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AN EARLY HALLOWEEN TRICK FOR CONNECTICUT'S PUBLIC-SECTOR LABOR UNIONS: WILL JANUS V. AFSCME, CO. 31 BE THE END OF THE AGENCY SHOP?

Education Law Notes

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Did Halloween come early this year? Well it just may have for Connecticut's public-sector unions. On September 28th, the United States Supreme Court granted *certiorari* in ***Janus v. American Federation of State, County, and Municipal Employees, Council 31***, thus once again agreeing to hear a case that poses the question of whether union agency fee arrangements – the so-called agency shop -- should be declared unconstitutional under the First Amendment.

In order to understand the potential importance of ***Janus*** a little background is required. An agency shop or agency fee requirement -- also known as a union security or fair share provision -- mandates that all members of a bargaining-unit pay a service fee to the union representing the bargaining-unit whether the employee wants to be represented by the union or not. Typically, this requirement is either statutorily created or included in a collective bargaining agreement. Non-member service fees are then paid to the union to cover the non-member's proportional share of the union's costs of representing the members, but such service fees may not be used by unions to support political or ideological activities.

This agency shop concept, with a reduced service fee for objecting non-union member bargaining-unit employees, is the outgrowth of the United States Supreme Court's 1977 decision in ***Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)**. In that case, the Supreme Court, ruled that objecting public-sector employees have a First Amendment freedom of association right not to be required to support union activities beyond collective bargaining, contract administration and grievance adjustment. As a result, agency fee requirements -- also known as union security requirements -- that require non-members to pay service fees for expenses *beyond* collective bargaining, contract administration and grievance adjustment are unconstitutional.

Over the past five years the ***Abood*** decision has been under what amounts to a legal siege. For example, in ***Knox v. Serv. Employees Int'l Union, Local 1000***, **567 U.S. 298 (2012)**, a conservative majority of the Supreme Court noted that agency shop arrangements amount to compelled speech that "impinges" upon an objecting fee payers' First Amendment rights, and held that the First Amendment requires that public-sector unions may only charge fee payers special, non-regular assessments if the objecting fee payer affirmatively *opts in* to pay such assessments. Two years later, in 2014, in ***Harris v. Quinn***, **134 S. Ct. 2618 (2014)** the

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same conservative majority rejected what it considered to be an expansion of ***Abood,*** holding that non-union member "quasi-public" Illinois home health care workers who are hired by homecare recipients but reimbursed by Medicaid could not be required to pay service fees under an agency shop requirement.

Finally, last March in the closely-watched ***Friedrichs v. California Teachers Ass'n*, 136 S. Ct. 1083 *reh'g denied*, 136 S. Ct. 2545 (2016)** the Supreme Court affirmed a lower Ninth Circuit Court of Appeals' decision that upheld ***Abood****'s* agency shop regime as binding Supreme Court precedent after the justices were deadlocked four-to-four on the question of whether ***Abood*** should be overruled in its entirety. The four-to-four tie vote in ***Friedrichs*** – which came a month after Justice Scalia's February 2016 death -- looks to have been a temporary reprieve for public-sector unions. Justice Scalia heard oral argument on the case and most likely would have cast a fifth vote overturning ***Abood***.

What Does It Mean?

For starters, Connecticut's public-sector labor unions should be afraid – *probably very afraid* – of the ***Janus*** case. Given the recent attacks on ***Abood,*** and with Justice Gorsuch's April appointment to the Supreme Court, there should be little doubt that agency shop requirements – at least in their current form – are on the rocks. If the agency shop falls, union coffers will certainly be at risk. Ambivalent public-sector union members will likely have little incentive to pay what would amount to voluntary dues if they have the choice to pay no dues at all. These "free-riders" would effectively starve unions of funding.

How will Connecticut's public-sector unions respond if ***Janus*** outlaws agency shop arrangements? As my colleague William R. Connon discussed in ***Education Law Notes*** last April, legislation that requires boards of education, municipalities and other public employers to negotiate direct "lump sum" service fee payments to unions instead of individual employee dues' deductions could be one approach. Last year, in apparent anticipation of a ***Friedrich****'s* decision overturning ***Abood***, the Labor and Public Employees Committee of Connecticut's General Assembly introduced **Raised House Bill 5505** which would have explicitly permitted the negotiation of such lump-sum service fees between boards of education and teacher and administrator unions, and also would have freed teacher and administrator unions from any legal obligation to represent non-members in grievance hearings.

Raised House Bill 5505 never made it to the House or Senate floor, but it could be a sneak preview of what's to come if ***Janus*** does away with the agency shop. Stay tuned – big, dramatic changes to the way public-sector unions are funded in Connecticut and across the rest of the country could be on their way in the very near future.

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