

Post-Friedrichs, The Agency Fee Ground Is Still Shaking Mightily, But For A Different Reason

Education Law Notes

04.07.2016

Agency fee contract provisions in collective bargaining agreements that require public sector bargaining unit employees, as a condition of employment, to pay the union for the cost of contract administration, grievance adjustment and collective bargaining, passed constitutional muster in the 1977 U.S. Supreme Court decision, *Abood v. Detroit Board of Education* (431 U.S. 209, 97 S.Ct. 1782). A recent challenge to that ruling, *Friedrichs v. California Teachers Association*, 578 U.S. _____ (2016), failed when the Supreme Court deadlocked at 4 to 4 following Justice Scalia's death. It remains to be seen which direction the Court will eventually take, but the attention the *Friedrichs* case has generated concerning agency fees should not now wane. A different sort of seismic challenge to *Abood* type agency fees is currently causing tremors, and deserves your continuing attention.

Probably anticipating a decision overturning *Abood*, legislation was proposed in Connecticut this year to permit the 169 boards of education to pay the equivalent of agency fees directly to the two unions representing teachers in Connecticut. See House Bill No. 5505 (Raised), to take effect October 1, 2016. As of this writing, this bill has been favorably reported out of the Labor and Public Employees Committee, and is awaiting approval in both houses of the General Assembly. This piece of legislation is designed to avoid the recent constitutional challenge to agency fees based upon the claim that they infringe upon an individual's rights to freedom of speech and association, as protected by the First Amendment. Instead of deducting an agency fee from each unit member's salary, and forwarding those fees to the union, the proposed legislation would permit each board of education to make an annual service fee payment directly to the union. Even more interesting, the amount of the annual service fee would not be limited to just compensating the union for the three services permitted by the *Abood* decision, but could also include reimbursement for costs incurred for supporting ideological causes and political lobbying, as stated in the following excerpt from the proposed bill:

Nothing . . . shall preclude a . . . board of education from making an agreement with . . . [a union] to require such . . . board . . . to pay an annual service fee that represents the costs incurred by such . . . [union] for providing services to employees . . . that may include but need not be limited to, services directly related to collective bargaining for salaries, hours and other conditions of employment, contract administration, professional development services . . . and such other services as agreed to by such local or regional board of education and the . . . [union]. Such service fee shall be calculated as on a per bargaining unit employee basis and shall be paid directly to the . . . [union]. [Emphasis added.]

pullcom.com  @pullmancomley

BRIDGEPORT
203.330.2000

HARTFORD
860.424.4300

SPRINGFIELD
413.314.6160

WAKEFIELD
401.360.1533

WATERBURY
203.573.9700

WESTPORT
203.254.5000

WHITE PLAINS
914.705.5355

Post-Friedrichs, The Agency Fee Ground Is Still Shaking Mightily, But For A Different Reason

If this draft legislation becomes law, the teacher unions would, apparently, be entitled to demand mandatory negotiation concerning the scope of the covered services and the amount of the annual fee. Like any other mandatory topic of negotiation, disputes, presumably, would be resolved in last best offer final and binding arbitration.

A University of Chicago Law Review Dialogue article published in 2015 asks the question in its title “Is *Abood* Irrelevant?” (82 U.Chi. L. Rev. Dialogue 227). The authors engage in a fascinating examination of the tax implications of substituting a direct payment annual service fee for agency fees, as well as a behavioral science related analysis of the two methods of paying unions for their services. But perhaps most interesting is their discussion about government “speech” and the different treatment our body of law, interpreting the First Amendment, has given to payments made by government entities in support of ideological causes, as compared to individuals. It is much less restricted for government entities, at least at this time, hence the design of the proposed legislation which substitutes government payment of fees for individual payments.

One day the judicial branch may, again, be asked to overrule *Abood* and effectively take agency fees away from public sector unions. But today, the Connecticut legislature is being asked to authorize a constitutionally less vulnerable fee collection mechanism, one that Connecticut teacher unions can use to fund an even wider array of services. The *Abood* ground hasn’t stopped shaking; the tremors are simply coming from a different direction. You can be sure all of the municipal unions are watching this bill very carefully – are you?

Posted in Board of Education, CT General Assembly (CGA), CT General Statutes, Federal Legislation, Labor & Unions, Municipalities, U.S. Supreme Court

Tags: Collective Bargaining, CT State Department of Education (CSDE)