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Charles J. Russo

University of Dayton, crusso1@udayton.edu

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Fair Share Fees, Teacher Unions, and the Supreme Court

By Charles J. Russo, J.D., Ed.D.

Disputes over whether teachers who are not union members must pay for the benefits they receive under their bargaining contracts continues—and likely will continue well into the future.

Disputes over whether teachers who are not union members must pay for the benefits they receive under their bargaining contracts have been litigated for almost 40 years.

Amid conflict over the ability of teachers' unions to collect fair share fees from nonmembers, the Supreme Court re-entered the controversy in *Friedrichs v. California Teachers Association* (2016), leaving the door open to future litigation on the status of fair share fees.

Fair Share Agreements

An important issue for unions is paying for bargaining-related costs, especially if these expenses result in providing benefits to nonmembers. In seeking to offset bargaining expenses, unions charge nonmembers agency or fair share fees covering their proportionate share of costs related to negotiations. These fees, which amount to less than dues, are based on the idea that nonmembers should be unable to obtain benefits through union efforts without paying their fair share of costs.

Some teachers are unwilling to pay fair share fees, saying that fair share fees violate their First Amendment rights by forcing them to engage in compelled speech when they must help to pay for union activities with which they disagree.

Fair Share Fees and the Court

Abood v. Detroit Board of Education (1977) was the first Supreme Court case on fair share fees in public education. In *Abood*, the Justices interpreted the First Amendment as permitting fair share fees as long as teachers' unions do not use these monies to support ideological activities unrelated to the negotiations process opposed by nonmembers.

The Supreme Court examined procedures established to effectuate the collection of dues

and fair share fees in a school setting in *Chicago Teachers Union, Local No. 1 v. Hudson* (1986). The Court invalidated a rebate system designed to return funds unrelated to bargaining to nonmembers because it risked having the money used, even temporarily, for union purposes. The Justices rejected this system because it offered inadequate information to justify the amount of agency fees charged and failed to provide reasonably prompt answers about expenditures.

In a case from Michigan involving a faculty union in a public college, *Lehnert v. Ferris Faculty Association* (1991), the Supreme Court addressed the activities for which nonmembers can be charged. In requiring chargeable items to be related to bargaining, the Justices allowed a union to bill nonmembers for costs associated with chargeable activities of its state and national affiliates such as for publications dealing with bargaining, teaching, and education generally; professional development; and employment opportunities. The Court refused to permit the union to charge nonmembers for the costs of lobbying and general public relations activities.

Friedrichs v. California Teachers Association

Friedrichs involved a challenge to fair share fees under a California statute allowing unions to charge nonmembers for bargaining expenses. This law permits nonmembers to petition unions to opt out of the non-chargeable portions of their fair share fees by seeking rebates for costs not associated with bargaining.

Public school teachers who resigned from their unions because they objected to paying for activities with which they disagreed, joined by like-minded members of a nonprofit organization serving Christians who worked in public schools, challenged

the fees. The plaintiffs sued their local union, its officials, the California Teachers Association, and the National Education Association. The teachers claimed that having to pay agency fees violated their rights to free speech and association because they had to submit to opt-out procedures to avoid contributing to non-chargeable union expenses.

A federal trial court in California wrote an unpublished opinion in resolving *Friedrichs* (2013). The court noted that under state law, once a majority of employees in units choose exclusive bargaining representatives, they can form agency shops. In agency shops, all “shall, as a condition of continued employment, be required either to join the recognized employee organization or pay the fair share service fee (Cal. Gov’t Code § 3546(a), 2015),” usually an amount about equal to union dues.

In response to the unions’ motions for judgment on the pleadings, the

court relied on *Abood* and an earlier case from California and the Ninth Circuit in upholding union opt-out procedures because they protected the First Amendment rights of nonmembers to object to paying full agency fees. Insofar as neither party disputed the court’s reliance on these cases as precedent, it granted the union’s motions, essentially dismissing the claim.

On appeal, in an unpublished, two-sentence opinion, a unanimous Ninth Circuit summarily affirmed *Friedrichs* (2014) in favor of the unions. The panel decided that insofar as it and the Supreme Court had already resolved a similar case, the dispute lacked merit.

When the teachers sought further review, the Supreme Court agreed to hear an appeal (*Friedrichs* 2015). In an equally divided opinion, the Court affirmed in favor of the union, thereby rendering *Friedrichs* precedent-setting and binding only in the Ninth Circuit.

Reflections

Following *Friedrichs*, unions retain the right to collect fair share fees from nonmembers. Yet, a question remains about what limits can or should be placed on how unions use funds from nonmembers, or dissenting members, as compelled speech. This situation exists because when duly elected bargaining representatives or unions approve contracts, nonmembers and dissenters have little recourse other than relying on opt-out procedures, even if claiming that their monies are spent on causes with which they disagree, in possible violation of their First Amendment rights. *Friedrichs* may spur leaders to wonder whether they should consider the views of nonmembers and dissenters.

Insofar as fair share fees have survived, *Friedrichs* may motivate union leaders to re-think how they operate if they want to prevent more teachers from opting out of membership in trying to avoid paying



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dues. The result is that union leaders may have to make greater efforts to recruit and retain members, thereby impacting their ability to raise funds and preserve their clout. If union officials do not consider the views of nonmembers and dissenters, they may face declines in receipts from membership dues even as they collect fair share fees. Such a decline could limit the ability of unions to remain as key players in educational labor relations. Consequently, unless union leaders consider a different approach, they may weaken their ability to engage in collective bargaining.

On another note, Justice Scalia's death cast a sense of uncertainty over a Supreme Court that has been fairly

evenly divided in recent years. Without Scalia, the Court faces the prospect of a series of deadlocked cases leading to additional litigation. Insofar as more challenges are likely to arise to fair share fees, the outcome of these, and other, cases may depend on who fills the vacancy created by Justice Scalia's death (Somin 2016).

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Charles J. Russo, J.D., Ed.D., Joseph Panzer Chair of Education in the School of Education and Health Sciences (SEHS), Director of SEHS's Ph.D. Program in Educational Leadership, is adjunct professor in the School of Law at the University of Dayton, Ohio. Email: crussol@udayton.edu

THE STATE OF FACILITIES

Earlier this year, SchoolDude conducted a survey of facilities managers and decision makers in educational institutions, including public K–12 districts, charter schools, private and independent schools, community colleges, four-year public universities, and four-year private universities. The following departments were represented:

- Maintenance and facilities
- Physical plant
- Buildings and grounds
- Business operations
- Finance
- Events/facility use
- Superintendent's office

SchoolDude received 385 responses to the survey: 79.74% from K–12 schools and 20.26% from higher-education organizations.

The results of the survey reveal a host of challenges that schools and colleges face as they operate and maintain facilities and infrastructure to support the business and educational goals of their institutions. The following were among the key K–12 findings of this inaugural research:

Facilities Landscape

- K–12 schools face the task of maintaining an aging facilities infrastructure. The average age of K–12 facilities is 38 years.
- Technology is having an increasingly profound effect on how classrooms and work spaces are being designed. Of the K–12 respondents, 78% said technology is likely to affect classroom redesigns over the next year, involving both the facilities and technology departments.
- Approximately two-thirds of K–12 facilities' operations run both evening and night shifts in addition to daytime hours.
- The overwhelming percentage of maintenance is done in-house. About 51% of custodial functions are centralized within the physical plant, maintenance, and operations, whereas 34% are distributed (managed at every location by the local administration).
- The average age of facilities staff is 45 and the average tenure is 12.5 years.

Facilities Budget and Staffing

- As a proportion of the overall school budget, maintenance and operations (M&O) average 10% for K–12 institutions.
- During the past five years, a higher number of K–12 institutions reported their M&O budgets increased (38%) rather than decreased (31.4%). Nearly 30% of K–12 M&O budgets stayed the same over the past five years.

From "How Do You Stack Up? What Schools Are Saying about Budgeting and Staffing Levels," published by SchoolDude. See the entire report at <https://explore.schooldude.com/rs/583-IUG-201/images/DOC%20PDF%20Budget-&-Staffing-Survey-Results.pdf>.