronger union" to have only an "attenuated connection with collective bargaining." Id. at 451. This court is satisfied that the constitutional standard of Abood requires a more direct connection. Accordingly, I hold that the union defendants' for organizing are not chargeable to the plaintiffs. [Emphasis added.]

At pp. 1324-1325.

Although the U.S. Supreme Court in Lehnert, 500 U.S. 507, 137 LRRM 2321 (1991), was not presented with the issue before the

Board, the Court defined the guidelines to determine permissible charges to the dissenting employee. The Court stated:

> Thus, although the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations. Hanson and Street and their progeny teach that chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

At p. 519.

The Court further discussed whether the local bargaining representative could charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of the state and national affiliates, even if those activities were not performed for the direct benefit of the bargaining unit. The Court stated:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and information resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any membership year.
>
> The Court recognized as much in Ellis. There it construed the RLA to allow the use of dissenters' funds to help defray the costs of the respondent unions' national conventions. It reasoned that "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its

> affairs, and may consult its members about overall bargaining goals and policy." 466 U.S., at 448. We see no reason why analogous public-sector union activities should be treated differently.
>
> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit . . . .

At pp. 523-524.

While the foregoing dicta in Lehnert, supra, tends to support the HGEA's position, I find it difficult to ignore the lower court's holding regarding the nonchargeability of organizing costs. As the Supreme Court found in Ellis, supra, I would find that the relationship between the alleged organizing costs incurred by the HGEA's national affiliate to promote the ideals of "strength in numbers" and collective bargaining to be too tenuous and not germane to collective bargaining activity. I am mindful that AFSCME already charges a per capita fee to nonmembers and I believe that these fees are properly chargeable because of the services available to the local union. However, the monies spent for organizing should be refunded to nonmembers because it impacts on their First Amendment rights. As such, these costs constitute expenses for ideological purposes unrelated to terms and conditions of employment and should not be charged to dissenting nonmembers.

In Albro v. Indianapolis Education Association, 585 N.E.2d 666 (Ind. App. 2 Dist. 1992), the Court of Appeals in Indiana held that organizing expenses which the teachers' union incurred for new member recruitment and member retention were not

chargeable expenses in determining fair share fees for nonmember teachers.

The Court stated at p. 673:

> IEA admits it cannot charge Teachers for what it terms "offensive" organization expenses (i.e., new member recruitment) but claims it can charge Teachers for "defensive" organization (i.e. member retention expenses). It argues the issue of whether organization expenses are chargeable expenses is controlled by the Court's decision in Ellis. According to IEA, the Ellis decision holds only that money spent on organizing people who are not union members (i.e. "offensive" organization under IEA's terminology) cannot be charged to nonunion members, and, therefore, Ellis implicitly holds that money spent on retaining members can be charged to nonunion members.
>
> The chargeability of so called "defensive" organizing expenses was not an issue in Ellis. Furthermore, organizing expenses, like all expenses that a union seeks to impose upon the nonunion members of the bargaining unit, must survive the three part chargeability standard articulated by the Court in Lehnert. "Defensive" organizing expenses are not chargeable under the Lehnert standard; they cannot survive the second and third prongs of the Lehnert standard. There is no "free-rider" problem associated with "defensive" organizing. The nonunion member does not receive any benefit or satisfaction from having the union incur expenses to retain its members. And charging a nonunion member for activities the union undertakes to convince its members to remain part of the union adds significantly to the burden of free speech associated with the agency shop. A member of the bargaining unit who does not wish to join the union would not want to bankroll the union's efforts to convince its members to remain in the union.

Hence, the Court instructed the lower court on remand to not charge the teachers for any expense incurred for either offensive or defensive organizing activities.

Recently, in Reese v. City of Columbus, 798 F. Supp. 463 (S.D. Ohio 1992), the plaintiffs, nonunion municipal employees, sought a preliminary injunction prohibiting payroll deductions for certain collective bargaining activities. Specifically, the District Court considered the charging of defensive and offensive organizing costs. The Court stated:

> Plaintiffs object to chargeable expense Item 10:
>
> > Defending AFSCME against efforts by other unions or organizing committees to gain representation rights in units represented by unions.
>
> Defendants justify the chargeability of this expense by relying on Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 453, 104 S.Ct. 1883, 1895, 80 L.Ed.2d 428 (1984) in which the Supreme Court approved expenses of litigation "incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit" and of "fair representation litigation arising within the unit, of jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining unit employees and is normally conducted by the exclusive representative."
>
> Defendants argue that if litigation expense in connection with jurisdictional disputes is chargeable, then other expenses incurred in defending against efforts by other unions or organizing committees to gain representation rights in units represented by the unions are likewise chargeable. However, there is a difference between litigation related to jurisdictional disputes and defensive organizing. The former would presumably arise in relation to enforcement of the collective bargaining agreement, and thus would be germane to collective bargaining activity. Defensive organizing would serve only the union's self-interest in perpetuating itself as the sole representative of the bargaining unit, a goal which is not germane

> to collective bargaining activity and which may add to the burden on an objector's First Amendment rights since the objector may favor some other union or no union. Such expenses are similar to the organizing expenses which were disallowed in Ellis. See Albro v. Indianapolis Education Assn, 585 N.E.2d 666 (Ind.App. 1992). Plaintiffs have shown a substantial probability of prevailing on the merits of this claim. [Emphasis added.]

At p. 470.

With regard to offensive organizing costs, the Court stated:

> Finally, plaintiffs challenge expenses Items 22 and 23 which are listed as chargeable to the extent that they meet the three-part test of Lehnert. These expenses are defined as follows:
>
> > 22. Organizing within the bargaining unit in which fair share fee or agency shop payers are employed.
> >
> > 23. Organizing other bargaining units.
>
> While these expense items are prefaced with the statement that they are chargeable only to the extent that they satisfy the three-part test of Lehnert, the Supreme Court expressly disapproved the chargeability of organizational expenses in Ellis, indicating that such expenses can never pass muster under the Lehnert test. Plaintiffs have shown a substantial likelihood of success on the merits on this claim.

Id.

Thus, applying the Lehnert test, the District Court concluded that the plaintiffs were likely to succeed on the merits of their claim and were entitled to an injunction. Thereafter, the District Court granted summary judgment in favor of the nonmembers as to the organizing expenses in Reese v. City of Columbus, 826

F. Supp. 1115 (S.D. Ohio 1993). With respect to offensive organizing expenses, the Court stated:

> The Supreme Court expressly disapproved the chargeability of organizational expenses in Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984). Defendants have attempted to show that, in the context of public employment, organizing is germane to collective bargaining activity because there is a direct linkage between union organizing activity and union bargaining power. The Court rejects this argument finding the linkage attenuated and that requiring nonmembers to contribute to the cost of union organizing would significantly increase the burden on their First Amendment rights. The Supreme Court's decision in Ellis strongly suggests that organizing expenses can never pass constitutional muster.

At pp. 1120-1121.

Finally, while the HGEA relies upon a number of cases decided by arbitrators and administrative agencies, it appears from a review of those cases that extensive evidence was produced. By contrast, only the Auditor's testimony as to AFSCME's tenets are in the record before us without any substantiation as to the actual breakdown of expenditures. I would therefore conclude that the Union failed to carry its burden in establishing the propriety of the organizing expenditures in this case.

For the foregoing reasons, I respectfully dissent from the majority opinion.

BERT M. TOMASU, Chairperson

JOSEPH FRANCIS GONSALVES v. HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO; CASE NO. PD-13-03
DECISION NO. 355
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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