TEXAS HOUSE OF REPRESENTATIVES

BRISCOE CAIN
District 128

RQ-0330-KP

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January 27, 2020

The Honorable Ken Paxton
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

RE: Application of *Janus* decision to Payroll Deductions of Public Union Members

Dear General Paxton,

Following the Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), public sector unions across the country have sought to prevent employees from resigning their membership and ceasing to pay dues and fees. *See, e.g.*, Christopher Magan, *Despite Supreme Court ruling, some MN public union members say stopping dues is too tough*, PIONEER PRESS (Apr. 24, 2019);[1] Rick Rouan, *Columbus Recreation and Parks worker sues over union dues requirement*, THE COLUMBUS DISPATCH (Mar. 14, 2019);[2] Jeremy Ervin, *Union settles lawsuit with Port Huron Schools employees*, PORT HURON TIMES HERALD (Feb. 5, 2019).[3] These nationwide developments highlight the need for guidance and clarity here in Texas.

We write to seek your office's opinion on three matters related to payroll deductions being used to support public sector unions. First, in light of the reasoning underlying the Supreme Court's recent *Janus* decision, does the State of Texas and its political subdivisions have an obligation to provide their employees with notice of their First Amendment rights against compelled speech? Second, if there is such an obligation, would certain information be legally sufficient when providing this notice? Third, how long should a waiver of these constitutional rights remain valid before needing to be affirmatively renewed?

BACKGROUND

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1 https://www.twincities.com/2019/04/24/despite-supreme-court-ruling-some-mn-public-union-members-say-stopping-dues-is-too-tough

2 https://www.dispatch.com/news/20190314/columbus-recreation-and-parks-worker-sues-over-union-dues-requirement

3 https://www.thetimesherald.com/story/news/2019/02/05/union-settles-lawsuit-port-huron-schools-employees/2776325002

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In Texas, "[a]n employee of a state agency may authorize a transfer each pay period from the employee's salary or wage payment for a membership fee in an eligible state employee organization" such as a public sector union. Tex. Gov't Code § 403.0165(a). In order to authorize payroll deductions to pay membership dues or fees, a state employee must "submit[] the form to the eligible organization to which the membership fees will be paid." 34 Texas Administrative Code, § 5.46(b)(1)(C)(ii). The authorization form is designed by the union and can be distributed to the employee after the form has been approved by the Comptroller of Public Accounts for the State of Texas. *See* 34 Texas Administrative Code, § 5.46(e)(1)(A). Once the deduction has been authorized, an employee's consent "shall remain in effect until an employee authorizes a change in the authorization." *Id.*

There are similar provisions that pertain to certain local government employees as well. *See* Tex. Loc. Gov't Code § 141.008 (employees of municipalities with a population exceeding 10,000); § 155.001 (county employees); Tex. Educ. Code § 22.001 (school district employees). While these provisions differ in some ways from their state-level equivalents, none of them require the local government employer to provide the employee requesting a payroll deduction with information on the associated waiver of First Amendment rights. Additionally, once the employee has authorized the payroll deduction, that authorization remains effective until the employee requests in writing that the deductions be discontinued. *See* Tex. Loc. Gov't Code § 141.008(e); § 155.002(b); Tex. Educ. Code § 22.001(b).

The processes described above may now conflict with recent guidance handed down by the Supreme Court of the United States. With its decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, the Supreme Court significantly limited a state's ability to deduct union dues and fees from its employees' wages. Specifically, the Court held that forcing public employees to subsidize union speech "violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." 138 S. Ct. 2448, 2460 (2018). While employees may still waive their First Amendment rights by agreeing to make monetary contributions to a public sector union, such a waiver "must be freely given and shown by 'clear and compelling' evidence" in order to be effective. *Id.* at 2486. This "clear and compelling" standard cannot be met "[u]nless employees clearly and affirmatively consent before any money is taken from them." *Id.*

ANALYSIS

In *Janus*, the Supreme Court once again reaffirmed that the "fixed star in our constitutional constellation . . . is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*" 138 S. Ct. at 2463 (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 642 (1943) (emphasis added by the *Janus*

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Court)). While the decision held that "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay," 138 S. Ct. at 2486, the principle underlying this ruling went well beyond fees paid by non-members. This is because the applicability of the First Amendment does not hinge upon membership in a union, as members and nonmembers alike possess the same fundamental rights to be free from compelled speech.

In order to be valid, the waiver of a fundamental right must be voluntary, knowing, and intelligent. *Brady v. United States*, 397 U.S. 742, 748 (1970). A waiver is voluntary if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). And a waiver is knowing and intelligent if the individual has "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). Because the freedom of speech is "the matrix, the indispensable condition, of nearly every other form of freedom," any purported waiver of this right is not effective "in circumstances which fall short of being clear and compelling." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 144 (1967) (plurality opinion).

However, the State of Texas currently does not provide its employees with any notice of their rights against compelled speech. Instead, this responsibility has been outsourced to the entity with the least incentive to crystalize the nature and scope of these rights—public sector unions. Specifically, Section 5.46(b)(1)(C)(ii) of the Texas Administrative Code empowers unions to elicit employee authorizations for the deduction of dues and fees from their paychecks. By ceding the process of eliciting employee consent to the unions themselves, this provision significantly hampers a state employer's efforts to ascertain whether those consents are knowing, intelligent, and voluntary. Not only do self-interested unions have every incentive to inadequately explain the nature of the rights being abandoned and the consequences of the decision to abandon them, but the requirement that employees submit any authorizations to the union leaves open ample opportunities for fraud, intimidation, and coercion. In fact, such perverse incentives and opportunities for mischief are already specifically recognized in this State's regulations. *See, e.g.*, 34 Texas Administrative Code, § 5.46 (l)(2)(C) (providing that a state agency "may not accept an authorization form that contains an obvious alteration without the state employee's written consent to the alteration"). Accordingly, we ask whether the current process at the state level that allows unions to directly solicit employees to submit a union-created payroll deduction authorization form can provide constitutionally adequate notice for the waiver of constitutional rights?

We also ask whether local government employers likewise must provide their employees with notice of the waiver of First Amendment rights before allowing them to authorize payroll deductions toward the payment of union membership fees? While payroll deduction requests are often submitted directly to the local

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governmental entity by the employee, there is still no mandate that these employees be informed of their First Amendment rights. Additionally, there is currently no process in place to assure that a waiver of these rights can be proven by clear and compelling evidence to have been voluntary, knowing, and intelligent.

Additionally, we ask for guidance on whether certain information would be legally sufficient when providing notice of the nature and scope of these rights to an employee. Specifically, would the following consent language, or its equivalent, be legally sufficient to be used to opt-into the use of payroll deductions to support a public sector union:

> I recognize that I have a First Amendment right to associate, including the right not to associate. My rights provide that I am not compelled to be a member of a labor organization. I am not compelled to pay a labor organization any money as a condition of employment, and I do not have to sign this consent form. However, I am waiving this right and consent to union membership. I also consent to having union dues deducted from my paycheck. My consent may be revoked at any time, resulting in the immediate termination of any financial agreement to pay the union dues, fees, or any other form of payment.

Finally, we request an opinion on the duration of time that an employee's consent to waive these fundamental rights continues to be constitutionally valid. Because circumstances change over time, it is reasonable to believe that the waiver of a constitutional right may eventually grow stale. This can happen in a variety of ways, including circumstances where an employee changes his views or a union changes the scope or content of its speech. Indeed, one of the precursors to the *Janus* decision specifically recognized that the choice to financially support a union's political activities may change "as a result of unexpected developments" in the union's political advocacy. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 315 (2012).

In other contexts, such as a suspect's waiver of *Miranda* rights, courts have consistently recognized that the waiver of constitutional rights may expire with the passage of time. *See, e.g., United States v. Nordling*, 804 F.2d 1466, 1471 (9th Cir. 1986) (concluding that additional *Miranda* warnings were not required where "[n]o appreciable time" elapsed between interrogations); *United States v. Jones*, 147 F. Supp. 2d 752, 761-62 (E.D. Mich. 2001) (concluding that where circumstances had changed over time, *Miranda* warnings had become "stale" and the suspect was entitled to receive new warnings and reconsider his prior waiver of rights). Similarly, an employee's waiver of his rights under the First Amendment should not be assumed to last forever. Therefore, we ask your office for an opinion as to whether some periodic inquiry into whether a public employee wishes to continue to waive his First Amendment rights is required. If so, we also ask that for an opinion as to the appropriate amount of time for an employee's waiver of these rights to remain in effect.

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CONCLUSION

Despite the clarity provided by *Janus* regarding the forced exaction of agency fees from non-members, the wider implications of that decision must still be determined. Accordingly, we ask that your office give an opinion on whether the State of Texas and its political subdivisions have an obligation to provide their employees with notice of their First Amendment rights against compelled speech, the legal sufficiency of certain information to be included when giving employees notice of these rights, and whether a waiver can remain valid in perpetuity.

Respectfully submitted,

Briscoe Cain
State Representative, Texas House District 128
Chairman, Select Committee on Driver's License Issuance & Renewal

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