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EDUCATION LAW ALERT

U.S. Supreme Court Holds that Non-Union "Quasi" Public Employees May Not Be Forced to Pay Agency Fees to Union

On June 30, 2014, the United States Supreme Court rendered a 5-4 decision holding that the agency-fee provision of the Illinois Public Labor Relations Act (PLRA) violated the First Amendment. *Harris v. Quinn*, No. 11-681, 2014 WL 2921708 (June 30, 2014). The case involved Illinois' Home Services Program (Recovery Program), which allows Medicaid recipients who would otherwise need institutional care to hire a home-care personal assistant (PA) to provide home services. Under the program, home-care recipients control nearly all aspects of employment, while the State—using its subsidy from the federal Medicaid program—pays the PAs for their services.

For the sole purpose of allowing PAs to join labor unions under the PLRA, the State legislature gave Illinois the legal status of an employer. A union was designated as the exclusive representative of the PAs working under the Recovery Program, and the union accordingly entered into collective-bargaining agreements with the State. But the agreements contained an agency-fee provision, which required all PAs who did not wish to join the union to pay a fee for the cost of its collective bargaining activities. Non-union PAs challenged the agency-fee provision as a violation of their First Amendment rights. Upon hearing the case, the Court ruled that non-union home-care PAs cannot be compelled to pay agency fees to a union pursuant to a collective-bargaining agreement negotiated with the State of Illinois when the PAs are not "full-fledged" public employees.

In reaching this conclusion, the Court's majority first distinguished the facts from those that supported its 1977 decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). In *Abood*, the Court held that state employees who choose not to join a public-sector union may be compelled to pay an agency fee to support union work that is related to its collective-bargaining process. Here, however, the majority keenly noted the PAs are quasi-public employees, not "full-fledged" public employees who would be answerable to the State. Unlike traditional public employees—like those at issue in *Abood*—the PAs are mostly answerable to the home-care recipient. The recipient has the power to hire, fire, train, supervise, and discipline the PA; whereas the State merely controls the PA's compensation. Moreover, observed the majority, PAs do not have the same rights and benefits enjoyed by typical state employees, such as the right to be indemnified by the State for claims against them arising out of actions taken during their course of employment. Reasoning that the decision in *Abood* only covers public employees, the majority concluded that *Abood*'s holding could not be applied here, where the PAs are not "full-fledged" public employees.

The majority further noted that *Abood* was premised on an assumption that the union has the full breadth of powers and responsibilities available under the conventional tenets of labor law in the United States. For example, in a case like *Abood*, an agency-fee could be justified by the union's ability to negotiate collective-bargaining agreements and to represent the interests of non-union public employees in resolving disputes and grievances. But here, concluded the majority, such a basis does not support the agency-fee imposed on the PAs. The majority reasoned that the union lacks such an ability to represent the interests of PAs because Illinois law already provides

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a uniform rate of pay for PAs, and the union can only resolve disputes with the State—not the individual home-care recipients, who primarily control the most basic elements of the PAs' employment relationship.

Next, the majority considered whether the agency-fee provision could meet the standards generally applied to First Amendment issues, since the agency-fee provision was not permissible under *Abood*. To make this determination, the majority applied a test derived from *Knox v. Employees International Union*, 132 S. Ct. 2277 (2012). For an agency-fee provision to pass the *Knox* test, the provision must serve a compelling state interest that is unachievable through significantly less restrictive means. The majority rejected both of the State's arguments in favor of the agency-fee as being insufficient to survive "exacting scrutiny" under the *Knox* test.

The majority rejected Illinois' first argument that the agency-fee furthers the State's interest by promoting "labor peace." Here, the PAs were neither challenging the union's role as an exclusive representative nor asserting a right to form a rival union. Rather, the PAs simply sought "the right not to be forced to contribute to the union, with which they broadly disagree." Accordingly, the majority noted the State's labor peace argument missed the point and was not sufficiently compelling because "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked."

Likewise, the majority found little merit in the State's second argument that the agency-fee furthered its interest by promoting the welfare of PAs, which in turn, would purportedly increase the Recovery Program's success. In support of the agency-fee, the State contended the union's efforts have helped PAs by improving their wages, instituting training and orientation programs, and establishing a procedure to resolve grievances arising from the collective-bargaining agreement. Nevertheless, the majority determined that such benefits—on their own—are not enough to pass the *Knox* test. Yet the agency-fee could have survived the *Knox* test only if the union could not have obtained the cited benefits had it been forced to rely on the dues paid by PAs who chose to join the union. The majority concluded Illinois failed to show the agency-fee was necessary to obtain the cited benefits. Consequently, the majority further ruled that the agency-fee could not have survived the *Knox* test's exacting scrutiny, even if the State had indeed been able to show that obtaining the cited benefits was a sufficiently compelling interest.

Finally, the majority dismissed Illinois' argument urging the Court to forego the *Knox* test and, instead, apply a balancing test first pronounced in *Pickering v. Board of Education*, 391 U.S. 563 (1968). According to *Pickering*, a public employee's speech is not protected if it is required by his job or is not made on a matter concerning the public. *Pickering* further provides that a state may not restrict a public employee's speech on matters concerning the public unless the state's interest, as an employer, outweighs the interests of the employee, as a citizen. As the majority pointed out, however, *Pickering* could not be applied because it relates only to public employees, and Illinois is not acting as a traditional employer with regard to the PAs. The majority concluded that, even if the balancing test was applicable, it would not have helped the State's arguments in support of the agency-fee because the provision "unquestionably impose[s] a heavy burden on the First Amendment interests of objecting employees."

The Supreme Court's decision clarifies a limit on the extent to which public-sector unions may exercise control over individuals who have chosen not to join them. As a result, public-sector unions may no longer require non-members, who are not "full-fledged" public employees, to pay a fee for benefits they receive through the union's collective-bargaining efforts. While the majority's decision does not invalidate all public-sector agency-fee arrangements, it does cast some doubt on the issue by questioning whether *Abood* still stands on a solid foundation. Public-sector unions, including those in New York State, may well have an increasing level of insecurity about the continuing vitality of agency-fee requirements. There can be little doubt that the demise of the agency-fee arrangement would negatively affect unions' organizational efforts and coffers.

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