OCMBOCES
Committed to Your Success
Mark Pettitt
Director of Labor Relations
Phone: 315 433 2629
Fax: 315 433 2650

M E M O R A N D U M

TO: Clients of OCM BOCES Labor Relations

FROM: Mark Pettitt, Director of Labor Relations

DATE: July 24, 2018

REGARDING: Janus Decision

The Decision of the Supreme Court in the Matter of Janus is causing quite a bit of confusion for schools across New York State. We realize you will be getting advice and information from a number of sources. Dave and I recently returned from the MASLA Summer Conference, where this issue was major source of conversation and debate. Based on our reading the decision and after reviewing the legislative reaction from the State of New York, we believe the following outlines the consensus of our MALSA colleagues and the appropriate response to Janus.

As the situation evolves we will update our advice and keep on top of the actions from the Governor and Legislature as well as the inevitable litigation that will follow. Please let us know if you have any additional questions, or need any assistance from us in regards to the following.

Dues Authorization Cards:

The Court's decision included the following:

> By agreeing to pay, nonmembers are waiving their First Amendment rights and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by "clear and compelling" evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

The Taylor Act includes the following at Section 208-1

1. A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights:

   (b) to membership dues deduction, upon presentation of dues deduction authorization cards signed by individual employees.

It was the consensus of the group that in order to prove affirmative consent of a unit member to have dues deducted, the employer needed to see the signed dues deduction authorization. Signed dues authorizations are required under the terms of the Taylor Act. Asking the unions to provide copies of the signed authorizations is the only way to guarantee that the employer is not violating the first amendment rights of their employees.

NYSUT clearly understood this. They have been actively collecting the cards from unit members since the case was first argued in February. We continue to believe that employers should require copies of the signed cards.

The DOL "Guidance for Public-Sector Employers and Employees in New York State"

On Wednesday, July 18, the New York State Department of Labor issued a set of guidelines concerning the implementation of Janus. Included in these was the following:

> The decision in Janus does not require a union to obtain new dues deduction cards or obtain other evidence of union membership or remove a public employer's obligation to collect dues from members of a union. Public employee unions are not required to produce dues authorizations cards for members from whom the employer has previously deducted dues.

This "guidance" leaves public employers in a bind. On the one hand, we have the Supreme Court directing that dues should only be taken from employees if we have clear and compelling evidence that they want dues deducted from their pay checks. On the other hand, we have the State saying that the unions (the only organizations that can reasonably be expected to provide the needed data for such proof) are under no obligation to give it to us.

It is accepted that a party to a collective bargaining agreement may request data to assist in the implementation and maintenance of the agreement. Given the Court's decision, and the need to implement the dues deduction provisions of our contracts, it seems it would be an improper practice for the union to refuse the reasonable request of the employer for copies of the dues deduction cards that are in the union's possession. The union can redact Social Security numbers and any other "confidential" data, but this is not an unreasonable demand for management to make.

Old Cards or New Cards

It was the consensus of the group that any dues authorization signed by an employee that has not been revoked is valid. If an employee signed an authorization in 1998, it is still valid. This may cause some confusion, depending on whether such cards include different opt out provisions.

Again, the State Department of Labor has issued the guidance that the unions do not need to produce cards for any employee for whom dues had previously been deducted. Given the potential for different standards for revocation based on when the cards were completed, it seems reasonable that the employer see those cards in case an active member should ask to withdraw their authorization.

It should be an Improper Practice if a union refuses the request for the cards. We may need the cards in order to effectively administer the terms of the CBA and to address any request to stop dues deductions.

Withdrawal of Dues Authorization

The recent changes made to the Taylor Law in response to Janus included the following:

> The (Union's) right to such membership dues deduction shall remain in full force and effect until:
>
> (i) an individual employee revokes membership in the employee organization in writing in accordance with the terms of the signed authorization…

While CSEA dues deduction forms allow for revocation of membership at any time, most NYSUT dues deduction cards provide for very limited windows when an employee can revoke his or her dues authorization. Normally revocation is limited to a period of 15 or 30 days around the opening of the school year, and such revocation must be in writing. It was the consensus of the group that these types of restrictions go beyond what will be allowed under Janus and will be challenged in the courts and before PERB.

There was no consensus on how to handle a request to withdraw the dues authorization outside these limited windows. If an employee presents a signed revocation of dues authorization to an employer outside the period specified on the card the employer has a couple of options:

1. Inform the employee that under New York State Law, he or she can only revoke the membership and dues authorization during the specified period. This may satisfy the employee, or it may result in a Federal lawsuit since the Court was clear that taking dues from someone who does not wish to belong to the union is a violation of their First Amendment rights.

2. Honor their request to withdraw. This may result in a grievance or an Improper Practice charge. It was suggested that NYSUT will not want to get into a public fight with employees looking to withdraw from the union.

This is a case of pick your poison, since employers will inevitably be caught in the middle of these cases.

New Unit Member Meetings

Also included as part of the recent changes made to the Taylor Law in response to Janus was the following:

> Within thirty days of providing (notice that new unit members has been hired).., a public employer shall allow a duly appointed representative of the employee organization that represents that bargaining unit to meet with such employee for a reasonable amount of time during his or her work time without charge to leave credits, unless otherwise specified within an agreement bargained collectively under article fourteen of the civil service law, provided however that arrangements for such meeting must be scheduled in consultation with a designated representative of the public employer.

It was the consensus of the group that the employer can set the time and time period of such meetings, and then inform the union, which will have the chance to respond. This is the normal process for consultation. It is believed that the union will then be allowed to bargain over the issue, similar to when the employer establishes a salary for a new position not previously covered by a contract. Consultation does not give the union the right to determine the length or timing of the meetings. It was also agreed that the meetings do not have to be set on an individual basis, but can be group meetings for all employees hired in the relevant thirty day period, and that the meetings are voluntary on the part of the new employees.

As to paid time, the law is clear that this is paid time during the work day for the new employee. It does not say that the time is paid work time for the union representative. If this is an LRS, the issue is moot, but if the representative is a local officer, the employer may require that contractual union leave time be used.

It was suggested that a note be sent to the union informing them of when the meetings will be scheduled and asking for their input or questions. It is also suggested that the new employees be informed of the meeting and told that their time will not be charged against their leave time and that their participation is voluntary.

Communications

It is clear that the unions, as well as outside groups, will be sending out information and propaganda regarding the rights of employees under Janus. It was suggested that employers develop a joint statement with their bargaining agents that factually outlines the rights of employees to join or not join the union under the ruling. We understand most employers will want to remain neutral in regards to union membership. It may be helpful if administrators and supervisors had a simple FAQ to present whenever they get a question from a unit member asking questions about his or her union membership and dues. This would avoid miscommunication or claims of union animus.