Limits on Union-Backed Political Speech: *Ysura v. Pocatello Education Association*

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When unions collect fair-share fees, those payments often support causes with which nonmembers and dissenting members disagree.

Teachers are not only the most unionized segment of American public employees but also one of the most powerful. Yet, just as the First Amendment's freedom of association clause affords unions the right to exist, its recognizing that employees do not have to join unions creates potential conflicts with the freedom of speech clause.

Free speech concerns associated with collective bargaining become important when unions impose fair-share fees that charge nonmembers for costs associated with the benefits they receive through labor negotiations. When unions collect fair-share fees, those payments often support causes with which nonmembers and dissenting members disagree. Although most people agree that unions should have the right to recoup legitimate bargaining expenses, questions arise as to what limits should be placed on the use of those fair-share fees.

In the face of litigation over their constitutionality, the U.S. Supreme Court has long ruled that unions are free to collect fair-share fees (*Machinists v. Street 1961*). Moreover, the Court determined that unions may collect agency fees as long as they do not use those monies to support ideological activities that dissenting members and nonmembers oppose and that are unrelated to the bargaining process.

The Supreme Court's recent decision in *Ysura v. Pocatello Education Association* (2009)—its fifth case on the status of fair-share fees in educational settings during the past 32 years—should be of interest to school business officials and other education leaders who are concerned with labor relations between teachers and their school boards.

In *Ysura*, the Court placed further restrictions on the ability of unions to spend the fair-share fees of nonmembers by upholding as constitutional a ban on public-employee payroll deductions for political activities at the local level because it furthered Idaho's interest in separating the operation of government from partisan politics.

Given the significant role of teachers unions, this column is divided into three parts. The first briefly reviews Supreme Court litigation on fair share-fees, whereas the second examines its recent opinion in *Ysura*. The third part reflects on what school business officials and other education leaders can do to mitigate labor conflicts while protecting the free speech rights of nonunion members and dissenters who must pay fair-share fees.

The Supreme Court and Fair-Share Fees in Education

The National Labor Relations Act, the federal statute governing bargaining primarily in the private sector, permits agency shop arrangements whereby, after 30 days, nonmembers must pay unions for the services that they render in negotiating terms and conditions of employment for all employees). Following the act's lead, 19 jurisdictions adopted laws allowing teachers unions to collect agency fees in order to receive additional financial support (National Institute for Labor Relations Research 2008), although, as detailed below, three states—Idaho, Ohio, and Utah—have attempted to limit unions' ability to collect fees for union political speech.

As evidence of how contentious the practice is, the Supreme Court has examined the constitutionality of various aspects of fair-share agreements in five cases directly involving education. In its first case on point, *Abood v. Detroit Board of Education* (1977), the Court upheld the constitutionality of an agency shop agreement wherein nonunion members were required to pay a service fee. However, the Court asserted that although unions could collect fees for

legitimate expenses, they could not charge nonmembers to support ideological causes unrelated to bargaining.

In *Chicago Teachers Union v. Hudson* (1986), the Supreme Court reiterated that agency fees could not be used for activities that were irrelevant to bargaining where the procedures that the union used to calculate the fees were constitutionally inadequate. The Court rejected the plan because union officials neither offered adequate information justifying the amount of agency fees nor provided reasonably prompt answers about expenditures and fees.

Lehnert v. Ferris Faculty Association (1991), a case from higher education, clarified which union expenses were chargeable to dissenting members and nonmembers. The Court pointed out that nonunion members could be charged a pro rata share of costs for activities of state and national union affiliates even if they did not directly benefit their bargaining unit. More importantly, the Court specified that the union could not charge objecting employees for expenses of legislative lobbying and other political activities, for litigation, and for public relations activities that were unrelated to the local bargaining unit.

The Supreme Court placed further restrictions on the ability of unions to spend the fair-share fees of nonmembers in *Davenport v. Washington Education Association* (2007). The Court unanimously found that "it does not violate the First Amendment for a State to require that its public-sector unions receive affirmative authorization from a non-member before spending that nonmember's agency fees for election-related purposes" (p. 2383). In maintaining that the disputed statute violated the rights of nonunion members by requiring them to expressly request that their fees not be used to support activities with which they disagreed, the Court posited that the plaintiffs should have been able to enjoy the benefits of union membership without having to support all union activities, since doing so would have reflected the support of members for the political activities of their unions.

Ysura v. Pocatello Education Association

At issue in *Ysura v. Pocatello Education Association* (2009) was the constitutionality of Idaho's Voluntary Contribution Act (VCA) that allowed payroll deductions for public employees for general union dues, but not for union political activities. In response to a union challenge, the federal trial court upheld the ban at the state level but struck it down as to local governments, thereby affecting local school boards. The Ninth Circuit subsequently affirmed that while the VCA was constitutional at the state level it was impermissible as applied to local units of government. In invalidating the VCA, the court applied the strict scrutiny standard that is difficult for governmental units to meet on the basis that the law was insufficiently narrowly tailored to achieve a compelling state interest.

On further review, in a six-to-three judgment, the Supreme Court reversed in favor of the State of Idaho solely on the question of the VCA's applicability to the local level; the unions did not dispute the ban at the state level. Writing for the Court, Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Ginsburg who concurred in part and in the judgment.

Roberts noted that while *Davenport* agreed that restrictions on content based-speech are ordinarily subject to the higher standard of strict scrutiny, it was inapplicable in *Ysura*. He reasoned that the state was under no obligation to engage in what was essentially subsidizing or promoting union speech by requiring non-members and dissenters to pay for speech with which they disagreed. Rather, he acknowledged that while unions are free to engage in free speech, they simply cannot expect local government units to support their activities. To this end, Roberts upheld the ban against payroll deductions as constitutional.

Dealing with the ban at the local level, the Chief Justice explained that the same lower rational basis scrutiny applied to the VCA. Reiterating his earlier analysis, Roberts concluded that since no precedent supports making a distinction between state and local bans, the statute was constitutional because it advanced the state's legitimate interest in avoiding involvement with partisan politics or subsidizing union speech.

Discussion

Litigation about whether unions in states that allow collective bargaining

for teachers can collect fair-share fees involves a delicate balance between two conflicting dimensions of the First Amendment. On the one hand are the rights of individuals to engage in collective bargaining. On the other hand are the rights of non-members and dissenters to not support union speech with which they disagree.

Permitting unions to collect fair share agreements, although equitable since they can recover legitimate costs associated with bargaining, raises significant First Amendment issues, especially with regard to the free speech rights of nonmembers and dissenters. *Ysura* is thus noteworthy because it reinforces that states can require unions to respect the rights of teachers who may disagree with union positions by not being able to collect fees for union political activities.

In upholding Idaho's Voluntary Contribution Act (VCA), the Supreme Court demonstrated its continuing support for protecting the rights of nonunion members and dissenters at the expense of unions. In *Ysura* and its predecessor cases, the justices protected the rights of nonmembers and dissenters from being compelled to fund union speech with which they disagreed while also leveling the playing field by limiting the way in which unions could spend money to support causes of their own choosing.

Clearly, then, *Ysura* represents a limited setback for unions, since it restricts their ability to collect fees for political activities and protects the free speech rights of nonmembers and dissenters by requiring union officials to provide educators with a closer accounting of how their funds are spent.

As noteworthy as *Ysura* may be, it will remain of limited value unless legislators in other jurisdictions follow Idaho's lead in adopting laws that are similar to the VCA. In fact, courts invalidated the only other two state statutes—from Ohio (*United Auto Workers, Local Union 1112 v. Philomena* 1998) and Utah (*Utah Education Association v. Shurtleff* 2008)—that had a ban similar to the one in the VCA. It will be interesting to observe whether legislators in Ohio and Utah are willing to confront unions in resuscitating their older statutes or implementing new laws to safeguard the free speech rights of nonmembers and dissenters not to have to pay fees and then seek their return.

School business officials and other education leaders might wish to consider two overlapping points, since boards can unwittingly become caught between the wishes of nonmembers and dissenters and the unions representing their teachers.

First, in states that do not adopt VCA-like statutes, school business officials and other education leaders should try to ensure that unions identify up front what percentage of the agency fees that they wish to collect are directly attributable to the bargaining process rather than to political activities so they can charge nonmembers and dissenters accordingly. Such an approach is more equitable to nonmembers because it gives them a better sense of how their money is being spent. The net result of having unions clarify how they spend dues and fees unassociated with bargaining is that it will make their activities more transparent and possibly create greater harmony since school employees will be better informed.

The second point addresses the fact that school boards with bargaining units commonly deduct union dues and agency fees from teachers via so-called check-off mechanisms. Members and nonmembers typically sign cards permitting their boards to deduct monies from their paychecks and pass the funds directly to their unions.

By having boards collect their dues and fair-share fees, unions undoubtedly save time and resources that they might otherwise spend gathering those funds. In this way, boards can apply some pressure on unions that are unwilling to comply with voluntarily limiting how they spend, and account for, funds short of complying with a VCA-type law by making it clear that they may discontinue supporting check-off provisions if unions refuse to be more financially accountable to nonmembers and dissenting members.

In conclusion, although *Ysura* may be of limited precedential value, it has the potential to spur a movement by states and local boards to limit union activities to collect fees for political activities at the expense of the free speech rights of nonmembers and dissenters.

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