The Firehouse Lawyer

Volume 16, Number Six

June 2018 Extra

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Joseph F. Quinn, Editor

Eric T. Quinn, Staff Writer

Quinn and Quinn, P.S. is legal counsel to more than 40 Fire Departments in the State of Washington.

His office is located at:

10222 Bujacich Rd. NW
Gig Harbor, WA 98332
(Gig Harbor Fire Dept., Stn. 50)

Mailing Address:
20 Forest Glen Lane SW
Lakewood, WA 98498

Office Telephone: 253-590-6628

Email Joe at firelaw@comcast.net
Email Eric at ericquinn@firehouselawyer2.com

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Inside this Issue

1. Municipal Roundtable
2. US SUPREME COURT HOBBLES UNIONS

UPCOMING MUNICIPAL ROUNDTABLE

As many of our clients are aware, we put on a quarterly Municipal Roundtable (MR) in which we discuss issues that are relevant to the fire service and municipal corporations, such as counties, cities, and special purpose districts. The next MR will occur on Friday, June 29, 9-11 AM, and will be located at West Pierce Fire and Rescue, Station 31 (headquarters), 3631 Drexler Drive, University Place, WA 98466. We will be discussing the article below. We are also discussing disclosures of medical records to local law enforcement. Such disclosures are highly limited under *Washington law* while these disclosures may be permitted under *HIPAA*.[1] Finally, we will consider the implications of the impending Washington State Paid Family Leave Act. Written materials will be provided.

EXTRA, EXTRA! THE UNITED STATES SUPREME COURT JUST HOBBLED PUBLIC-EMPLOYEE UNIONS

The purpose of this article is to discuss the implications of the *Janus* decision of the United States Supreme Court, issued on June 27, 2018, to public-employee unions in the State of Washington. To discuss the implications of *Janus,* we must (1) state the applicable law; (2) enumerate the relevant

1 https://www.firehouselawyer.com/Newsletters/September2017FINAL.pdf

facts; and (3) apply the facts to the law to reach a conclusion.

Applicable Law

Under Washington law, specifically RCW 41.56.040, the Public Employees' Collective Bargaining Act, public employees have a right to be represented by a bargaining representative of their choosing. Each of these public employees, whether those individuals belong to a union or not, are owed a duty of "fair representation" by their exclusive bargaining representative.[2] *See Midland,* DECISION 12351 – PECB (2015).[3] A collective bargaining agreement **"may…Contain union security provisions."** RCW 41.56.122 (1).

41 years ago, in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), the United States Supreme Court ("Court") held that a public employer could *force* employees who wished not to associate with a union pay fees equivalent to union dues. The rationale for this holding was that non-associated employees benefited from the collective bargaining agreement between the public employer and the union and therefore should pay their "fair share." The *Abood* Court found that in carrying out the duty of fair representation, "the union is obliged 'fairly and equitably to represent all employees… union and nonunion,' within the relevant unit," and this costs money. Hence the need for agency shop—"fair share"—provisions in collective bargaining agreements ("CBA"). In finding that agency shop provisions are lawful, the *Abood* Court noted that "[T]o compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests." After all, a public employee "might have economic or political objections to unionism itself," said the Court. Put another way, agency shop provisions impact the rights of public employees *not* to associate with a union, according to the *Abood* Court. Nonetheless, agency shop provisions were declared constitutional by the *Abood* Court.

41 years later, in a 5-4 split along ideological lines, the *Janus* Court reversed *Abood.* The issue in *Janus* was whether "agency shop" arrangements, in their entirety, should be invalidated under the First Amendment. At issue in *Janus* was an Illinois law which states that bargaining representatives may *force* public employees to "pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment." 5 ILL. COMP. STAT. 315/6(e).[4] The petitioner in *Janus* argued that

[2] Take note that an election by a *majority* of the employees in a bargaining unit to certify a particular bargaining representative is sufficient to require that the elected representative give the same representation to "all public employees in the unit without regard to said membership in said bargaining representative," pursuant to RCW 41.56.080.

[3] To be clear, questions involving the duty of "fair representation" are resolved between the public employee and his or her exclusive bargaining representative, not between the employee and his or her employer.

[4] RCW 41.56 contains no such provision, but instead indicates that a CBA may include "union security provisions," which logically may permit agency shop arrangements—the compulsory payment of "fair share" fees by those unit members not associating with a union. *See* RCW 41.56.122.

the Court could not remedy "futility" separating union bargaining expenses from political expenses. In other words, the petitioner argued that "agency shop" arrangements should be declared invalid in their entirety, not merely those fees that are being remitted for purposes of lobbying the government.

Presumably anticipating that *Janus* would reverse *Abood,* the Washington State Legislature passed House Bill 2751,[5] which was signed into law by Governor Inslee and was **set to become effective** on June 7, 2018. This law states as follows:

> (2) If the employer and the exclusive bargaining representative of a bargaining unit enter into a collective bargaining agreement that:
> (a) Includes a union security provision authorized under RCW 41.56.122 (referenced above), the employer **must** enforce the agreement by deducting from the payments to bargaining unit members the dues required for membership in the exclusive bargaining representative, or, for nonmembers thereof, **a fee equivalent to the dues**;
> or (b) Includes requirements for deductions of payments other than the deduction under (a) of this subsection, the employer must make such deductions upon written authorization of the employee.

(emphasis added). Put another way, despite the holding in *Janus,* sub-section (2)(a) of House Bill 2751 (hereinafter "Sub-Section (2)(a)") would have permitted a public employer to deduct fair share fees from payments made to a represented public employee despite that employee's non-membership in a union, without that employee's consent; furthermore, under sub-section (2)(b) of House Bill 2751, the employee must *authorize* the deduction of "fair share" fees, in writing, if those fees relate to something other than the administration of a collective bargaining agreement—i.e. lobbying and political purposes.

But *Janus* flips labor law, and Sub-Section (2)(a), on its head, by so-holding:

> Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern…*Abood* is therefore overruled…whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that "labor peace" can be readily achieved "through means significantly less restrictive of associational

[5] http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/2751.SL.pdf

freedoms" than the assessment of agency fees.[6]

In other words, the Illinois law above, and similar laws and arrangements in effect across the country, violate the First Amendment and are therefore unconstitutional, in their entirety.

Relevant Facts

Let us pretend that the CBA in effect with your agency includes the following provision:

ARTICLE TWO: UNION SECURITY

New employees hired during the term of this Agreement **shall** within thirty (30) days of their hiring date:

2.1. Become a member of the Union and pay the dues, fees and costs required of Union membership; **or**

2.2 Agree to pay to the Union an amount equal to the dues, fees and costs required of Union membership, in which case, the employee would not be required to join the Union.

Section 2.2 of the above is a classic example of a "fair share" fee provision, which is typically included in the "Union Security" Article of CBAs across Washington State and the country. Such provisions have also been referred to as "agency shop" provisions. Section 2.2 requires an employee, who is part of a bargaining unit, to pay a fee in lieu of union dues in order to receive the same protections as those *unionized* employees who are part of the same bargaining unit.

Application of the Law to the Facts and Conclusion

Sub-Section (2)(a) would have preserved the lawfulness of Section 2.2 above. However, under *Janus,* a public employee may no longer be *compelled* to pay "fair share" fees, regardless of whether those fees are allocated toward administering collective bargaining or lobbying the government. Consequently, under *Janus*, Sub-Section (2)(a) and Section 2.2 are unconstitutional in their entirety.[7] Therefore, the public employer is faced with the argument that Section 2.2 and others like it must be stricken from CBAs across the country.

Agency shop provisions are typically intended to mitigate the "free rider" problem. Justice Samuel Alito, writing for the majority in *Janus*, did not view this as a sufficient reason to override the "associational freedoms" of individual public employees.[8]

[6] See the link the 83-page *Janus* opinion here: https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

[7] Take note that RCW 41.56.110, which was set to be amended by House Bill 2751 on June 7, 2018, does not contain any of the language proposed by House Bill 2751.

[8] Of course, permitting a public employee to enjoy the protections of a CBA without paying for those benefits is akin to permitting an employee that does not pay into a public pension system, such as

Moving forward, here are the implications of *Janus:*

1. Members of bargaining units can receive the benefit of a collective bargaining agreement **without cost,** because Sub-Section (2)(a) and Section 2.2 are unconstitutional;

2. Public employers are not required to subsidize unions or bargaining units, and therefore are not compelled by the law to contribute funds to a bargaining unit that formerly would have been paid by bargaining unit members; the argument could also be made that if public employers opted to subsidize unions or bargaining units with funds that otherwise would have been paid by public employees, that this would constitute an unconstitutional gift of public funds under Article VIII § 7 of the Washington Constitution;

3. Although Washington is a liberal state and public-safety unions and bargaining units espouse a "brotherhood" mentality not necessarily present in other sorts of bargaining units—such as in the education sector—as the New York Times puts it, *Janus* "could encourage many workers perfectly happy with their unions' work to make the economically rational decision to opt out of paying for it"[9]; put another way, unions and public employers should consider this a matter of *economics,* not *politics*;

4. Consequently, and although the interest-arbitration provisions of RCW 41.56 shall remain in effect, bargaining units may have substantially less money to administer CBAs: For example, bargaining units will have less money to hire attorneys, labor representatives or consultants, lobbyists, and other supporting personnel; of course, the Public Employment Relations Commission may look even more favorably upon the plight of workers, given the perceived disadvantages placed upon them by *Janus*;

LEOFF 2, to receive the same pension as a premium-paying employee, which of course is absurd.

[9] https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html

5. Unions may decide to lobby—with available funds—the Washington Legislature for the opportunity to exclude those persons that do not pay "fair share" fees from bargaining units, contrary to the provisions of RCW 41.56.080, set forth above in Footnote 2; but this will be subject to (likely successful) court challenges; furthermore, even if such an effort was successful, there may be an influx of employees that seek to individually negotiate personal services contracts with their employers, to be afforded the same benefits as those members who are part of a bargaining unit. Put another way, labor strife is on the horizon. This is true unless and until public-employee unions, and public employers alike, establish methods for covering any shortfall in union funds applicable to the administration of collective bargaining agreements, or by some miracle, the majority of young public employees—who may not be able to afford the approximately $100.00 that come out of their monthly paycheck toward "fair share" fees—decide to do their part.

In other words, the implications of *Janus* cannot be over-stated. *Janus* will not have the automatic impact of turning every state in this country into a right-to-work state. The impacts of *Janus* will not be felt overnight. However, with the recent retirement of Supreme Court Justice Anthony Kennedy, the Court is likely to look ever-more favorably on right-to-work laws in the coming *decades*. The Court is likely to look ever-more favorably on the viewpoints of organizations that in fact harbor animus toward the fundamental goal of unions: protecting the middle class from abuse by feckless and greedy employers. The time has come for public employers and employees to—even more so—publicly harbor a willingness to foster and/or continue cooperative, fair and prosperous labor relations, despite the economic consequences of *Janus*.

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