2Q2018

THE PUBLIC SECTOR LEADER

A quarterly publication of Cafardi Ferguson Wyrick Weis + Stotler, LLC.
A full service public and private business law firm.

cfwws.com

THE FUTURE OF FAIR SHARE FEES?

by: Stephanie Fera

The U.S. Supreme Court is currently considering a challenge to so called, "fair share fees," — money that union's collect from public sector workers who choose not to join the union. The case, called *Janus v. American Federation of State, County, and Municipal Employees Council 31*, may rule that the collection of such fees is unconstitutional.

While fair share fees are not supposed to be used for union political activities such as lobbying, Mark Janus, a public employee from Illinois, is arguing that even collective bargaining furthers a political agenda because wages and other terms of employment can affect taxes and the overall governmental budget. Janus claims that as a "forced rider" he must subsidize the union even though he disagrees with its goals and that this violates his First Amendment rights of free speech and association.

This is the second time since 2016 that the Supreme Court was faced with the issue of whether to overturn its 1977 ruling in *Abood v. Detroit Board of Education*, which permitted public sector unions to charge fair share fees to nonmember public employees. The last challenge on this subject was in *Friedrichs v. California Teachers Association* in 2016. The 4-4 ruling in that case was issued just after Justice Scalia died, and most assumed his vote would have been in favor of overturning the prior precedent.

Now, in the Janus case, that tie-breaking decision may be left to President Trump's appointment, Justice Neil M. Gorsuch, causing many to speculate that fair share fees may be ruled unconstitutional. During the sixty-minute argument on February 26, Justice Gorsuch remained silent, but his conservative reputation suggests to many that he will join the other conservative justices in a ruling against the fair share fees.

In Pennsylvania, the Public Employee Fair Share Fee Law provides that "if the provisions of a collective bargaining agreement so provide, each nonmember of the collective bargaining unit shall be required to pay the exclusive representative a fair share fee." 43 P.S. § 1102.3. If the parties agree to such a provision in the collective bargaining agreement (and most agreements do contain a fair share provision), then the public employer deducts the fair share fee from the nonmember employee's pay. If the *Janus* case, which is widely expected to be decided in June, invalidates this law, many public employers in Pennsylvania will have to assess their bargaining agreements. Such a ruling will likely have a huge impact on the state's unions as well, because they draw significant resources from fair share fees. The loss of that money will likely impact their ability to represent their members.

If Janus does change the law regarding fair share fees, public employers should seek legal counsel to review their collective bargaining agreements and to give advice about how to proceed.

CFWW+S
www.cfwws.com
412.515.8900

CAN YOU EVER GET RID OF A UNION?

Union Decertification

By: Stephanie Fera

Legend has it that a Sultan asked his sages to inscribe a stone for him with a truth that would last forever, and they returned to him with a tablet bearing the words: "This too shall pass away." Nothing lasts forever, and public sector unions do occasionally fizzle out. Knowing when this is happening and what, if anything, you should do can be tricky.

A public employer with a good faith basis to believe that the majority of employees within a certified collective bargaining unit do not wish to be represented by the union, may file a Petition for Decertification with the Pennsylvania Labor Relations Board (PLRB), subject to certain restrictions. But the employees themselves can do the same thing and often their effort will be viewed with less skepticism than yours as the employer. Reading the signs coming from your employees requires some deftness because employers are prohibited from coercing employees into action against the union. Encouraging them away from the union or repeatedly asking them why they do not throw them out is a sure recipe to run afoul of the law. And, as a strategy, generally will not work.

To approach an issue of union decertification, you must have a "good faith doubt of majority status." This requires a review of the totality of the circumstances involved and a demonstration "that [the employer] has some reasonable grounds for believing the union has lost its majority status since its certification." *In the Matter of the Employees of Bath Borough*, 48 PPER ¶ 55. It also requires that "the majority issue must not have been raised by the employer in a context of illegal antiunion activities or other conduct by the employer aimed at causing disaffection from the union" or to gain time to otherwise undermine the union. *Id.*

The employees are in the driver's seat on this issue. The law is intended for them to have the representative of their choice and they are also free to choose *not to be represented*. Where a union is in place and it is failing to serve its members to their satisfaction, the employer's role is one of support and education, not coercion or even direction or advice. Moreover, promising that "things will be better" or similar enticements must be studiously avoided because those are seen as evidence of illegal coercion.

That said, employees who are unhappy with their union tend to ask the employer if it knows how employees can remove or replace it. Answering that question honestly is permissible. Many times that answer is the catalyst they need to take the next step towards decertifying their union. As noted, the employer can also take the same step, and there are circumstances where this makes sense. Each situation has to be evaluated on its own facts and these cases are ones that require guidance form experienced legal counsel.

No matter what the circumstances, being armed with a little basic knowledge can really help. There are some rules of the road to keep in mind and the first of those are the timing rules: A petition for decertification cannot be filed during the term of any collective bargaining agreement for three years or less. 43 P.S. § 1101.605(7)(i). The petition must also be filed within a mandatory timeline.

The timelines are different under Act 195 and Act 111. Under Act 195, petitions may be filed within a thirty-day window, spanning from "not sooner than ninety days or later than sixty days before the expiration date of any collective bargaining agreement." 43 P.S. § 1101.605(7)(ii). For most public employers with contracts expiring December 31st, that would require the filing of the petition between October 2nd and November 1st.

Under Act 111, the PLRB has adopted the contract bar rule annunciated in *O'Hara Township*, 9 PPER ¶ 9073 (Order for Election 1978), *aff'd* 14 PPER ¶ 14102 (Court of Common Pleas of Allegheny County, 1983). The *O'Hara* opinion establishes a window period of 30-60 days prior to the time when bargaining must commence under Act 111, which is June 30th. Therefore, the window period for filing a decertification period would be between May 1st and 31st.

In addition, under either Act 195 or Act 111, a petition for decertification may be filed after the expiration date of a collective bargaining agreement until such time as a new agreement is made. 43 P.S. § 1101.605(7)(ii); *Conference of State College Police Lodges v. Pennsylvania Labor Rels. Bd.*, 719 A.2d 1122 (Pa. Commw. 1998).

If the union has lost the support of a majority of the employees and the timing provisions can be followed, either the employer or the employees can file a petition with the PLRB asking for an election. That election may (and sometimes does) result in the decertification of the union.

The Pennsylvania Labor Relations Board uses standard forms for all petitions, and they are available on the PLRB website: www.dli.pa.gov. If your employees are not being served by the union and you think decertification might be appropriate, please call use to discuss your case.

AROUND THE COMMONWEALTH

The potential litigation against opioid manufacturers continues to be a hot topic. The County Commissioners Association is making efforts to help counties understand the current state of this issue, and several counties have had either group or direct discussions with the PA Attorney General's Office. Counties should call us at (412) 328-5853 if they want further information about this important topic.

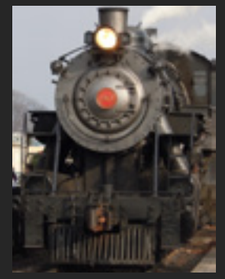
The jurisdiction of sheriffs and deputy sheriffs is being considered in the General Assembly. Take a look at HB 466 (Session of 2017) for more information, and consider its impact on county sheriffs and police operations in your municipality. HB 466 was removed from the table on 4/18/18. More on the jurisdiction of sheriffs and their deputies in the next issue.

In Pennsylvania the time for reviewing collective bargaining agreements that expire at the end of this year is now. Under both Act 195 and Act 111, the bargaining calendars begin after June. The Public Sector Leader will include detailed information about the statutory calendars in the next issue. Counties and municipalities should use the Spring to begin preparing their goals and objectives, as well as determining who will be on their bargaining teams.

COUNTIES: If you are coming to the CCAP Annual Conference in Gettysburg PA, be sure to stop by and see us under the Big Tent on Sunday, August 5! We will have delicious food and the great local jazz band, *The Anthony Pieruccini Trio.*

WHERE IS IT?

This iconic engine was built by Baldwin Locomotive Works in Philadelphia in 1924. It spent much of its career hauling freight in Colorado and is now part of a wonderful attraction here in our great Commonwealth.



Can you guess where it is?

(Find the Answer on the last page.)

SOLICITOR'S CORNER: PUBLIC COMMENT

By: John Rushford

We often receive questions and concerns about how to handle public comment correctly and efficiently during a public meeting. The Sunshine Act provides:

> (a) General rule. —. . . the board or council of a political subdivision or of an authority created by a political subdivision shall provide a reasonable opportunity at each public meeting for residents of the political subdivision or of the authority created by a political subdivision or for taxpayers of the political subdivision or of the authority created by a political subdivision or for both to comment on matters of concern, official action or deliberation.

65 Pa.C.S. § 710.1(a).

There are six points to remember under the public comment section of the Sunshine Act. First, public comment must occur *prior to* official action or deliberation. The board or council must provide a reasonable opportunity for comment before a discussion or vote occurs on an agenda item. This effectively means that there must be a comment period at the beginning of the meeting. There may be good reason to have a second comment period at the end of the meeting, but it is not required. In addition, and a requirement often missed, the public must be permitted to comment on items that are added to the agenda even where this occurs during the meeting(after initial comment is closed). For example, if a motion is added to the agenda during a public meeting, then *before* deliberating or voting upon the motion, the board or council must ask if any residents or taxpayers have any comments concerning the newly added motion.

Second, the Sunshine Act grants residents and tax payers of the municipality or authority the opportunity to make public comment. This means those who reside in the municipality and those who do not reside in the municipality but pay taxes to the municipality, like owners of businesses located in the municipality, are afforded the right to comment.

Third, public comment does not require a response from the governing body. There is no requirement that the board or council reply to a resident's or taxpayer's comments. Engaging in back and forth banter creates hostility and becomes the expectation of the public. Picking and choosing which questions to answer can be even worse, creating the appearance of disparate treatment among your residents and taxpayers. And, you run the risk of providing incorrect information. Simply thank the resident for the comment and if action is required state: "Thank you for your comment; we will look into the matter and staff will get back to you, if necessary." If you are consistent in this response, the public will react accordingly. Your minutes should reflect the name of the person making the comment and the subject matter of the comment. A summary or transcription of the comment is not required.

Fourth, if there is a significant amount of comment and there is not sufficient time to entertain all the comment, then the board or council may defer comment to the next regular meeting or to a special meeting occurring in advance of the next regular meeting. As a practice, delaying comment to a subsequent meeting should be a thoughtful decision. Delaying comment could give the public the impression that their comments are not important or are a nuisance, potentially inflaming an already tense situation. Conversely, delaying comment can prevent the complete disruption of the meeting and may give time for cooler heads to prevail. Different circumstances may warrant different approaches.

Fifth, set a reasonable time for the comment of each person. Three minutes is typical, but four or five minutes may work also. Whatever the time it must be reasonable and you should consistently apply the rule to all persons who wish to speak.

Sixth, the Sunshine Act permits the public to lodge objections to the way in which comments are treated. Don't let this surprise you or derail the meeting. Be prepared for it. Objections can be made "at any time." That is not to say that objections can be used to interrupt speakers or hijack the meeting. However, give the objector the opportunity to state the objection and record the objection in the meeting minutes.

These six issues can be effectively addressed by the adoption of meeting rules. Rules are authorized by the Sunshine Act and can be adopted by resolution of the governing body and should be publicly discussed and posted in the meeting area. Of course, consistency in application is the key to maintaining control over public comment.

As Judge Ambrose stated in *Miller v. North Belle Vernon Borough*:

> "[A]public body may confine meetings to a specified subject matter and may restrict repetitive, disruptive and truculent behavior. "Restricting such behavior is the sort of time, place, and manner regulation that passes muster under the most stringent scrutiny for a public forum. Indeed, for the presiding officer of a public meeting to allow a speaker to try to hijack the proceedings, or to filibuster them, would impinge on the First Amendment rights of other would-be participants."

Miller v. North Belle Vernon Borough, 2009 U.S. Dist. LEXIS 33902, *7, 2009 WL 1082093 (citations omitted).

If handled correctly, the public comment portion or portions of a public meeting can allow for the council or board to understand its residents' and taxpayers' concerns, and it can afford residents and taxpayers the opportunity to be acknowledged and heard by their elected officials.

JURISDICTIONAL CROSSHAIRS:
SHERIFF DEPUTIES, POLICE AND SHARED SERVICES

By: Neva L. Stotler

It's difficult to imagine a more important area in which to share municipal services than law enforcement. If you have a police department it is the single largest item in your budget. And it's likely at the top of the heap for employee grievances, lawsuits and work-related injuries. Sharing personnel, equipment, training and schedules in a geographic region should make sense, and, it may under certain circumstances. All too often in joint agency endeavors complicated issues of jurisdiction, authority, cost and liability are left unaddressed or insufficiently addressed. The result is that criminal cases are jeopardized and local government officials do not understand or plan for the cost and liability that comes with "joint task force"work.

Multi-jurisdictional task forces that include local police and county sheriffs present practical challenges to joint work. For instance, as a general matter, deputy sheriffs are not legislatively assigned powers and jurisdiction similar to municipal police, and so their role within the task force and jurisdiction are different than municipal police. This is a difference that must be considered in structuring cooperative law enforcement arrangements.

Municipal police are vested with powers consistent with the Municipal Police Jurisdiction Act ("MPJA"), 42 Pa. C.S.A. §8951 *et seq*. A municipal police officer is broadly defined as any person "properly employed" by a "municipality" (42 Pa. C.SA. §8951), to exercise the powers of police within the primary jurisdiction (territorial limits) of the employing municipality.42 Pa. C.S.A. §8951. There are exceptions to primary jurisdiction for municipal police that permit wider jurisdiction. A municipal police officer can act beyond his/her territorial limits when there is an order of court; in hot pursuit; there is a need to assist other local, state, federal or park police officers; with prior consent of the chief law enforcement officer of a law enforcement agency that has primary jurisdiction; or crimes are committed in their presence. 42 Pa. C.S.A. §8953(statewide jurisdiction). Obviously, no written agreement is needed for multiple law enforcement jurisdictions to respond to an emergency, if one of these exceptions apply. That is not to say that the same issues of liability, cost, and jurisdiction go away, but the purpose of the MJPA—cooperation—is achieved by providing for a quick response to the emergency, leaving the other issue to be resolved later. The MJPA contemplates joint cooperative agreements as a way to coordinate planned tactical operations among different jurisdictions.

Workers' Compensation Insurance is required in Pennsylvania. The policy and the law define which employees and work are covered. It is important to clearly define when law enforcement personnel are working for the employing municipality and when they are working for the joint task force so that there is clarity as to which workers' compensation policy covers training and operations, or, at least, understand the potential liability for work related injuries. This may require a discussion with the carrier. The risks of not doing so include jeopardizing coverage, negatively impacting rates of coverage, and assuming unplanned expenses and manpower shortages. Similarly, Heart and Lung Act, 53 P.S. § 637 benefits apply when law enforcement officers are injured during in the performance of their duties. "Performance of their duties" may include joint task force operations sanctioned directly or impliedly by the employing local government.

The Fair Labor Standards Act as well as collective bargaining agreements require the payment of overtime, or compensatory time, at least for hours worked over 40 in a work week (and often for hours worked over 8 in a day per the CBA). If your employees are working joint task force assignments, you must account for the overtime consistent with the law and the CBA and make sure that the hours worked are tracked according to the Fair Labor Standards Act. An agreement in place can impose the same time keeping practices as you have at the police department, as well as determine how and who pays for overtime.

Liability for police work is significant. Litigation that arises under theories related to police work is costly. Moreover, your insurance coverage for police may not contemplate police work that is outside of regular employment. This requires a discussion with the carrier. Additionally, to defend litigation against the member local agencies that may arise from joint task force work, the participating member agencies need to insure that the appropriate training and policies apply to the task force work just as they would to regular police work.

For multi-jurisdictional law enforcement work, a detailed shared services agreement is essential to addressing assignments (jurisdiction and role), liability, workers' compensation coverage and overtime. Multi-jurisdictional agreements are subject to the requirements of the Intergovernmental Cooperation Act, 53 Pa. C.S.A. §2301 *et seq*. Two or more local government entities may jointly cooperate in the performance of "their respective governmental functions, powers or responsibilities." 53 Pa. C.S.A. §2303. Local government is broadly defined as "a county, city of the second class, second class A and third class, borough, incorporated town, township, school district or any other similar general-purpose unit of government created by the General Assembly after July 12, 1972." 53 Pa. C.S.A. §2302. An ordinance is required to implement a multi-jurisdictional cooperation agreement. The ordinance essentially adopts the joint cooperation agreement, making it effective and enforceable in the enacting jurisdiction.

If your jurisdiction wishes to accomplish law enforcement objectives cooperatively with other local government entities, including with the assistance of county deputy sheriffs, the following questions drive the formation of a well drafted cooperative arrangement to accomplish the given law enforcement objectives:

- Who can participate?
- How are wages and overtime handled for training and operations?
- How are time and schedules managed?
- What are the participants' duties, e.g. deputy sheriffs may conduct transports, serve warrants, etc.?
- What training is required and who pays for it?
- What uniform should be worn and whose equipment used?
- How is equipment selected or purchased?
- What standards and procedures apply to the joint work?
- Who pays for workers' compensation insurance for training and operations?
- What command structure is used?
- How are positions filled in a given response?

These questions are not just questions for the members of the joint task force; they are questions to be answered by the government agencies participating in the cooperative effort. The answers to the questions should become a part of an agreement that assists in mitigating unwanted or unintended liability.

WHERE IS IT ANSWER:
This is Locomotive No. 90 at the Strasburg Rail Road, Lancaster County. A great place to visit! (StrasburgRailRoad.com).

This quarterly publication brought to you by
Cafardi Ferguson Wyrick Weis + Stotler, LLC.
cfwws.com