Friedrichs: The End of Public Sector Labor Relations as We Know It?

By James A. Brown

This past June, the United States Supreme Court granted certiorari to hear a constitutional challenge to the requirement that non-union employees must contribute financially to public sector unions that bargain on their behalf. By agreeing to hear *Friedrichs et al. v. California Teachers Association, et al.*,[1] the Court seized the opportunity to overturn a nearly 40-year-old precedent by declaring that such "agency fee" arrangements are invalid.

A victory for the *Friedrichs* plaintiffs has the potential to cripple public sector labor unions. At present, bargaining unit employees may either join a public sector union and pay dues, or reject membership and pay agency fees. If agency fees can no longer be charged, non-membership becomes more attractive, driving down the ranks and revenue of unions.

This article examines how agency fee arrangements are now on the brink of elimination, and also briefly highlights the recent experience of Wisconsin's public sector unions, which can no longer charge agency fees. The article concludes with an analysis of how Justice Antonin Scalia, in *Friedrichs*, may be the unlikely bulwark to protect public sector unions from significant losses.

Agency Fee Origins

In 1977, the Supreme Court in *Abood v. Detroit Bd. of Ed.*[2] first considered the legality of compulsory agency fees in the public sector. The plaintiffs argued that being required to pay agency fees violated their First Amendment rights, and cited their opposition to public sector collective bargaining and the union's various political and ideological activities.

Abood heavily relies on two decisions involving service fees charged to non-union employees in the private sector. In *Railway Employees' Dept. v. Hanson*,[3] the Supreme Court upheld the Railway Labor Act's authorization of union shop agreements that require all bargaining unit employees to share the costs of union representation. In *Machinists v. Street*,[4] the Court limited such fees to "core expenses" related to collective bargaining, contract administration, and adjusting grievances, which were "the reasons...accepted by Congress why authority to make unionshop agreements was justified."[5]

The *Abood* plaintiffs gained a limited but meaningful victory. The Supreme Court unanimously ruled that public employees have a constitutional right to opt out of paying any part of an agency fee intended to finance a union's political or ideological activity. As the Court stated, an employee may not be forced "to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher."[6]

Abood also upheld properly circumscribed agency fees based, in part, on a union's "exclusive representative" status, which was described as follows:

> The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money.[7]

Referencing a union's duty of fair representation, the Court explained that an agency fee "counteracts the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."[8]

Abood Reconsidered

In its 2012 decision, *Knox v. Service Employees International Union, Local 1000*,[9] the Supreme Court's more conservative Justices expressed their lack of support for *Abood*. *Knox* involved a union's temporary, special assessment which was intended to fund a campaign to defeat two ballot initiatives and to elect sympathetic political candidates. Those opposed to paying the assessment could only opt out during the 30-day objection period the following year.

Knox held that non-members cannot be required to pay such assessments unless they first express their "affirmative consent." Writing for the 5-4 majority, Justice Samuel Alito observed that the opt-out system used in *Abood*, was a "remarkable boon for unions" with significant constitutional implications:

> By authorizing a union to collect fees from nonmembers and permitting the use of an optout system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate.[10]

Continuing its broadside against *Abood*, the Court added that public sector unions have no "right" to agency fees

and that the collection of such fees from nonmembers was "authorized by an act of legislative grace" which was "unusual" and "extraordinary."[11] Moreover, the "free rider" rationale used to justify agency fees was deemed "generally insufficient to overcome First Amendment objections" and an "anomaly" to achieving the state's interest in furthering labor peace.[12]

Abood's Near Reversal

Given the Supreme Court's pronouncements in *Knox*, many expected public sector agency fees to be invalidated two years later in *Harris v. Quinn*.[13] While *Abood* managed to survive, the Court left little doubt that the future of agency fees remains imperiled.

In *Harris*, the Court invalidated agency fees for Illinois home care attendants because they were not "full-fledged public employees." The Court noted that the employees' terms and conditions of employment were largely determined by the individual home care customers and were not subjects of collective bargaining. Agency fees, according to the Court, were not intended for *Harris'* non-public employees for whom collective bargaining was "sharply limited."[14]

The narrow holding in *Harris* did not slow the attack on *Abood*. Justice Alito, again writing for a 54 majority, posited that all union speech in the public sector is political, and inquired if a meaningful distinction still exists between "union expenditures that are made for collective bargaining purposes and those that are made to achieve political ends."[15] The Court continued: "[I]n the public sector, both collectivebargaining and political advocacy and lobbying are directed at the government."[16] Bolstering its argument, the Court added that the demand for wages and benefits in *Harris* "would almost certainly mean increased expenditures under the Medicaid program" which is a matter of "great public concern."[17]

Harris also observed that the "free rider" rationale, essential to the outcome of *Abood*, "rests on an unsupported empirical assumption"[18] that a union cannot discharge its duty of fair representation without agency fees, and cautioned that said duty and agency fees are "not inextricably linked."[19] Finally, in what some perceived to be an invitation for another challenge to agency fees, the Court observed that *Abood* was decided on "questionable" grounds which "have become more evident and troubling in the years since."[20]

Wisconsin: The Future?

The recent experience of Wisconsin's public sector unions may foretell what can be expected nationwide if the *Friedrichs* plaintiffs prevail. In 2011, Wisconsin enacted a Budget Repair Bill ("Act 10")[21] that invalidated agency fees for most of the state's public sector unions. Act 10 also sharply limits the unions' collective bargaining to the subject of wages (provided pay raises never exceed the rate of inflation); bars public employers from using payroll deductions to remit union dues; and requires unions to submit to an annual vote in order to maintain their certification.

As anticipated, public sector union membership in Wisconsin swiftly declined. Various factors explain the decline besides the loss of agency fees (including Act 10's gutting of collective bargaining and its increase in employee contributions for retirement and health benefits). Nonetheless, the statistics are striking. One year after Act 10 was passed, the membership of the Wisconsin State Employees Union declined from 22,000 to fewer than 10,000 members.[22] In the three-year period after Act 10's passage, the combined membership in AFSCME Councils 40 and 48 (representing city and county employees) declined by more than half.[23] By 2014, the percentage of all Wisconsin public employees who were union members decreased from fifty percent in 2011 to less than one-third.[24] Certainly, these are sobering statistics for supporters of public sector unions.

Scalia as Swing Vote

The petition for certiorari in *Friedrichs* presents two questions for the Court this term: (1) whether *Abood* should be overruled and public sector agency fee arrangements invalidated under the First Amendment; and (2) whether the First Amendment is violated by requiring public employees to opt out of paying for non-chargeable speech (rather than requiring them to affirmatively consent to paying for such speech).

Justice Scalia may very well be the deciding vote in *Friedrichs*. He joined the majority in *Harris*, but also previously endorsed agency fee arrangements in *Lehnert v. Ferris Faculty Association*,[25] in which he observed that such fees are a necessary outgrowth of a union's duty of fair representation:

> Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them, or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost.[26]

Scalia also observed that a labor union—unlike a civic organization—is obligated to represent everyone, *i.e.*, all employees in the bargaining unit:

> What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects they are free riders whom the law requires the union to carry–indeed requires the union to go out

> of its way to benefit, even at the expense of its other interests.[27]

Will Justice Scalia, having joined the majority in *Harris*, now abandon his past support of agency fees? *Harris* offers no conclusive answer. This is because virtually no collective bargaining was conducted on behalf of the *Harris* employees whose terms and conditions were determined by the home care customers and Illinois law and regulations. As *Harris* states, no showing was made that the homecare attendants' benefits "could not have been achieved" without agency fees.[28] Thus *Harris*, because of its unusual facts and lack of any potential free rider problem, offers little proof that Scalia has abandoned agency fees.

The other looming question is whether Justice Scalia now accepts the assertion that all union activity in the public sector is political speech and thus not chargeable to non-members. The colloquy between Scalia and plaintiffs' counsel during the *Harris* oral arguments is revealing. Scalia asked counsel whether a police commissioner who refuses to meet with a police officer petitioning for a pay raise violates that officer's First Amendment rights? Counsel's response that a "collective" must make the bargaining demand in order for it to qualify as political speech did not seem to persuade Scalia, who expressed skepticism in response to the distinction drawn by counsel: "It seems to me it's always a matter of public concern..., whether it's an individual policeman asking for that or a combination of policemen or a union."[29]

Conclusion

For nearly forty years, the Supreme Court has permitted contractual arrangements that compel bargaining unit employees to make financial contributions to public sector unions to defray the costs of collective bargaining and contract administration. This term, the Court in *Friedrichs* may decide that such agency fee arrangements violate a public employee's First Amendment rights. In the alternative, the Court could rule that non-members cannot be required to pay for a union's political activities without first providing their consent. Recent Supreme Court decisions suggest that the *Friedrichs* plaintiffs, alleging constitutional violations, are well-positioned to see agency fees invalidated. Such an outcome is not assured, however. Witness Justice Scalia's past support of agency fees. Despite the long odds, Scalia may cast the swing vote that upholds the nearly 40-year-old precedent and preserves agency fees for public sector unions.

Endnotes

1. No. 14915 (2015).
2. 431 U.S. 209 (1977).
3. 351 U.S. 225 (1956).
4. 367 U.S. 740 (1961).
5. *Id.* at 768.
6. *Abood*, 431 U.S. at 235.
7. *Id.* at 221.
8. *Id.* at 222.
9. 132 S.Ct. 2277 (2012).
10. *Id.* at 2290-2291.
11. *Id.* at 2291.
12. *Id.* at 2289-2290.
13. 134 S.Ct. 2618 (2014).
14. *Id.* at 2635.
15. *Id.* at 2632.
16. *Id.* at 2632-2633.
17. *Id.* at 2642-2643.
18. *Id.* at 2634.
19. *Id.* at 2640.
20. *Id.* at 2632.
21. 2011 Wis. Act 10.
22. Verburg, Steven, *Rift in WSEU Widens as Prison Guards Try to Break Away, Form New Union*, Wisconsin State Journal, December 2, 2012.
23. U.S. Department of Labor, LM2 forms.
24. http://www.unionstats.com (Union Membership, Coverage, Density and Employment by State, 2011 and 2014).
25. 500 U.S. 507 (1991).
26. *Id.* at 556.
27. *Id.*
28. *Harris*, 134 S.Ct. at 2641.
29. *Id.* at 7:8-7:12.

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