Janus v American Federation of State, County and Municipal Employees

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U.S. Supreme Court Prohibits Forcing Non-Members to Pay Fees to Public Employee Unions

On June 27, 2018, the United States Supreme Court, in the case of *Janus v American Federation of State, County and Municipal Employees*, *Council 31,* swept away more than 40 years of precedent and declared that "agency shop" provisions requiring public employees who choose not to join a union to involuntarily pay service fees to the union violates the First Amendment of the United States Constitution. Some 22 states and the District of Columbia have laws allowing a public employer, such as a school district or municipal government, to enter into an agreement with a union representing its employees to require employees who refuse to join the union to pay a so-called "fair share" fee to compensate the union for services related to collective bargaining. Examples of these collective bargaining activities are: representation at the bargaining table, grievance adjustment, grievance arbitration.

Existing law has long prohibited unions from using these "fair share" agency fees for strictly political activities on behalf of candidates. Nevertheless, agency fees have typically closely shadowed the full amount of union dues. In the case before the Supreme Court, the "fair share" agency fee imposed under the Illinois law on non-members was 78.06% of the full dues paid by union members. The result is that "fair share" payers end up contributing nearly the same amount as union members, but are not permitted to participate in important union business, such as the election of officers. In addition, fair share fees are typically deducted directly from an employees' pay under the "dues check off" provision of the labor agreement.

The Supreme Court's decision in *Janus* makes it illegal for any public employer to require payment of "fair share" or agency fees by employees who have not voluntary agreed to union membership and to the payment of union dues and fees. The decision does not affect other union security devices such as voluntary dues deduction or "maintenance of membership" clauses, which require employees who are union members to remain so for the entire term of a collective bargaining agreement.

Pennsylvania has two agency fee laws. The first, an amendment to the state Administrative Code added in 1988, allows the state government or a school district to include as part of its collective bargaining agreement that non-members pay the union the amount of dues charged to its members "less the cost for the previous fiscal year of its activities or undertakings which were not reasonably employed to implement or effectuate the duties" of the union in its role as "exclusive representative" for purposes of collective bargaining. 71 P.S. Section 575. This statute was followed in 1993 by the Public Employee Fair Share Fee Law that allows deduction of a "fair share fee," described in language identical to as the earlier statute, from employees of any political subdivision, including cities, boroughs and townships. 43 P.S. Section 1102.2. Both laws permit "fair share" payers to challenge the amount of the charges through an impartial arbitration paid for by the union.

The Supreme Court reasoned that many positions a union takes to the bargaining table affect fundamental issues of public policy, including how public money is spent. Key examples are whether teachers' pay should be based on seniority or some merit-based pay system or whether teacher performance should be measured by standardized tests or other means. Should financial pressures of increased costs for medical benefits and pensions be met by budget savings in the form of reductions in benefits or increased taxes? Other controversial issues commonly addressed by unions during collective bargaining relate to sexual orientation, gender identity and minority rights.

The Court analogized its decision in *Janus* to previous rulings that prohibit making support of a political candidate or political party a condition of employment. If the First Amendment forbids old style patronage, how can a public entity extract union fees from non-consenting employees? According to the Court, "When speech is compelled, …individuals are coerced into betraying their convictions."

Applying an "exacting" scrutiny, the Court concluded that a state's interest in "labor peace" is not a sufficient justification for infringement of First Amendment rights, because the union can still be the "exclusive representative" of the entire bargaining unit and abide by its duty of "fair representation" for all bargaining unit members even if the union is unable to compel payments from non-members. Nor was the court persuaded by arguments that abolishing agency fees creates incentives for "free riders." It concluded the risk of "free riders" is simply not a "compelling interest" that justifies infringement of First Amendment rights. The Court reasoned that the advantage to a union of being exclusive representative with control of negotiations of wages, benefits and terms and conditions of employment for all employees – members and non-members – far outweighs any burden placed on the union to provide "fair representation" to non-members. Moreover, allowing a union to be the exclusive bargaining agent for all employees is already "itself a significant impingement on associational freedoms that would not be tolerated in other contexts."

The Court also seemed troubled by ambiguity in determining costs associated with collective bargaining, and, specifically, the use of non-member payments to support membership meetings, conventions and other expenses. The Court concluded that the "line between chargeable and unchargeable union expenditures has proved to be impossible to draw with precision." The Court found "it is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely."

Applying this reasoning, the Court declared agency fees charged to non-members be immediately prohibited as an unconstitutional use of state power:

Neither an agency fee nor any other payment to the union may be deducted from a non-members wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

Effective immediately:

- Public employers must cease deducting fair share fees from employees who have not specifically joined the union or authorized such deduction.
- Employers are strictly forbidden from making payment of agency fees a condition of continued employment.
- Public employers should notify any certified collective bargaining representative that they will no longer collect or require the payment of agency fees or any payments to the union from non-members without specific consent.

In the opinion of the four dissenting justices, the 1977 case reversed by the majority, *Abood v Detroit Board of Education* – an opinion that was joined by conservative Justices White and Rehnquist as well as liberal Justices Brennan and Marshall – was a "paradigmatic example of how the government can regulate speech in its capacity as an employer." The obligation of the union to fairly represent **all** employees in the bargaining unit involves a substantial cost in lawyers, expert negotiators, economists and research staff. How, the dissenters ask, can this financial burden be sustained if employees

can reap the advantages of those efforts and expenses without bearing any of the financial burden? In the dissenters' view, the existing rule prohibiting the use of agency fees for political candidates or ideological causes struck the appropriate balance between the First Amendment and the government's ability to regulate its own workforce. The speech involved in the collective bargaining process is a classic example of speech directed to the workplace, which is not protected to the same extent as speech on public issues directed to the public square. The essence of collective bargaining always involves choices that favors some employees over others. Typical examples are whether a raise should be given in terms of a percentage or an across-the-board-dollar amount for all employees; seniority-based as opposed to so-called merit-based promotions; prioritizing of fringe benefits that favor some employees over others. Accordingly the four justices on the losing side, the Court's decision, in effect, turns all of these choices into "public" issues, deserving of full First Amendment protection.

In the end, however, the critical issue is the decision's ultimate impact on the survival of collective bargaining in the public sector.

The Court majority questions the "assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations," stating that "ample experience, …shows that this is questionable." In contrast, the dissenting justices state that the Court's ruling "creates a collective action problem of nightmarish proportions. Everyone – not just those who oppose the union, but also those who back it – has an economic incentive to withhold dues; only altruism or loyalty – as *against* financial self-interest – can explain why an employee would pay the union for its services."

Recent experience in three traditionally union-friendly states seems to indicate that the elimination of agency fees will diminish union membership. When Michigan passed a right-to-work law in 2012 ending mandatory union membership, active membership of the Michigan Education Association **dropped** by 25%.

Since 2011, when the state of Wisconsin adopted Act 10, which eliminated agency fees and payroll dues deduction along with imposing limitations on collective bargaining by government employees, union membership declined from 14.2% to 8.3%, a drop in 132,000 employees, primarily among teachers and public sector workers.

When the Supreme Court struck down agency fees charged to home based workers who serve private individuals through government programs, 40% of these employees were union members, with the balance paying agency fees. As a result of the Court's decision, the union not only lost agency fee payers, but union membership dropped from 68,000 to 48,000.

Some suggest that unions can rebuild their numbers through better service to and more direct communication with rank-in-workers. Nevertheless, the latest developments represent a blow to organized labor, eliminating a pillar of union support and finance that has been taken granted for many years. Only time will tell whether this is only the beginning of a permanent erosion of public sector unionism.