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JANUS v. AFSCME: U.S. SUPREME COURT DECLARES AGENCY SHOP AGREEMENTS UNCONSTITUTIONAL

The U.S. Supreme Court today overruled four decades of precedent and declared public-sector agency shop agreements unconstitutional, holding the First Amendment is violated when money is taken from a nonconsenting employee for the benefit of a public employee union. The 5-4 decision in *Janus v. American Federation of State, Municipal and County Employees (AFSCME)* means local agencies and public-sector unions can no longer collect union dues or agency fees without the employee's affirmative consent to pay.

The *Janus* plaintiff, an Illinois state employee who was a fair share member of his AFSCME local, argued that collective bargaining by public employee unions is political speech just as much as the lobbying activities exempt from dues under *Abood v. Detroit Board of Education* (1977) 431 U.S. 209. He successfully argued laws requiring public employees to pay to organize and bargain behind an exclusive representative "appointed" by the government – i.e., the recognized bargaining representative – force individual workers to support third-party speech with which they do not agree.

Court Finds Union Activity is Public Speech

The court held all public employee union activity is speech on matters of public concern, whether it concerns the municipal budget, the costs of health insurance benefits and holiday pay, retirement benefits, pay raises, merit-pay for teachers, public safety and even controversial political subjects. Public-sector agency shop arrangements violate the First Amendment by requiring employees who disagree with their union to pay for its advocacy anyway. Employees who object to the union's position on such issues, said the court, cannot be required to "subsidize" that speech.

Therefore, the court said, "States and public-sector unions may no longer extract agency fees from nonconsenting employees." When a government entity deducts dues from the paycheck of a fair-share union member, the agency is violating the member's First Amendment right not to be compelled to support opinions with which the member disagrees.

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Court Rejects "Free Rider" Argument

In California, as in Illinois and other states with laws providing for representation of public employees by exclusive bargaining representatives, the statutory scheme imposes on public employee unions a duty of fair representation of all bargaining unit members, whether full- or fair-share. Thus, under California's Meyers-Milias-Brown Act (MMBA), a public employee union has to represent the interests even of fair-share members in collective bargaining. The court said that duty will continue to exist after the *Janus* decision even for nonmembers.

The court said the First Amendment prohibits local governments from compelling public employees who do not want to join the union to pay dues that subsidize union activities. But even when, as in California, state laws require the union to represent the interests of members and nonmembers alike, the union must allow nonmembers to be "free riders", who get to enjoy the benefits of union representation without paying for them.

However, the court did endorse requiring individual nonmembers to pay for representation in disciplinary actions, grievance proceedings and arbitration. The court cited California Government Code section 3546.3, part of the Educational Employment Relations Act, which allows unions to charge the costs of grievance and arbitration proceedings to any member with a religious objection to paying agency fees. "This . . . alternative," the court said, "if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights."

Where Do Unions Go from Here?

Any public employee union operating under an agency-shop or agency fee agreement can expect, at a minimum, that the local government will stop collecting dues from fair-share members no later than the next pay period. A city or county could decide not to collect dues even from full union members unless it receives an "affirmative consent to pay"; however, the fact a member currently is a full share member may be treated as consent to continue deducting dues and sending those dues to the union.

Unions next must determine the price of non-membership. What benefits should be available to members? What benefits other than collective bargaining should be made available to nonmembers? Since the court approved of charging a "user fee" to nonmembers for some union services, unions may wish to determine the dollar value of those services and make a fee schedule available to nonmembers.

Whether *Janus* will result in great numbers of employees leaving public-sector unions, of course, has yet to be seen. Unions would be well-advised to

continue getting the message out to employees about the benefits of full union membership. Voluntary participation in the union will require active union outreach through social media and worksite visits.

There are changes needed to the MMBA and the other statutes governing public employer-employee relations in California to limit the duties unions are required to perform for nonmembers. There is not yet a provision in the MMBA, for example, allowing unions to charge objectors for the costs of grievances or representation in disciplinary actions. The Legislature may be asked to narrow the scope of representation under the MMBA and other statutes to avoid claims a union failed to represent the interests of nonmembers at the bargaining table.

As predicted by many, the *Janus* decision is the most significant court ruling affecting organized labor and public-sector labor unions in over 40 years. It is likely to give rise to additional litigation, PERB charges and legislative changes in California and elsewhere as unions and the attorneys who represent them try to navigate the new labor landscape.