FAIR SHARE FEES: WHERE ARE WE NOW?

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Well, the United States Supreme Court has ruled in *Janus v. AFSCME* that it is unconstitutional for fair share fees to be collected from non-consenting public employees. Where does that leave us?

First, a little background. Fair share fees are specifically authorized by Ohio law. Under Ohio law, public employees of a bargaining unit do not have to join the union that represents them. They have the statutory right not to be a union member. However, the union still represents them, whether they are union members or not.

Ohio, like many other states, recognized that it would be unfair to allow non-members to gain all the benefits of collective bargaining and representation by the union, unless all employees shared in the costs of that representation. In other words, there shouldn't be "free-riders," employees who have all the benefits of union representation without any of the associated costs. Ohio Revised Code Section 4117.09(C) specifically addresses the free-rider issue by providing that employees who do not belong to the union may have to pay a fair share fee, which is calculated based upon the expenditures of the union related to collective bargaining or the administration of the agreement (e.g., processing grievances). Fair share fee payers cannot be charged for unrelated expenses, such as campaign contributions or political activities or expenditures not germane to the work of employee organizations in the realm of collective bargaining.

Since at least 1977, it has been legal for public employee unions to collect fair share fees from non-members to support the collective bargaining operations of the unions. As stated in *Abood v. Detroit Bd. of Ed.* 431 U. S. 209 (1977): "Insofar as the service charges are used to finance expenditures by the Union for collective bargaining, contract administration, and grievance adjustment purposes, the agency shop clause is valid."

However, several justices on the Supreme Court have over the last few years signaled that they wanted to review, and then reverse, *Abood v. Detroit Bd. of Ed.* Their opportunity came in the *Janus* case.

Exactly what is the *Janus* decision? Mark Janus was a public employee employed by the State of Illinois. He along with all the other employees in the bargaining unit were represented by AFSCME, although he himself was not a member of AFSCME. Under Illinois law, as a nonmember, he had to pay a fair share fee to the union. However, Janus believed that the union was advancing positions contrary to his own beliefs; for example, negotiating for a pay increase at a time he thought the State was in fiscal crisis and should not be giving out pay increases. He, supported by right to work attorneys, joined a lawsuit alleging that requiring him to pay a fair share fee violated his First Amendment free-speech rights.
On June 27, 2018, the United States Supreme Court agreed with Janus and the right to work

attorneys. It ruled that "The State's extraction of agency fees from nonconsenting public sector employees violates the First Amendment." The Court's summary of its holding was as follows:

> States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay.

Thus, under the *Janus* decision, it now violates the constitutional rights of public employees to make them pay a fair share fee.

So where does the *Janus* decision apply? The *Janus* decision applies only to local unions that have negotiated a fair share provision in the collective bargaining agreement with the public employer. *Janus* does not apply to a local that does not have a contractual provision allowing for the collection of fair shares.

After *Janus*, fair share fee provisions can only be collected if the employee specifically agrees to it. If a union has a bargaining unit member who does not belong to the union, but who really does not want to be a free rider and is willing to pay a fair share fee to support the union (but not necessarily those activities that he disagrees with, such as expenditures on political campaigns, endorsements, etc.), the member can consent to the collection of fair share fees. The Supreme Court made it quite clear that public employees could waive their free-speech rights and allow fair share fees to be deducted or collected.

Be aware that a union cannot just assume that because an employee does not object to the fair share fee, that the employee is agreeing to pay it. To the contrary, a waiver of the employee's constitutional rights will be effective only if the employee affirmatively acknowledges such a waiver and voluntarily states (in writing) that the employee is waiving his/her constitutional rights, including those granted by the *Janus* decision. But if the employee consents, fair share fees can be deducted fro the employee's wages.

Regardless of whether fair share fees are paid, remember that public employee unions in Ohio must represent all bargaining unit employees, whether they belong to the union or not. A ruling that employees cannot be forced to pay fair share fees does not change this; Ohio public employee organizations must still represent all bargaining unit members, whether they pay union dues or fair share fees or not. Declining to represent some employees because they are not union members or are not paying fair share fees would be an unfair labor practice under Ohio law.

Local union leaders, whose collective bargaining agreements contain a fair share fee provision, may be approached by the public employers who ask (demand) that the fair share fee provision be deleted from the agreement or not included in a successor agreement. Don't agree to such a demand. Even though unions may not be able to force employees to pay a fair share fee, that does not mean they should voluntarily agree to remove or delete the fair share provision of their

collective bargaining agreements. Times may change, and fair share fees potentially may be allowed in the future. Perhaps, more importantly, if any employee agrees to waive the constitutional free-speech right granted by *Janus*, the union will still need a provision in its collective bargaining agreement to have the fair share fees deducted and transmitted to the union.

As a result of *Janus*, firefighters do not have to pay fair share fees, and local unions should not coerce or intimidate firefighters to belong to the union or pay a fair share fee. However, every firefighter needs to know and be informed that there are many, many, benefits to being a member of the local, the OAPFF, and IAFF. Not only does the local bargain for members to obtain and protect better working conditions, benefits and wages, but there are many fringe benefits available to local members that are not available to nonmembers. Deferred compensation programs, representation before the Ohio Police and Fire Pension Fund, a college tuition program, and assistance in workers compensation claims are only a few examples of the internal benefits available only to members. Firefighters should know that they now can reside anywhere they want thanks to the efforts of the OAPFF in securing passage of a state-wide residency law, prohibiting public employers from requiring firefighters to live in the employer's jurisdiction. Firefighters who develop cancer now have coverage under workers compensation and pension laws, again thanks to the efforts of the OAPFF and its locals. Regardless of *Janus*, there are a multitude of reasons firefighters should remain members of their IAFF local.