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TRAINING BULLETIN

VOL XII ISSUE No. 5 April 2016

Agency Fees for Public Sector Employees Upheld - for Now

FRIEDRICHS v. CALIFORNIA TEACHERS ASSOCIATION, filed March 29, 2016
Supreme Court of the United States, No. 14-915

By Michael P. Stone, Esq. and Muna Busailah, Esq.

In a one sentence decision that reads, "The judgment is affirmed by an equally divided Court", the most important labor union controversy to reach the Supreme Court in years, ended with a four-to-four split, with no decision or explanation. The Court heard oral argument in Friedrichs in January, and it seemed a five-to-four decision, declaring it unconstitutional for unions representing government employees to charge "agency fees" to workers they represent but who are not members, the culmination of decades of conservative advocacy and litigation, was likely. Then, the death of Justice Scalia left the Court with the even split.

A decision preventing the collection of "agency fees" would have made it harder for unions representing teachers, police and firefighters, and other government workers to maintain their effectiveness by affecting their pocketbooks. As counsel for Friedrichs put it, arguing to the Court, "if anything [public employers] don't want" effective unions, "because nobody wants a strong bargaining partner that's going to drive up public expenditures." Justice Scalia questioned whether "the union would not survive without" agency fees and Chief Justice Roberts asked for proof that "the unions are going to collapse" without agency fees. An amicus brief submitted on behalf of public safety unions had said a defeat "risks setting in motion a union 'death spiral' - as membership drops, the union will have to increase dues to cover its expenses, which will create further incentives for additional workers to quit the union."

Many states actually desire effective and well-resourced unions, even though those unions will be on the other side of the bargaining table. The MMBA, the first law in California giving public-sector employees the right to collectively bargain, was signed into law in 1968 by a former union president, then-Governor Ronald Reagan. As the solicitor general of California explained to the Court during argument in Friedrichs, the MMBA was passed in response to "a long history in California in the '50's and '60s of labor unrest." Implementing collective bargaining proved an effective antidote - research has confirmed collective bargaining curtails strikes and other

disruptions in the public sector. Even more important, when public unions fight for measures that help workers do their jobs safely and effectively, the public benefits too. Employers are less likely to realize these benefits when a union with inadequate resources sits across the table. A union operating on a shoestring will have a difficult time being an effective conduit for the workers its represents. If a union cannot hire lawyers to enforce a Memorandum of Understanding, that will quickly render its protections illusory.

If a state views unions as unhelpful partners, it is free to eliminate or curtail collective bargaining. Most states, however, allow collective bargaining, and twenty-three states have laws that require non-union government employees to contribute to the cost of collective bargaining, even if they disagree with the union demands. Other states have laws that prevent such contributions. These so-called "right to work" laws often result in inferior schools and public services. The irony is, the members of the Court most hostile to agency fees are the strongest advocates for federalism - i.e., giving states a free hand in structuring their public-sector labor relations. Yet these same Justices are the ones who would unilaterally impose a nationwide "right to work" regime.

The practical effect of the decision in Friedrichs will leave undisturbed a ruling by the Court of Appeals for the Ninth Circuit, which had found itself bound by a prior Supreme Court precedent upholding such fees. The decision will leave intact, for now, a system of "agency fees" for non-union government employees in California, that covers the costs of handling employee grievances and bargaining over working conditions and wages, (but not lobbying or outright political advocacy). Since the Friedrichs decision has an uncertain legal foundation, there will be lingering doubts for public workers' unions across the nation about their future until a ninth Justice joins the Court at some point and the issue is revisited. For those concerned about the viability of public-sector unions in California the stakes in the next presidential election just got a bit higher.

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced exclusively in police law and litigation for 37 years, following 13 years as a police officer, supervisor and police attorney.

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