The Beginning of the End for Public Sector Unions? U.S. Supreme Court Bans Mandatory Union Fees

July 16, 2018 | by Einhorn Barbarito

The U.S. Supreme Court's recent 5-4 decision on June 27, 2018 in Janus v. American Federation of State, County, and Municipal Employees, was a landmark decision finding that laws requiring non-union member public-sector employees to pay "agency fees" to relevant unions, were unconstitutional and invalid as a violation of the First Amendment.

In Janus, the relevant Illinois law in question, like similar union laws in 22 other states across the nation, required that when a majority of public sector employees voted to be represented by a union, the union serves as the exclusive bargaining agent for all of the relevant employees even if a number of employees did not belong to the union, or disagreed with the union's positions. What is more, such non-union employees were also required to pay dues in connection with this representation, based on the indirect benefits they received from the union's collective bargaining efforts.

At the heart of this issue was the potential "free-rider" dilemma, where if employees could reap the benefits of representation without paying dues, potentially more and more employees would opt out of the union, with fewer and fewer employees paying for the cost of representation, thus leading to a decline in the quality of representation, and creating a cycle leading to an eventual collapse of the overall structure.

Justice Alito writing for the majority struck down the Illinois agency fee law, finding that forcing individual employees by law to financially support the expression of views that they disagreed with was a clear violation of their First Amendment rights. Notably, the decision in Janus overruled the longstanding precedent set more than 40 years ago in Abood v. Detroit Board of Ed. (1977), which attempted to strike a balance by splitting mandatory fees into "chargeable" fees that were related to the expenses for collective bargaining, and for which such employees would receive benefits, and separating out "nonchargeable" expenses relating to political and ideological activities. However, the

court in Janus ruled that drawing the lines clearly between chargeable and nonchargeable expenses was often a nearly impossible effort. The court further found that Abood's reliance on the assumption that labor peace could only be achieved by requiring all employees to pay into the union to avoid the anticipated "free-rider" problem was misguided. Notably, the court referred to the many states (28) which did not force all public sector employees to pay into their union, yet had not suffered the anticipated collapse due to "free-rider" issues.

Justice Kagan writing in dissent, argued that the Abood standard had properly struck the balance between protecting first amendment rights and protecting government entities' interest in running their workforces effectively. Justice Kagan warned that the decision would potentially have large-scale consequences, and that the nation's vigorous policy debate regarding the societal usefulness of such unions should be left to the states to decide, rather than being effectively eliminated by the Court.

A decline in membership and funding for public-sector unions will likely occur as a result of this decision which bans mandatory fees for non-members, and effectively allows "free-riders" in all public-sector unions; it is now merely a question of the degree of decline. Union membership has already been trending downwards for decades, and this decision will likely accelerate this trend. As to how public-sector unions will respond, and whether this decision will result in the severe decline portended by Justice Kagan that leads to the end of public-sector unions in the United States, remains to be seen.