

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
PORTLAND DIVISION

DANIEL B. LOCKE; *et al.*, ON BEHALF OF
THEMSELVES AND THE CLASS THEY SEEK
TO REPRESENT,

Plaintiffs,

v.

EDWARD A. KARASS, STATE CONTROLLER, *et*
al.,

Defendants.

CASE NO. 2:05-cv-00112-GZS

**PLAINTIFFS' STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

Pursuant to Rule 56, FED.R.CIV.P., and Civil Rule 56(b), D.ME., Plaintiffs Daniel B. Locke, *et al.*, on behalf of themselves and the class they seek to represent (“the Nonmembers”), file the foregoing Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment, as follows:

1. This is a civil rights action pursuant to 42 U.S.C. § 1983, seeking equitable relief, declaratory relief, nominal damages and other relief to prevent and/or redress the deprivation under color of Maine law of Plaintiffs’ rights, privileges and immunities under the United States Constitution. Defendants are threatening to deprive, and have actually deprived, Plaintiffs and the class Plaintiffs seek to represent of their constitutional rights. Specifically, Defendants Edward A. Karass, Controller for the State of Maine, and Kenneth A. Walo, Director of the Maine Bureau of Employee Relations, have agreed to compel the payment of union dues or agency fees (so-called “service fees”) from the wages of Plaintiffs, and each member of the class Plaintiffs seek to represent, in order to tender same to Defendant Maine State Employees

Association, Local 1989, Service Employees International Union, AFL-CIO-CLC, and have actually demanded payment of such fees by each Plaintiff, and each member of the class Plaintiffs seek to represent, with payments to begin in July 2005. These demands have been conducted in a manner which violates Plaintiffs' and class members' First, Fifth, and Fourteenth Amendment rights as set forth by the United States Supreme Court in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986). Unless this Court enters a preliminary and permanent injunction against Defendants to prevent the enforcement of Defendants' forced-dues scheme, Plaintiffs' and class members' First, Fifth, and Fourteenth Amendment rights will be irreparably damaged.

Clerk's Docket No. 47: Plaintiffs' First Amended and/or Supplemental Complaint ("Complaint"), ¶ 1; Clerk's Docket No. 48: Answer of Defendants Edward A. Karass, Rebecca M. Wyke, and Kenneth A. Walo ("State Defendants' Answer"), ¶ 1; Clerk's Docket No. 49: Answer of Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO-CLC ("MSEA's Answer"), ¶ 1.

JURISDICTION AND VENUE

2. This action arises under the Constitution and laws of the United States, particularly the First, Fifth, and Fourteenth Amendments to the United States Constitution. The jurisdiction of this Court, therefore, is invoked under 28 U.S.C. § 1331. Complaint, ¶ 2; State Defendants' Answer, ¶ 2; MSEA's Answer, ¶ 2.

3. This is also an action under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, to redress the threatened deprivation, under color of state law, of rights, privileges and immunities secured to Plaintiffs and class members by the Constitution of the United States, particularly the First, Fifth, and Fourteenth Amendments thereto. The jurisdiction of this Court,

therefore, is invoked under 28 U.S.C. § 1343, pursuant to which this Court may grant: a) nominal damages for the violation of Plaintiffs' and class members' First, Fifth, and Fourteenth Amendment rights; b) restitution of fees unconstitutionally collected from Plaintiffs and class members, and other equitable relief; c) permanent injunctive relief against any unlawful demand for and/or collection of agency fees; and d) reasonable attorneys' fees and costs, pursuant to 42 U.S.C. § 1988. Complaint, ¶ 3.

4. This is also a case of actual controversy where Plaintiffs seek a declaration of their rights under the Constitution of the United States. Under 28 U.S.C. §§ 2201 and 2202, this Court may declare the rights of Plaintiffs and grant further necessary and proper relief based thereon, including preliminary and permanent injunctive relief, pursuant to Rule 65, FED.R.CIV.P. Complaint, ¶ 4.

5. **Venue:** Pursuant to 28 U.S.C. § 1391(b) and § 1392, venue is proper in this Court because Defendants either reside and/or have offices and conduct their business in the judicial district of the United States District Court for the District of Maine. Complaint, ¶ 5; State Defendants' Answer, ¶ 5; MSEA's Answer, ¶ 5.

PARTIES

6. Plaintiffs Daniel B. Locke, Hazel Dyer, Denise D. Gilbert, Robert Hoey, William A. Elliot, Kathleen M. Heath, Ratnasiri Liyanage-Don, Jeanne F. Locke, Kathleen Maguire, Rickey K. McKenna, Judith Melanson, Faith Mouradian, Gina M. Pelletier, Patricia W. Rolfe, Margaret P. Rudolf, Katherine B. Rugan, Sean P. Scully, Michael R. Smith, Tricia L. Thompson, and Beth Weirich are, and were at all times mentioned herein, individuals employed by various departments, agencies, and/or commissions of the executive branch of the State of Maine. As

such, each is a “state employee” within the meaning of the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979-A(6). Each of the named Plaintiffs is employed in one of the four bargaining units represented by Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO, CLC (“MSEA”), designated as the Administrative, Professional & Technical, Supervisory Services, and Operations, Maintenance, and Support bargaining units. Plaintiffs are not members of MSEA and have not been members of MSEA at any time material hereto. Complaint, ¶ 6; State Defendants’ Answer, ¶ 6; MSEA’s Answer, ¶ 6.

7. Defendant Edward A. Karass (hereinafter “Karass”) is the Controller of the State of Maine. As such, he is charged with the responsibility of issuing wages to employees of the State, including Plaintiffs and members of the class Plaintiffs seek to represent, and processing all deductions therefore, including for union dues and/or so-called “service” fees pursuant to “union security” agreements. He is sued in his official capacity. Complaint, ¶ 7; State Defendants’ Answer, ¶ 7; MSEA’s Answer, ¶ 7.

8. Defendant Rebecca M. Wyke (hereinafter “Wyke”) is the Commissioner of the Department of Administrative and Financial Services for the State of Maine. As such, Defendant Wyke is responsible for overseeing all aspects of the civil service system and employee training and benefits, including the negotiation and administration of relations between the State and labor unions representing State employees, and she is a signatory to all collective bargaining agreements negotiated with the State. She is sued in her official capacity. Complaint, ¶ 8; State Defendants’ Answer, ¶ 8; MSEA’s Answer, ¶ 8.

9. Defendant Kenneth A. Walo (hereinafter “Walo”) is Director of the Bureau of Employee Relations of the Department of Administrative and Financial Services for the State of

Maine. As such, Defendant Walo is the primary official of the State of Maine charged with responsibility for negotiating and administering relations between the State and labor unions representing State employees, and he is a signatory to all collective bargaining agreements negotiated with the State. He is sued in his official capacity. Complaint, ¶ 9; State Defendants' Answer, ¶ 9; MSEA's Answer, ¶ 9.

10. Defendant Maine State Employees Association, Local 1989, Service Employees International Union, AFL-CIO, CLC ("MSEA" or "the union") is a "bargaining agent" as defined in the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979-A(1), and has been recognized as the exclusive representative under said law for collective bargaining purposes of all employees in Administrative, Professional & Technical, Supervisory Services, and Operations, Maintenance, and Support bargaining units. On information and belief, Defendant MSEA is a non-profit corporation formed and existing under the laws of the State of Maine. MSEA conducts its business and operations throughout the State of Maine. Complaint, ¶ 10; State Defendants' Answer, ¶ 10; MSEA's Answer, ¶ 10.

CLASS ACTION ALLEGATIONS

11. Plaintiffs' action is a class action brought by Plaintiffs on their own behalf and on behalf of others similarly situated, pursuant to Rule 23(b)(1)(A) and (b)(2), FED.R.CIV.P. The class that Plaintiffs seek to represent consists of: all State of Maine employees employed in the Administrative, Professional & Technical, Supervisory Services, and Operations, Maintenance, and Support bargaining units who were or are represented exclusively for purposes of collective bargaining by MSEA and who were or are subject to demands for payment of union dues or "service" fees to MSEA as a condition of continued State employment. Complaint, ¶ 11.

12. The number of persons in this class is believed to number approximately 2,000-3,000. These persons are therefore so numerous that joinder of all members of the class obviously is impractical. Complaint, ¶ 12.

a. The number of persons in this class, as of 17 January 2006, is 2,491. Defendant MSEA's Answers to Plaintiffs' First Set of Interrogatories, Answer to Interrogatory No. 1 (attached hereto and incorporated herein as Exhibit A).

b. Subsequent to each MSEA demand for payment of union dues and/or agency fees, a successively larger number of State employees in the relevant bargaining units had authorized the deduction of union dues from their wages. As of 1 April 2005 (prior to any of Defendants' demands), the total number of State employees in the relevant bargaining units who had authorized the deduction of union dues from their wages was 6,831; on 1 May 2005, that number had risen to 6,866; on 1 June 2005, that number had risen to 6,940; on 1 July 2005, that number had risen to 6,967; as of 17 January 2006, that number had risen to 7,237. Exhibit A, Answer to Interrogatory No. 2.

c. Subsequent to each MSEA demand for payment of union dues and/or agency fees, a successively larger number of State employees in the relevant bargaining units had authorized the deduction of agency fees from their wages. As of 1 April 2005 (prior to any of Defendants' demands), the total number of State employees in the relevant bargaining units who had authorized the deduction of agency fees from their wages was 103; on 1 May 2005, that number had risen to 122; on 1 June 2005, that number had risen to 177; on 1 July 2005, that number had risen to 211; as of 17 January 2006, that number had risen to 1,307. Exhibit B, Answer to Interrogatory No. 3.

13. There are questions of law and fact common to all members of the class, to-

wit, whether Defendants have demanded payment of agency fees from the Nonmembers prior to providing them with all of the notice and procedural safeguards required by the First, Fifth, and Fourteenth Amendments to the United States Constitution as prerequisites to the collection of compulsory agency fees from nonunion employees. Complaint, ¶ 13.

14. Plaintiffs' claims are typical of other members of the class, who are: (1) subject to the same deprivations of their rights by Defendants' implementation of the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979, *et seq.*, as hereinafter alleged; and (2) subject to the same threatened deprivations of their rights by Defendants' demand for and/or collection of compulsory agency fees in the absence of the constitutionally-required notice and procedural safeguards, as hereinafter alleged. Complaint, ¶ 14.

15. Plaintiffs can adequately represent the interests of other members of the class. Plaintiffs have no interests antagonistic to other members of the class related to the subject matter of this lawsuit. Plaintiffs are members of the class and, like all current and future nonunion State employees in the relevant bargaining units, were, are, and will be "potential objectors" as that term was used by the United States Supreme Court in *Hudson*, 475 U.S. at 306. Complaint, ¶ 15.

16. Plaintiffs' attorneys are experienced in representing similarly-situated litigants before the various federal courts. Plaintiffs' counsel is provided *pro bono publico* by a national charitable legal aid organization, and their lead counsel is experienced in representing nonunion employees in litigation, including class actions, involving issues identical or similar to those raised in this action, and in fact, has litigated many of the leading cases addressing these issues. Complaint, ¶ 16.

17. Because Defendants have a duty under *Hudson* to provide notice and procedural

protections adequate to protect the First, Fifth, and Fourteenth Amendment rights of nonunion employees — which duty applies equally to all class members — the prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Defendants. Complaint, ¶ 17.

18. Defendants have acted and threaten to continue to act on grounds generally applicable to all members of the class, thereby making appropriate final injunctive and declaratory relief with regard to the class as a whole. Complaint, ¶ 18.

19. The questions of law and fact common to the members of the class predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy, because the individual class members are deprived of the same rights by Defendants' actions and threatened actions, and differ only in non-material aspects of their factual situation. Complaint, ¶ 19.

CAUSE OF ACTION

20. Acting in concert under color of state law — to-wit, the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979, *et seq.* — the State of Maine has recognized MSEA as the exclusive bargaining agent for the Plaintiffs and other State employees in bargaining units designated as the: (1) Administrative; (2) Operations, Maintenance, and Support; (3) Professional & Technical; and (4) Supervisory Services bargaining units. Complaint, ¶ 20; State Defendants' Answer, ¶ 20; MSEA's Answer, ¶ 20.

21. Pursuant to the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979, *et seq.*, the State of Maine (represented by, *inter alia*, Defendants Wyke and Walo) and MSEA have entered into a series of collective bargaining agreements (CBAs) controlling the

terms and conditions of employment for Plaintiffs and the class of state employees Plaintiffs seek to represent (“the Nonmembers”). The current CBA for each unit identified in ¶ 20, *supra*, is effective by its terms from 1 July 2005 through 30 June 2007. Complaint, ¶ 21; State Defendants’ Answer, ¶ 21; MSEA’s Answer, ¶ 21.

22. For each unit identified in ¶ 20, *supra*, the State and MSEA have negotiated provisions providing, *inter alia*, that:

Any employee covered by this Agreement shall, as a condition of employment, be required to choose from the options of membership in MSEA-SEIU or payment to MSEA-SEIU of a service fee equal to their pro-rata share of the costs to MSEA-SEIU that are germane to collective bargaining and contract administration as defined by law. The amount of the fee charged to certain employees hired prior to July 2, 2003, who were not members of MSEA-SEIU on that date, will be capped for approximately the first year of the contract, as provided under the subsection titled “Calculation of Service Fee.”

Employees shall be required to (a) sign a written payroll deduction authorization form authorizing deduction from their pay of the membership dues or service fee, or (b) tender the amount of the service fee due to the union, or (c) indicate in writing their religious objection to such fee and make contributions at least equal in amount to the service fee to a non-religious charitable organization mutually agreed upon by the employee so objecting and the Union. Employees choosing (b) or (c) shall make payments within ten (10) days after each payday.

The obligation to pay fees or dues shall become effective as follows:

- a. For employees first hired after December 1, 2004, the payment obligation shall be effective at the start of the pay period commencing closest to but not earlier than the thirtieth day after the end of their initial six months of probation;
- b. For all other employees, the period commencing closest to but not earlier than July 1, 2005. This obligation shall be implemented simultaneously with the salary increase scheduled for July 2005.

Complaint, ¶ 22; State Defendants’ Answer, ¶ 22; MSEA’s Answer, ¶ 22.

23. In addition to authorizing the exaction of union dues and/or so-called “service” or agency fees from nonunion employees, each such article contains a provision entitled “Indemnification,” as follows:

MSEA-SEIU agrees that it shall indemnify, defend, reimburse, and hold the State harmless against any claim, demand, suit, cost, expense, damages, or any other form of liability, including attorneys' fees, costs, or other liability arising from or incurred as a result of any act taken or not taken by the State, its members, officers, agents, employees, or representatives in complying with or carrying out the provisions of this Article, including, but not limited to, as a result of being ordered to reinstate an employee terminated at the request of MSEA-SEIU for not paying the service fee; in reliance on any notice, letter, or authorization forwarded to the State by the union pursuant to this Article; and including but not limited to any charge that the State failed to discharge any duty owed to its employees arising out of the service fee deduction. MSEA-SEIU will intervene in and defend any administrative or court litigation concerning the propriety of any act taken or not taken by the State, including, but not limited to, termination for failure to pay the service fee. In such litigation the State shall have no obligation to defend its act taken or not taken.

Complaint, ¶ 23; State Defendants' Answer, ¶ 23; MSEA's Answer, ¶ 23.

24. In addition to the indemnification clauses, the forced-unionism provisions of the relevant State/MSEA collective bargaining agreements each contains a "Severability" clause, providing in pertinent part as follows:

Should the United States Supreme Court, the First Circuit Court of Appeals, or any Court in Maine hold indemnity clauses relating to union security void or unenforceable on Constitutional or public policy reasons, this Article shall be stricken in its entirety upon written notification to MSEA-SEIU by the State. Should any Court find the indemnity clause in this Article to be void or unenforceable for any reason, this Article shall be stricken in its entirety upon written notification to MSEA-SEIU by the State....

Clerk's Docket No. 1: Complaint, Exhibit A, page 5, § 10.

25. On or after 11 April 2005, the Nonmembers received from Defendant MSEA: (1) a two-page memorandum; (2) a four-page, 11" x 17" tabloid-style document on newsprint identified as the "Notice of Rights Concerning MSEA-SEIU Membership, Dues and Fees"; and (3) a dues checkoff authorization card. Complaint, ¶ 24 & Exhibits A(1), A(2), and A(3); State Defendants' Answer, ¶ 24; MSEA's Answer, ¶ 24.

26. On or about 11 May 2005, the Nonmembers received from Defendant Walo an

e-mail communication stating “your need to either become a member of the Maine State Employees Association or pay a service fee beginning in July 2005,” and electronically attaching two documents. Complaint, ¶ 25 & Exhibits B(1), B(2), and B(3); State Defendants’ Answer, ¶ 25.

27. On or after 10 June 2005, the Nonmembers received from Defendant MSEA: (1) a five-page memorandum; and (2) a two-page affidavit signed by Joan Towle. Complaint, ¶ 26 & Exhibits C(1) & C(2); State Defendants’ Answer, ¶ 26; MSEA’s Answer, ¶ 26.

28. On or after 12 July 2005, the Nonmembers received from Defendant MSEA: (1) a seven-page memorandum; (2) a two-page affidavit from Joan Towle; (3) a one-page “Revised Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses with Organizing as Non-Chargeable” for the year ended 31 December 2004; (4) a one-page letter to MSEA’s Executive Director, dated 7 July 2005, signed by Kathleen Tyson, a partner in the accountancy firm Runyon Kersteen Ouellette; (5) an eight-page copy of the “Audited Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses and Supporting Documents” for the year ended 31 December 2004 for MSEA; (6) an eleven-page copy of the “Consolidated Statement of Expenses and Allocation Between Chargeable Expenses and Non-Chargeable Expenses — Alternative Basis for Allocation” for the year ended 31 December 2003 for the Service Employees International Union, AFL-CIO, CLC, United States Division; and (7) a five-page copy of the forced-unionism provisions applying for 2005-2007 for the Professional and Technical, Supervisory, Administrative and Operations, and Maintenance and Support Units. Complaint, ¶ 27 & Exhibits D(1), D(2), D(3), D(4), D(5), D(6), & D(7); State Defendants’ Answer, ¶ 26; MSEA’s Answer, ¶ 26.

a. Ms. Tyson's July 7, 2005 letter, Complaint, Exhibit D(4) (attached hereto for the convenience of the Court as Exhibit B), does not meet the reporting standards as described by auditing standards generally accepted in the United States of America. Expert Witness Report of Mark D. Myers ("Myers Report"), ¶ 9, attached hereto and incorporated herein as Exhibit C.

i. Reporting on the results of an audit engagement are governed by four standards. The first standard of reporting states the report shall state whether the financial statements are presented in accordance with generally accepted accounting principles. When an auditor reports on financial statements prepared in accordance with a comprehensive basis of accounting other than generally accepted accounting principles, the first standard of reporting is satisfied by disclosing the other basis of accounting in the report. Ms. Tyson's July 7, 2005 letter, Exhibit B, contains references to the May 17, 2005 report on the original chargeable percentage, but does not meet the first standard of reporting with respect to the revised chargeable percentage.

ii. The third standard of reporting states informative disclosures are to be regarded as reasonably adequate unless otherwise stated in the report. A financial statement or schedule, and the related disclosures with respect to the Association's revised chargeable percentage, did not accompany nor were they referenced in Ms. Tyson's July 7, 2005 letter. Exhibit B.

iii. The fourth standard of reporting states the report shall either contain an expression of opinion regarding the financial statements, taken as a whole, or an assertion to the effect that an opinion cannot be expressed. The report

should contain a clear-cut indication of the character of the auditor's work, if any, and the degree of responsibility the auditor is taking. Ms. Tyson's July 7, 2005 letter, Exhibit B, does not express an opinion, or assert an opinion cannot be expressed, on the revised chargeable percentage.

b. Ms. Tyson's July 7, 2005 letter does not meet the reporting standards as described by the Statements on Standards for Attestation Engagements. Reporting on the results of an attestation engagement are also governed by four standards. The report shall: (1) identify the subject matter being reported on and state the character of the engagement; (2) state the CPA's conclusion about the subject matter or the assertion in relation to the criteria against which the subject matter was evaluated; (3) state all the CPA's significant reservations about the engagement, the subject matter and, if applicable, the assertion related hereto; and (4) restrict the use of the report to specified parties under applicable circumstances. Exhibit C, Myers Report, ¶ 10.

c. The materials provided to the agency fee payors in this case do not constitute adequate financial disclosure under *Hudson*. Ms. Tyson's letter, Exhibit B, does not constitute a "verification by an independent auditor," and it does not enable agency fee payors to "gauge the propriety of the union's fee." Furthermore, it does not "determine whether the union has actually spent the amounts of money it claimed to have spent on the chargeable activities" under *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 813 (9TH CIR. 1997), and fails to provide "real independent verification of the financial data in question to make sure that expenditures are being made the way that the union says they are" under *Prescott v. County of El Dorado*, 177 F.3d 1102, 1107 (9TH CIR. 1999). Exhibit C, Myers Report, ¶ 14.

d. Ms. Tyson’s letter, Exhibit B, does not constitute an “Independent Auditor’s letter verifying the accuracy of Towle’s recalculation,” Clerk’s Docket No. 23, page 5, as it is not a form of professionally recognized correspondence in the accountancy profession. Deposition of Runyon Kersteen Ouellette (Kathleen Tyson), pages 769-72 (attached hereto as Exhibit D).

28. On or after 12 July 2005, those Nonmembers who had, after receiving the 11 April 2005 notice, Exhibits A(1), A(2), and A(3) hereto, received a one-page memorandum from MSEA, “providing [them] with an additional opportunity to decide whether [they] want to resign [their] membership in MSEA-SEIU and instead pay” an agency fee. Complaint, ¶ 28 & Exhibit E; State Defendants’ Answer, ¶ 28; MSEA’s Answer, ¶ 28.

29. Plaintiffs object, on behalf of themselves and the class they seek to represent, to the collection and/or expenditure of any amounts for purposes other than their *pro rata* share of

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the costs of collective bargaining, contract administration, and grievance adjustment for their individual bargaining units. Complaint, ¶ 35.

DATED: 24 January 2006

Respectfully submitted,

/s/ W. James Young

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ATTORNEYS FOR PLAINTIFFS AND THE CLASS
THEY SEEK TO REPRESENT

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Tuesday, 24 January 2006, 18:45:11 pm, E.D.T.

CERTIFICATE OF SERVICE

I hereby certify that on 24 January 2006, I electronically filed the foregoing **Plaintiffs' Statement of Undisputed Material Facts In Support of Their Motion for Summary Judgment** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following: Philip J. Moss; William H. Laubenstein, III; Jeffrey Neil Young; Robert Alexander; and Jeremiah A. Collins.

/s/ W. James Young

W. JAMES YOUNG