

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED
STATE OF ALASKA
2019 SEP 16 AM 11:16
CLERK OF THE TRIAL COURTS

STATE OF ALASKA,

Plaintiff,

v.

ALASKA STATE EMPLOYEES
ASSOCIATION/AMERICAN
FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES LOCAL 52, AFL-CIO,

Defendant.

Case No.: _____

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff State of Alaska, pursuant to AS 22.10.020(g) and Alaska R. Civ.
Proc. 57(a), brings this action for declaratory relief against Defendant Alaska State
Employees Association/American Federation of State, County and Municipal Employees
Local 52, AFL-CIO. Plaintiff alleges as follows:

PARTIES

1. Plaintiff State of Alaska ("State") has approximately 15,000 employees.
Approximately 8,000 of these employees are represented in collective bargaining
negotiations by Defendant. The State has entered into a collective bargaining agreement
("CBA") with Defendant. The CBA governs the employment terms and conditions of
these employees.

2. Defendant Alaska State Employees Association/American Federation of State, County and Municipal Employees Local 52, AFL-CIO (“Defendant” or “Union”) is a public sector union based in Alaska. Defendant represents state and municipal employees in the General Government Unit and is the largest public union in Alaska.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this declaratory action pursuant to AS 22.10.020(a), (g).

4. Venue is proper in this Court pursuant to Civil Rule 3(c) and AS 22.10.030.

STATEMENT OF FACTS

A. The First Amendment to the U.S. Constitution and Public Sector Unions

5. The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech and association.

6. The First Amendment creates an “open marketplace” in which differing ideas about political, economic, and social issues can compete for public support free from government interference. It also protects the rights of individuals to associate with others in pursuit of a wide range of political, social, economic, educational, religious, and cultural ends. Free speech thus is critical to our democratic form of government and to the search for truth.

7. Freedom of speech protects more than the right to speak freely and to associate with others. It also protects the right *not* to speak and the right *not* to associate. As the Supreme Court has long recognized, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be

1 orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to
2 confess by word or act their faith therein.” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S.
3 624, 642 (1943).

4
5 8. Compelling a person to subsidize the speech of others raises similar First
6 Amendment concerns. It is a “bedrock principle that, except perhaps in the rarest of
7 circumstances, no person in this country may be compelled to subsidize speech by a third
8 party that he or she does not wish to support.” *Harris v. Quinn*, 573 U.S. 616, 656 (2014).

9
10 9. These important First Amendment principles are always at stake whenever
11 a state subsidizes public sector unions through employee paycheck deductions.

12
13 10. Such state actions receive heightened First Amendment scrutiny because
14 the collective bargaining, political advocacy, and lobbying of public sector unions is
15 directed at the government, and bargaining subjects (such as wages, pensions, and
16 benefits) are important political issues. Public sector unions also engage in an array of
17 other speech, including on issues related to state budgets, healthcare, education, climate
18 change, sexual orientation, and child welfare.

19
20 11. “Because a public-sector union takes many positions during collective
21 bargaining that have powerful political and civic consequences,” the Supreme Court has
22 held, “compulsory fees constitute a form of compelled speech and association that
23 imposes a ‘significant impingement on First Amendment rights.’” *Knox v. SEIU, Local*
24 *1000*, 567 U.S. 298, 310-11 (2012). Compulsory-fee requirements, therefore, “cannot be
25 tolerated unless [they] pass[] exacting First Amendment scrutiny.” *Harris*, 573 U.S. at
26 647-48 (citation omitted).

B. The State's Collective Bargaining Agreement with Defendant

12. The Public Employment Relations Act ("PERA") authorizes public employees to "self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." AS 23.40.080.

13. Under PERA, public employers must "negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment." AS 23.40.070.

14. Defendant, as a public sector union, engages in collective bargaining with the State over the employment terms and conditions of the employees it represents.

15. Through its collective bargaining and lobbying efforts, Defendant has advocated on political issues concerning wages, pensions, and employee benefits.

16. In accordance with PERA, the State has negotiated a collective bargaining agreement with Defendant ("CBA"). The CBA governs the employment terms and conditions of approximately 8,000 state and municipal employees in the General Government Unit.

17. Section 3.04 of the CBA governs payroll deductions of state employees. It states: "Upon receipt by the Employer of an Authorization for Payroll Deduction of Union Dues/Fees dated and executed by the bargaining unit member which includes the bargaining unit member's employee ID number, the Employer shall each pay period deduct from the bargaining unit member's wages the amount of the Union membership

1 dues owed for that pay period. The Employer will forward the monies so deducted to the
2 Union together with a list of bargaining unit members from whose wages such monies
3 were deducted no later than the tenth (10th) day of the following calendar month.”

4
5 18. Section 3.04 further states: “Bargaining unit members may authorize
6 payroll deductions in writing on the form provided by the Union. Such payroll deductions
7 will be transmitted to the Union by the state. The amount of voluntary contribution shall
8 be stated on the authorization form, together with the bargaining unit member’s employee
9 identification number.”

10
11 19. Thus, it has been the State’s practice to take money from an employee’s
12 paycheck and transfer it to Defendant when the State receives a payroll deduction
13 authorization form from Defendant for that employee.

14
15 20. According to Defendant’s payroll deduction authorization form, the
16 employee is prohibited from withdrawing his financial support for the Union unless he
17 gives “the Employer and the Union written notice of revocation not less than ten (10)
18 days and not more than twenty (20) days before the end of any yearly period.”

19
20 21. In other words, if the employee does not provide this notification to both
21 the Union and the State during this ten-day window, the employee must continue to
22 subsidize the Union’s speech for another year.

23
24 **C. The Supreme Court’s Opinion in *Janus v. AFSCME, Council 31***

25 22. On June 27, 2018, the U.S. Supreme Court issued its opinion in *Janus v.*
26 *AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

23. In *Janus*, an Illinois state employee (Mark Janus) challenged an Illinois law that required him to pay an “agency fee” to a union even though he was not a member of the union and strongly objected to the positions the union took in collective bargaining and related activities.

24. Janus argued that such a scheme violated his rights under the First Amendment, and the Supreme Court agreed.

25. The Court noted it had long recognized that “a significant impingement on First Amendment rights occurs when public employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences.” These types of compulsory-fee provisions thus required heightened scrutiny under the First Amendment.

26. Applying heightened scrutiny, the Court concluded that neither of the rationales for the Illinois law—promoting “labor peace” and preventing “free riders”—could justify the serious burdens imposed on employees’ free speech rights.

27. The Supreme Court thus concluded that the Illinois law was unconstitutional because it violated Janus’ free speech rights by compelling him to subsidize private speech on matters of substantial public concern.

28. In finding this law unconstitutional, the Court made clear that its holding was not limited to the facts before it. *All* employees—not just non-members like

Mr. Janus—had a First Amendment right not to be forced to subsidize the speech of public unions.

1 29. Going forward, the Court warned, public employers may not deduct “an
2 agency fee nor any other payment” unless “the employee affirmatively consents to pay.”
3

4 30. The Court stressed that a waiver of First Amendment rights must be “freely
5 given and shown by ‘clear and compelling evidence,’” and such a waiver “cannot be
6 presumed.”
7

8 31. Thus, the Court explained, “[u]nless employees clearly and affirmatively
9 consent before any money is taken from them, this [clear and compelling] standard
10 cannot be met.”
11

12 **D. The State’s Response to *Janus***

13 32. Before *Janus*, the State’s collective bargaining agreement with Defendant
14 (which has been superseded by the current CBA) required the State to deduct dues from
15 employees who were members of the Union and deduct an agency fee (or “service fee”)
16 from employees who were not members of the Union.
17

18 33. In response to *Janus*, the State, under the administration of then-Governor
19 Bill Walker, stopped deducting agency fees from non-members’ paychecks. The State
20 also reached agreement with a number of unions, including Defendant, modifying the
21 terms of the collective bargaining agreements to account for *Janus*.
22

23 34. The State, however, failed to take sufficient steps to comply with *Janus*’s
24 requirements. In particular, the State did not ensure that the First Amendment rights of *all*
25 employees (both members and non-members) were protected.

26 35. Shortly after taking office, Governor Michael J. Dunleavy requested a legal
27 opinion from Attorney General Kevin G. Clarkson as to whether the State had fully

1 complied with its obligations under *Janus*. The Governor sought this opinion to ensure
2 that the State's employee payroll-deduction process complied with the First Amendment
3 in light of *Janus*.
4

5 **E. The Attorney General Opinion**

6 36. On August 27, 2019, Attorney General Clarkson issued a legal opinion in
7 which he concluded that "the State's payroll deduction process is constitutionally
8 untenable under *Janus*."
9

10 37. Although the plaintiff in *Janus* was a non-member who was objecting to
11 paying a union's agency fee, the Attorney General recognized that the "the principle of
12 the Court's ruling ... goes well beyond agency fees and non-members." The Court had
13 held that the First Amendment prohibits public employers from forcing *any* employee to
14 subsidize a union, whether through an agency fee or otherwise.
15

16 38. The Attorney General explained: "Members of a union have the same First
17 Amendment rights against compelled speech that non-members have, and may object to
18 having a portion of their wages deducted from their paychecks to subsidize particular
19 speech by the union (even if they had previously consented)." Thus, "the State has no
20 more authority to deduct union dues from one employee's paycheck than it has to deduct
21 some lesser fee or voluntary non-dues payment from another's." In both cases, "the State
22 can only deduct monies from an employee's wages if the employee provides affirmative
23 consent."
24

25
26 39. That was why, as the Attorney General further explained, "the Court in
27 *Janus* did not distinguish between members and non-members of a union when holding

1 that 'unless *employees* clearly and affirmatively consent before any money is taken from
2 them, this standard cannot be met.'"

3
4 40. Following Supreme Court guidance governing the waiver of constitutional
5 rights in other contexts, the Attorney General concluded that an employee's consent to
6 have money deducted from his or her paycheck was constitutionally valid only if it met
7 three requirements. The employee's consent must be (1) "free from coercion or improper
8 inducement"; (2) "knowing, intelligent[, and] done with sufficient awareness of the
9 relevant circumstances and likely consequences"; and (3) "reasonably contemporaneous."

10
11 41. In light of these constitutional requirements, the Attorney General
12 identified three overarching problems with the State's payroll deduction process.
13

14 42. First, because unions design the form by which an employee authorizes the
15 State to deduct his or her pay, the State cannot "guarantee that the unions' forms clearly
16 identify—let alone explain—the employee's First Amendment right *not* to authorize any
17 payroll deductions to subsidize the unions' speech." Nor could the State ensure that its
18 employees knew the consequences of their decision to waive their First Amendment
19 rights.
20

21 43. Second, because unions control the environment in which an employee is
22 asked to authorize a payroll deduction, the State cannot ensure that an employee's
23 authorization is "freely given." For example, some collective bargaining agreements
24

25 require new employees to report to the union office within a certain period of time so that
26 a union representative can ask the new employee to join the union and authorize the
27 deduction of union dues and fees from his or her pay. Because this process is essentially a

1 “black box,” the State has no way of knowing whether the signed authorization form is
2 “the product of a free and deliberate choice rather than coercion or improper
3 inducement.”
4

5 44. Third, because unions often add specific terms to an employee’s payroll
6 deduction requiring the payroll deduction to be irrevocable for up to twelve months, an
7 employee is often “powerless to revoke the waiver of [his] right against compelled
8 speech” if he disagrees with the union’s speech or lobbying activities. This is especially
9 problematic for new employees, who likely have no idea “what the union is going to say
10 with his or her money or what platform or candidates a union might promote during that
11 time.” An employee, as a result, may be forced to “see [his] wages docked each pay
12 period for the rest of the year to subsidize a message [he does] not support.”
13
14

15 45. To remedy these First Amendment problems, the Attorney General
16 recommended that the State implement a new payroll deduction process to bring the State
17 into compliance with the Supreme Court’s *Janus* decision.
18

19 46. First, the Attorney General recommended that the State require employees
20 to provide their consent directly to the State, instead of allowing unions to control the
21 conditions in which the employee consents. The Attorney General recommended that the
22 State implement and maintain an online system and draft new written consent forms.
23

24 47. Second, the Attorney General recommended that the State allow its
25 employees to regularly have the opportunity to opt-in or opt-out of paying union dues.
26 This process would ensure that each employee’s consent is up to date and that no
27 employee is forced to subsidize speech with which he disagrees.

1 **F. Defendant Threatens to Sue the State**

2 48. Within hours of the release of the Attorney General's legal opinion,
3 Defendant threatened to sue the State.
4

5 49. Defendant's Executive Director, Jake Metcalfe, told *Alaska Public Media*
6 that the Attorney General's opinion was antagonistic and "legally incorrect." Metcalfe
7 warned: "If [the Governor] follows through with an administrative order, then we're
8 going to go to court and fight him from beginning to end on this." Metcalfe similarly told
9 the *Anchorage Daily News* that if the State implements an annual opt-in program, "we
10 will sue."
11

12 50. In an Alaska AFL-CIO press release, Metcalfe stated that the Attorney
13 General's opinion was "an attack on all of us, and we'll challenge it in the courts at every
14 step of the way to protect the Constitutional rights of Alaska's public employees in the
15 workplace."
16

17 51. On its website, Defendant stated that the Attorney General's
18 recommendations are "obviously illegal" and "ASEA won't let this happen. ASEA and
19 all the other Alaska public employee unions are prepared to fight this unconstitutional
20 power grab at every stage."
21

22 52. In an article entitled "Unions Pledge Legal Fight After State Announces
23 Plans to Intervene in Union Membership Process," the *Midnight Sun* wrote: "Alaska's
24 organized labor is pledging to take the Dunleavy administration to court if it implements
25 what they say will be one of the harshest implementations of the U.S. Supreme Court
26 ruling that found government employees can't be forced to pay union dues." According
27

1 to the article, Defendant "will plan to fight the implementation of any changes through
2 the courts."

3
4 53. Joelle Hall, operations manager for AFL-CIO, told the *Anchorage Daily*
5 *News*: "I believe this would be the most aggressive and interventionalist interpretation of
6 [*Janus*] in the country. Obviously, we will be taking action to prevent this from taking
7 place."

8
9 **G. Employees Contact the State Seeking an End to Their Paycheck**
10 **Deductions**

11 54. Following the release of the Attorney General's Opinion, many state
12 employees contacted the State to ask it to stop deducting money from their paychecks to
13 give to Defendant.

14 55. According to one employee: "At the time when I started with the State in
15 October, I was told the dues were not optional, and it was only yesterday that I learned
16 that was not the case. I would like these deductions to cease immediately." The employee
17 continued: "In the time since I started, I have also told two new employees that these
18 dues were not optional, acting on the information I had been given by the union. If they
19 would also like to opt out at this time, can I let them know to contact you?"

20
21
22 56. Another employee told the State: "After I was hired I received what I felt
23 was a threatening letter from the Union saying that I had TEN DAYS, in caps and
24 underlined, to contact the union office within the time specified or failure to do this may
25 result in dues arrearage." The employee requested: "I want my payroll deductions to

1 GGU to stop and want back the dues that were deducted without my permission from
2 2/10/19 to this date.”

3
4 57. Another employee told the State that he had informed Defendant that he
5 wanted to resign his membership in the Union and to no longer have dues deducted from
6 his paycheck. The employee “requested to be provided with the timeframe for revocation
7 of [his] signed and executed GGU Authorization for Payroll Deductions.” The Union,
8 however, never provided this information nor granted his request to resign from the
9 Union.
10

11 58. On September 9, 2019, the Department of Administration emailed
12 Mr. Metcalfe in order to provide him “courtesy notice that the following individuals have
13 reached out to the State to cease their membership dues deductions effective
14 immediately.” The Department informed Mr. Metcalfe that it had processed these
15 employees’ requests and that the changes should be reflected on the next payroll.
16

17 59. The next day, Mr. Metcalfe responded to the Department. He stated that if
18 the State stopped deducting dues from these employees it would be in violation of the
19 CBA and Alaska law. Mr. Metcalfe stated: “If you do not immediately notify me that you
20 have ceased and desisted the action described in your email, we will notify our attorney
21 and initiate legal action.”
22

23 60. The State continues to receive requests from employees who wish to no
24 longer have their paychecks deducted to subsidize the Union’s speech.
25
26
27

**CLAIM FOR RELIEF
(Declaratory Judgment)**

61. Plaintiff realleges paragraphs 1 through 60 as if fully stated herein.

62. Alaska Statute 22.10.020(g) (the "Declaratory Judgment Act") grants to superior courts the power to issue declaratory judgments in cases of actual controversy.

63. It states in relevant part: "In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought."

64. Declaratory judgments are rendered "to clarify and settle legal relations, and to 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'" *Lowell v. Hayes*, 117 P.3d 745, 755 (Alaska 2005).

65. The State has received numerous requests from state employees to stop deducting money from their paychecks to transfer to the Union.

66. The State has concluded that the First Amendment to the U.S. Constitution and the Supreme Court's decision in *Janus v. AFSCME, Council 31* require the State to honor these employees' requests and stop deducting funds from their paychecks to transfer to the Union.

67. The Union, however, has threatened to sue the State if the State honors these employees' requests.

68. Accordingly, an actual controversy has arisen and now exists between the State and the Union regarding whether the First Amendment requires the State to stop

1 deducting dues and/or fees from an employee's paycheck when the employee informs the
2 State that he or she no longer wishes to subsidize the Union's speech.

3
4 69. To resolve this legal uncertainty, the State is entitled to a declaratory
5 judgment that (1) the State, in accordance with the First Amendment, cannot deduct dues
6 or fees from an employee to give to the Union unless the State has clear and compelling
7 evidence that an employee has given his or her consent to subsidize the Union's speech;
8 and (2) the State must timely stop deducting dues or fees from an employee's paycheck
9 when the employee informs the State that he or she no longer wishes to subsidize the
10 Union's speech.

11
12 **WHEREFORE**, Plaintiff respectfully requests that the Court:

13
14 (1) Declare that the State cannot deduct dues or fees from an employee to give
15 to the Union unless the State has clear and compelling evidence that an employee has
16 freely given his or her consent to subsidize the Union's speech;

17
18 (2) Declare that the State must timely stop deducting dues or fees from an
19 employee's paycheck when the employee informs the State that he or she no longer
20 wishes to subsidize the Union's speech;

21
22 (3) Award the State its costs and attorney's fees to be paid by the defendant
23 pursuant to Alaska Civil Rules 79 and 82; and

24 (4) Provide such other and further relief as this Court deems just and equitable
25 under the circumstances.

1 DATED: September 16, 2019

2
3 KEVIN G. CLARKSON
ATTORNEY GENERAL

4
5 By:



6 Tregarrick R. Taylor
7 Deputy Attorney General
Alaska Bar No. 0411081

8
9 William S. Consovoy (*pro hac vice*
forthcoming)

10 J. Michael Connolly (*pro hac vice*
11 forthcoming)

12 CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, Virginia 22209

13 Tel: (703) 243-9423

14 will@consovoymccarthy.com

15 mike@consovoymccarthy.com

16 *Counsel for Plaintiff State of Alaska*
17

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

2019 SEP 16 AM 11:16

CLERK OF THE JUDICIAL COURT

STATE OF ALASKA,

Plaintiff,

v.

ALASKA STATE EMPLOYEES
ASSOCIATION/AMERICAN
FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES LOCAL 52, AFL-CIO,

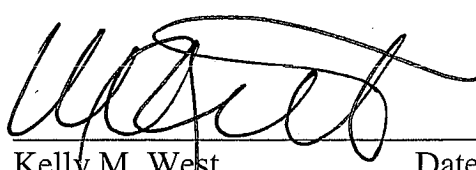
Defendant.

Case No.: 3AN-19- BY CLERK

CERTIFICATE OF SERVICE

I certify that on this date true and correct copies of the **Summons and Notice to Both Parties of Judicial Assignment, Complaint for Declaratory Judgment, and this Certificate of Service** were served via process server on the following:

Jake Metcalfe
Executive Director, ASEA
2601 Denali Street
Anchorage, AK 99503


Kelly M. West
Law Office Manager

Date 9/16/19

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL
ANCHORAGE BRANCH
1031 W. FOURTH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 269-5100