

April 2018

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Michael Klein  
*Stockton University*

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### Recommended Citation

Klein, Michael (2018) "Responding to Janus: Collective Bargaining and Membership Engagement," *Journal of Collective Bargaining in the Academy*. Vol. 0, Article 28.

DOI: <https://doi.org/10.58188/1941-8043.1771>

Available at: <https://thekeep.eiu.edu/jcba/vol0/iss13/28>

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# Responding to Janus: Collective Bargaining and Membership Engagement

Michael W. Klein, JD, PhD

Interim Executive Director

William J. Hughes Center for Public Policy, Stockton University

45<sup>th</sup> Annual NCSCBHEP Conference

CUNY Graduate Center, New York

April 17, 2018

# *Abood v Detroit Board of Education*, 431 U.S. 209 (1977)

## Union-Shop Fee Helps Pay for Union's Duties

[I]n carrying out these duties [negotiating and administering a collective-bargaining agreement; representing the interests of employees in settling disputes; processing grievances], the union is obliged “fairly and equitably to represent all employees ... , union and nonunion,” within the relevant unit. 431 U.S. at 221-22 (citing *Machinists v. Street*, 367 U.S. 740, 761 (1961))

A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it 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. 431 U.S. at 222 (citing *Machinists*, 367 U.S. at 761)

## *Abood v Detroit Board of Education*, 431 U.S. at 224 The Government's Interests

The **governmental interests** advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law. The **confusion and conflict that could arise if rival teachers' unions**, holding quite different views as to the proper class hours, class sizes, holidays, tenure provisions, and grievance procedures, each sought to obtain the employer's agreement, are no different in kind from the evils that the exclusivity rule in the Railway Labor Act was designed to avoid. ...The **desirability of labor peace** is no less important in the public sector, nor is the risk of "free riders" any smaller.

# Balancing Government's Interests with Individuals' First Amendment Rights

Our province is not to judge the wisdom of Michigan's decision to authorize the agency shop in public employment. Rather, it is to adjudicate the constitutionality of that decision. The same **important government interests** recognized in the *Hanson* and *Street* cases **presumptively support the impingement upon associational freedom created by the agency shop** here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us. *Abood*, 431 U.S. at 224-26.



# The Law in New Jersey on “Representation Fee”

In place since 1979:

- C. 34:13A-5.5 Representation fee in lieu of dues
- C. 34:13A-5.6 Representation fee in lieu of dues by payroll deduction

# Statute: C. 34:13A-5.5

## Representation Fee in Lieu of Dues

2. a. Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all nonmember employees in the unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative.

b. The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members. but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.



# The Management Perspective from New Jersey

(This is actually a photo of negotiations between the National Association of Letter Carriers and the U.S. Postal Service for a new National Agreement in 2016, but our negotiations look a lot like this.)



# Collective Bargaining Participants



C. 18A:64-21. The Governor shall continue to function as the public employer under the "New Jersey Employer-Employee Relations Act," P.L.1941, c.100 (C.34:13A-1 et seq.) and through the Office of Employee Relations act as the chief spokesperson on behalf of the State colleges with respect to all matters under negotiation. One representative of the State college sector shall be designated by the Governor as a member of the negotiating team, upon recommendation by the State colleges. L.1986,c.42,s.12; amended 1994,c.48,s.102.

# State Colleges and Universities



**Collective Bargaining Agreement**  
**COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, AFT, AFL-CIO**  
**Article VI, Dues Deduction**  
**B. Representation Fee (Agency Shop)**

h. It is understood that the implementation of the agency fee program is predicated on the demonstration by the UNION that more than 50% of the eligible employees in the negotiating unit are dues paying members of the UNION. If at the signing of this Agreement the above percentage has not been achieved, the agency fee plan will be continued through pay period 26 of the calendar year, after which it shall be discontinued unless the minimum has been achieved prior to that occurrence. Thereafter, if the minimum percentage is exceeded on any quarterly date, i.e., January 1, April 1, July 1 or October 1, the agency fee plan shall be reinstated with proper notice to affected employees. In each year of the Agreement on July 1 an assessment shall be made to determine if the minimum percentage has been exceeded. If it has, the agency fee shall continue until the following annual assessment. If it has not, the agency fee will be discontinued and eligibility for reinstatement shall be on a quarterly basis as provided above.

# Examples of Public Union Membership in New Jersey and Representation Fees

- Stockton University: Over 90% of the full-time faculty are full members of Stockton Federation of College Teachers Local 2275
- New Jersey Education Association
  - 195,000 members
  - Only 2,041 employees (1.05%) opted to pay representation fee
  - Highest dues: \$791 for full-time professional staff, including teachers and administrators
- Statewide: New Jersey has about 344,000 public union members



# Four Issues From the Management Side

- Strikes
- Grievances
- Policy Decision Over Pay for Members/  
Non-Members in Same Position
- The Ping-Pong Ball of Politics



## Government's Interest in Maintaining Labor Peace and Preventing Strikes: What is the Role of Agency Fees?

*Aboud*: The distinctive nature of public-sector bargaining has led to widespread discussion about the extent to which the law governing labor relations in the private sector provides an appropriate model. To take but one example, there has been considerable debate about the desirability of prohibiting public employee unions from striking (421 U.S. at 229)

The libertarian Freedom Foundation, in its amicus brief in *Janus*, argued on behalf of two economists that their research indicates that “right-to-work” states have greater labor peace and fewer strikes than states that permit agency fees. Source: Brief for Freedom Foundation and Economists as Amici Curiae Supporting Petitioners, *Janus v. AFSCME* (No. 16-3638).

# Without Agency Fees, States Will Need Other Incentives to Prevent Strikes

- “As AFSCME’s attorney pointed out in his oral arguments, the agency fee is routinely traded for a no-strike clause in most union contracts. Should those clauses disappear, employers will have chaos and discord on their hands.”
- “‘No-strike’ clauses buy employers a period of guaranteed labor peace. They would be basically unenforceable if workers could quit a voluntary association to engage in a wildcat strike, or join an alternative union that eschews signed agreements to have the freedom to engage in sudden unannounced job actions.”

Shaun Richman (2018, March 1). If the Supreme Court rules against unions, conservatives won’t like what happens next. *Washington Post*.

# Harbinger of Things to Come in Unionized States?

The New York Times

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N.Y. / REGION

## *Jersey City Teachers Go on Strike Over Health Insurance*

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By ELIZABETH A. HARRIS

MARCH 16, 2018

“My 4,000 members have been disregarded and disrespected by the board,” Ronald Greco, the union president, said in a statement. “They are outraged by the board’s behavior, and they refuse to give up or accept it. My members are fighters. They fight for their students every day.”

### Union Statement

“We greatly hope that we can resolve issues around the contract quickly,” the district said in a statement. “While teachers are asking for salary increases and a reduction in what they pay for their health insurance, the district is facing a \$70 million shortfall.”

### District Statement

## Increase in Grievances?

- My observation: Campuses with good labor relationships tend to have fewer grievances filed
- “America’s labor-law arrangement “rewards employers with the ... guarantee of the right to direct the uninterrupted work of the enterprise while union leadership has to tamp down rank-and-file gripes and discord for the length of the contract.” Shaun Richman (2018, March 1). If the Supreme Court rules against unions, conservatives won’t like what happens next. *Washington Post*.

# Disparate or Uniform Treatment of Employees?

Public employers must establish **fair policies with uniform criteria** in managing large workforces. In doing so, the government can either unilaterally implement policies or it can do so by collectively bargaining with employees. Source: Brief for Labor Law and Labor Relations Professors Supporting Respondent, Janus v. AFSCME (No. 16-3638)

## Policy Decision:

- 1) Provide same package of salary and benefits to all employees in the same position, whether or not they are in the union ...or...
- 2) Provide two levels of salaries and benefits: “Same title, same work, different pay”

Lessons from Current Instances of Salary Compression: union members get increases, managers don't. Morale issues between unionized professional staff and nonunionized supervisors



# Consequences of Elections and Influence of Politics on States' Positions

Teachers' unions deserve a “punch in the face” and “are the single most destructive force in public education in America.” NJ Gov. Chris Christie, Aug. 2, 2015, CNN Interview

“And, by the way, as a general matter, we will rebuild this state on the shoulders of our union brothers and sisters.” NJ Gov. Phil Murphy, March 13, 2018, Budget Address



# Back to *Janus*

## 20 States and Washington, DC Support *Abood*

Brief for NEW YORK, ALASKA, CONNECTICUT, DELAWARE, HAWAII, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA AND WASHINGTON, AND THE DISTRICT OF COLUMBIA Supporting Respondent, Janus v. AFSCME (No. 16-3638), filed January 2018

- State governments enacted laws to allow collective bargaining and fair-share fees in response to disruptive public-sector strikes and labor unrest. These laws have succeeded in creating labor peace because states are able to alter them to their individual needs.
- If the Supreme Court finds fair-share fees to be unconstitutional, it would significantly disrupt the states that follow this course of labor management.

# I Look Forward to Our Discussion

Michael W. Klein, JD, PhD  
Interim Executive Director  
William J. Hughes Center for Public Policy  
Stockton University  
Office L-212F  
Office Phone 609-626-3541  
Cell Phone 609-851-6637  
Email [michael.klein@stockton.edu](mailto:michael.klein@stockton.edu)  
Hughes Center <https://stockton.edu/hughes-center/index.html>

