MASSACHUSETTS LAWYERS WEEKLY

Massachusetts becoming unlikely post-'Janus' battleground

By: Kris Olson February 7, 2019

After the U.S. Supreme Court freed public employees from the burden of paying agency fees with its *Janus* decision, it was natural to wonder where the next front in the "war on unions" — or the war to preserve workers' association rights, depending on your point of view — might open up.

There is more than one answer to that question, but, with oral arguments at the Supreme Judicial Court last month in *Branch, et al. v. Commonwealth Employment Relations Board*, you can add Massachusetts to the list of battlegrounds.

Once *Janus v. American Federation of State, County, and Municipal Employees, Council 31* rendered issues related to compulsory agency fees moot, what remains to be decided in *Branch* is "whether, by permitting a union to be the exclusive employee representative with respect to bargaining on the terms and conditions of employment, but failing to require that non-union public employees have a voice and a vote with respect to those terms and conditions, G.L.c. 150E impermissibly coerces non-union member public employees to discontinue the free exercise of their First Amendment rights," according to the SJC.

Arguing the case for the plaintiff appellants in *Branch* was Bruce N. Cameron, a staff attorney at the National Right to Work Legal Defense Foundation. Cameron has been making periodic trips to Boston from Virginia to argue about agency fees and similar issues ever since the SJC heard *School Committee of Greenfield v. Greenfield Education Association, et al.* in 1981.

Cameron stressed that his clients in *Branch* — unlike plaintiffs elsewhere in the country (see sidebar) — are not mounting a frontal challenge to a union's exclusive representation status, but are merely seeking a seat at the bargaining table.

'Voice and vote'

Cameron's clients are three employees of the University of Massachusetts and a Hanover middle school teacher. At oral argument Jan. 8, the SJC justices seemed to struggle with just how giving them a "voice and a vote" would work.

Justice Scott L. Kafker asked Cameron what, exactly, his clients wanted. Cameron mentioned the opportunity to attend union meetings and cast votes.

"So they want to be members of the union?" Justice Elspeth B. Cypher interjected.

Cameron reiterated that they only want to participate in the bargaining process. In a subsequent interview, Cameron noted that there is a "whole raft of things" — from credit cards to discounts on the drafting of wills and other legal services — that organizations such as the Massachusetts Teachers Association provide but for which nonunion members like his clients would be ineligible.

The grand plan behind 'Branch'

For most of Bruce N. Cameron's four-decade tenure with the National Right to Work Legal Defense Foundation, he has been one of about a dozen lawyers, though the group's numbers are now up to 15 or 16.

The foundation boasts 22 decisions on the merits from the U.S. Supreme Court, including *Janus* itself, a "remarkable record" for what is essentially a small law firm, Cameron said.

Essentially, the Right to Work Foundation has been involved in every Supreme Court decision involving compulsory union fees in

Cameron told the SJC that his clients could potentially sit on bargaining committees if they won elections but would not be able to run for president or otherwise be involved in union administration, if they prevailed.

He explained that his clients were not asking to bargain separately, nor were they trying to disturb the system any more than necessary to avoid the "Hobson's choice" between joining the union and forgoing their "voice and vote."

In a subsequent interview, Cameron likened it to being forced to use the services of an agent to negotiate wages and other terms of employment, but then having that agent refuse to listen to you.

Chief Justice Ralph D. Gants asked Cameron how the union is any different from a local Lions Club; if you do not pay dues, you do not get to vote.

The union's status as exclusive bargaining agent makes all the difference, Cameron said.

"In this case, the lobbying is 'we're not going to represent you in the way an agent would represent you unless you join; we're not going to give you that unless you pay for our politics,'" Cameron said in a later interview.

He noted that the MTA is particularly active with supporting slates of candidates for public office.

"That is what is being foisted on my clients so they can have their voice and a vote," he said.

Cypher asserted, "They have a voice. They could not work there."

Cameron replied that that was "not an appropriate constitutional standard."

Reading the tea leaves

Though Cameron acknowledged that he could not identify a single member of the SJC panel who was clearly on his side, he said he thought the argument went well overall. He and the justices were "on the same wavelength" in that they focused on his clients' free speech rights rather than Assistant Attorney General Timothy J. Casey's argument that the case involves the union's internal rules rather than "state action."

While the plaintiff appellants see their argument as wholly

Post-'Janus' cases hitting the Supreme Court

Last December, think tank Buckeye Institute filed a petition with the U.S. Supreme Court presenting the type of frontal challenge to exclusive representation that the plaintiff appellants in *Branch, et al. v. Commonwealth Employment Relations Board* insist they are *not* making in Massachusetts.

In *Uradnik v. Inter Faculty Organization*, a professor at St. Cloud University in Minnesota is claiming that her union has not acted in her best interest, negotiating contracts the last 45 years, with the exception of 2016's *Friedrichs v. California Teachers Association*, Cameron noted.

Could *Branch, et al. v. Commonwealth Employment Relations Board* be next? Maybe, said Cameron, who is arguing the case for the plaintiff appellants.

"This is what we do," he said.

On the other side of the battlefield are people like John M. Becker, one of the attorneys for the union intervenors in *Branch*, who continue to believe that unions are good for the country. He noted that that idea was enshrined in the preamble to the National Labor Relations Act when it was first passed in the mid-1930s.

"There are certain forces in capitalism that, left unchecked, are damaging to workers," Becker said.

Providence attorney Lori Caron Silveira agreed, theorizing that cases like *Branch* may stem from a certain disenchantment of the backers of the Right to Work Foundation, like the national right-wing network led by the Koch brothers, that *Janus* had not triggered the mass exodus from unions they were hoping for.

Now, the strategy seems to be to "fight the fight on the inside" by throwing a wrench into unions' efforts to negotiate higher wages and better benefits for public sector workers, which in turn would impact the private sector.

"They seem to be saying: 'We got the decision we wanted but not the effect we wanted; here's step two,'" Silveira said.

consistent with *Janus*, John M. Becker, one of the Boston attorneys for the union intervenors in the case, said unions' status as exclusive representatives of employees was a "foundation for the logic in *Janus*." That there should now be an erosion of the right to serve in that capacity runs counter to *Janus'* logic, he said.

At oral argument, Becker's co-counsel, Jeffrey W. Burritt, left the SJC with a parting thought: If the SJC sided with the plaintiff appellants, it would be making a first-in-the-nation ruling.

Providence attorney Lori Caron Silveira said if or when *Janus* is extended, it probably will not happen in a state that has been a "bastion of support for organized labor."

Silveira said she and most other management-side labor attorneys prefer a world in which negotiations in the public sector do not have to be conducted individually.

"There are benefits to bargaining collectively with a large workforce," she said. "When it works well, the employers and the union become partners."

that bar nonunion members like herself from joining the faculty senate and serving on various committees.

Uradnik argues that forcing nonunion members to be represented by public sector unions is tantamount to forced association and violates the First Amendment. The Buckeye Institute believes that would be a logical extension of the Supreme Court's decision in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.

Meanwhile, the National Right to Work Legal Defense Foundation, which is representing the plaintiff appellants in *Branch*, is also providing its services to a group of Minnesota home care providers that, in December, asked the Supreme Court to strike down on First Amendment association grounds a Minnesota law that makes the Service Employees International Union the bargaining agent for home care providers who receive public aid.

Lead plaintiff Teri Bierman and seven others are not state employees but receive state aid through Minnesota's distribution of federal Medicaid funds. In *Bierman, et al. v. Dayton, et al.*, they claim they should not be forced to affiliate with a union or have the union as its exclusive representative in collective bargaining.

No one who spoke to Lawyers Weekly was willing to read too much into the fact that the SJC is now composed of a majority of justices appointed by Republican Gov. Charlie Baker. Indeed, Cameron suggested that he received his warmest reception in his earliest days in Massachusetts, when liberal justices were particularly open to arguments grounded in the First Amendment.

"As time has progressed, it seems the members of the court have gotten less receptive to my arguments," he said.

Still, James P. McKenna, a senior fellow in law and policy at the Pioneer Institute, which filed an amicus brief in the case, noted that the SJC "has always been a strong advocate of First Amendment rights, and that's what this case is about."

What the case is not about, McKenna agreed, is the constitutionality of exclusive representation in collective bargaining.

If there are tea leaves to be read, supporters of the appellees are heartened that, as evidenced by a question from Justice Frank M. Gaziano, the SJC seems to realize that no court has yet accepted an argument like the one being made by the appellants in *Branch*.

Cameron contends that, to the extent courts have entered this domain at all, they have been asked to grapple with the constitutionality of exclusive representation itself, which he and McKenna urge is not the issue in *Branch*.

Yet, rulings continue to reaffirm relevant principles in *Branch*, according to the appellees. Post-argument, Burritt wrote to the SJC to make it aware of a Jan. 14 decision out of the U.S. District Court in the Southern District of Ohio, *Thompson v. Marietta Education Association*, which denied a request for a preliminary injunction prohibiting the defendants from recognizing a union as the plaintiff's representative.

While *Thompson* may also involve a more direct attack on exclusive representation, it highlights the duty of fair representation that an exclusive representative owes to union and nonunion members alike. That duty "avoids constitutional questions that might otherwise arise from exclusive representation in the public sector," Burritt wrote.

As Assistant AG Casey argued to the SJC, the duty of fair representation means that the union cannot negotiate more favorable contract terms for members or otherwise act in bad faith. But the government is under no obligation to listen to an individual when it makes policy, and there is no constitutional right to speak to one's employer or to be heard by the union, Casey asserted.

No getting around 'Knight'?

In *Thompson*, Ohio Judge Michael H. Watson cited to a 1983 U.S. Supreme Court decision, *Minnesota State Board for Community Colleges v. Knight*, that the appellees believe controls *Branch*.

In *Knight*, the nonunion-member plaintiffs unsuccessfully challenged their exclusion from committees through which professional employees like the college faculty plaintiffs had been granted the statutory right to "meet and confer" with their employers on matters outside the scope of mandatory bargaining.

"I don't see how you get around *Knight*," Kafker told Cameron at oral argument.

Justice David A. Lowy asked whether *Janus* had modified *Knight* in any way. *Janus* makes no mention of *Knight*, Cameron replied.

In its amicus brief in support of the appellants, the Pioneer Institute wrote that the unions' argument — premised on *Knight* — that exclusive representation is justified by the government's need for efficiency ignores the fact that such efficiency would inhere no matter what, so long as an exclusive representative is retained.

A need for efficiency "does not justify depriving non-union employees of a voice and vote on the strategy for negotiation, or the terms to be negotiated, by the exclusive bargaining representative," Boston attorneys Mark G. Matuschak and Robert K. Smith wrote on Pioneer's behalf.

But Becker believes that, at some point, the First Amendment rights of union members also have to enter the equation.

"If you are going to be taking First Amendment rights of the association seriously, at some point you run into the association rights of union members," Becker said. "They have certain right to associate or not associate with certain people."

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