

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' OPPOSING STATEMENT
OF MATERIAL FACTS IN
OPPOSITION TO THE STATE
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

Pursuant to Rule 56, FED.R.CIV.P., and Civil Rule 56(c), D.ME., Plaintiffs Daniel B. Locke, *et al.*, on behalf of themselves and the class they seek to represent (“the Nonmembers”), file the foregoing Opposing Statement of Material Facts In Opposition to the State Defendants’ Motion for Summary Judgment, as follows:

1. The State Defendants hereby incorporate by reference Paragraphs 1-3, 6-11 and 28 in the Defendant Maine State Employees Association’s Statement Of Material Facts As To Which There Is No Genuine Dispute, together with the record citations set forth therein, and rely upon same as if fully set forth here.

Response: Admitted, Denied, and/or Qualified to the same extent as stated in Plaintiffs’ Opposing Statement of Material Facts In Opposition to the Defendant MSEA’s Motion for Summary Judgment, submitted contemporaneously herewith.

2. Kenneth A. Walo (“Walo”) is the Director of the Bureau of Employee Relations of the Department of Administrative and Financial Services (“BER”) of the State of Maine (“the

State”). As such, he is the primary official of the State charged with responsibility for negotiating and administering collective bargaining agreements between the State and labor unions representing State employees, and he is signatory to all collective bargaining agreements negotiated by the State. Affidavit of Kenneth A. Walo (“Walo Aff.”), ¶ 1.

Response: Admitted.

3. The first collective bargaining agreement between the State and Defendant Maine State Employees Association (“MSEA” or “the Union”) was signed in 1979. Walo Aff., ¶ 2.

Response: Admitted.

4. Since 1979, every collective bargaining agreement between the State and the MSEA has included a union security clause, requiring employees in the bargaining units represented by the MSEA who were members of the Union to pay union dues as a condition of their employment with the State. Walo Aff., ¶ 2.

Response: Qualified; the State Defendants’ characterization of a “union security clause” is semantically inaccurate. A “union security,” or forced-unionism, clause requires “all employees represented by a union to become or remain members of the union as a condition of employment.” *Black’s Law Dictionary* (5th ed. 1979), pages 1374-75, **see also** *Abood v. Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977) (defining “union shop agreement” as one in which “an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required”). Under the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, the requirement for “membership,” 29 U.S.C. § 158(a)(3), has been “whittled down to its financial core,” *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), and that obligation only entails “merely by paying to the union

an amount equal to the union's initiation fees and dues," *id.*, citing *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954), further limited to "fees and dues necessary to support the union's activities as the employees' exclusive bargaining representative." *Communications Workers v. Beck*, 487 U.S. 735, 762-63 (1988). Thomas R. Haggard, Professor of Law at the University of South Carolina School of Law, defines the term "union security" as follows:

Union security is not a term with a precise meaning.... Usually, ... union security connotes some kind of external compulsion.

.... [C]ompulsory union or union security agreements are federally sanctioned contracts between a labor union and an employer whereby the employer agrees to require his employees, as a condition of their employment, to affiliate with a union in some way.

There are several different kinds of union security agreements. Unfortunately, consistent terminology has not always been used in the description of these various types, a fact contributing substantially to the confusion that exists in both the law and in the popular understanding of exactly what union security is. The most common usage, however, together with a careful study of the legal obligations imposed under the various types of union security agreements, suggests adherence to the following definitions:

Closed Shop Agreement: An individual must be a member of the union in order to be eligible for hire and must retain this membership as a condition of continued employment with the contracting employer.

Union Shop Agreement: An individual who is not a member of the union may be hired but within a specified time after hire must become and remain a member as a condition of continued employment with the contracting employer.

Maintenance-of-Membership Agreement: An employee who is a member of the union at the beginning of the contract or who becomes a member during the term of the contract is obligated to remain a member until the termination of the contract.

Agency Shop Agreement: An individual who is not a member of the union may be hired and retained in employment without the necessity of becoming a member of the union, but he is required to tender the equivalent of initiation fees and periodic dues to the union as a condition of continued employment with the contracting employer.

Service Fee Agreement: An individual who is not a member of the union may be hired and retained in employment without the necessity of becoming a member of the union, but as a condition of

employment he is required to tender to the union his pro rata share of the costs incurred by the union in performing its statutory function as the exclusive bargaining representative.

Irrevocable Checkoff Authorization Agreement: An individual who elects to discharge his financial obligation to the union by authorizing the employer to deduct money from his paycheck and forward it to the union is bound to continue this authorization (and the employer is bound to honor it) for a specified term.

Haggard, Thomas R., *Compulsory Unionism, The NLRB, and The Courts* (University of Pennsylvania, 1977), pages 3-4. Thus, to the contrary, a clause “requiring employees in the bargaining units represented by the MSEA who were members of the Union to pay union dues as a condition of their employment with the State” affirms the State’s refusal to compel any of the incidents of union membership.

5. Until 2003, the union security clause in these contracts provided that employees who chose not to become members of the Union (“nonmembers”) were not required to pay anything, as a condition of employment with the State. *Id.*

Response: Qualified to the same extent as ¶ 4, *supra*. The clause described by the State Defendants was not, prior to 2003, a “union security clause.”

6. This created a potential for labor unrest, because employees who were members were likely to resent the fact that nonmembers were “free riders” who received the benefits of collective bargaining without paying their fair share of the costs of negotiating and administering the collective bargaining agreements. *Id.*

Response: Denied. The State Defendants’ characterization is sheer speculation on many levels, insofar as it presumes: (a) a state of mind by union members; and (b) that nonmembers received “benefits” from collective bargaining, *i.e.*, that the terms and conditions of employment pursuant to a union’s monopoly bargaining agreement were more favorable than

they might have negotiated on their own. Moreover, the sole reason that Nonmembers “received” such “benefits” were because the State’s monopoly bargaining law, the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979, *et seq.*, extinguished their individual power to bargain on their own behalf and granted a monopoly of bargaining power to a “bargaining agent” as defined in the State Employee Labor Relations Law, 26 ME. REV. STAT. ANN. § 979-A(1).

7. In order to eliminate or mitigate this potential for unrest and to promote labor peace in the State of Maine, the State agreed during negotiations for the 2003-2005 collective bargaining agreements to the MSEA’s request that the union security clause include provision for a “service fee” which would require new employees who were nonmembers to pay a portion of the dues charged to members of the Union. In negotiations for the 2005-2007 collective bargaining agreement, the State agreed to extend this requirement to all employees who were nonmembers. *Id.*

Response: Qualified to the same extent as ¶ 6, *supra*.

8. Every collective bargaining agreement with the MSEA has also included an “indemnification clause.” The State sought this provision to protect itself against liability which might arise from its reliance upon acts, omissions or representations by the Union. *Walo Aff.*, ¶ 3.

Response: The first sentence is Admitted. The second sentence is Qualified, insofar as the State Defendants improperly characterize acts for which they are themselves responsible as “reliance upon acts, omissions or representations by the Union [*sic*].”

9. Until this lawsuit was commenced, the State has never had occasion to invoke

application of the indemnification clause. *Id.*

Response: Admitted.

10. When the requirement of a service fee was added to the collective bargaining agreements in 2003, the indemnification clause was amended to read 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.

Walo Aff., ¶ 4.

Response: Admitted.

11. The State never intended that the indemnification clause apply in any case involving an intentional deprivation of an individual's constitutional rights by the State.

Accordingly, on October 18, 2005, the State of Maine and the MSEA executed a clarification of the indemnification clause in their collective bargaining agreements, after which the clause read as follows (new language appears in **bold face**):

MSEA-SEIU agrees that it shall indemnify, defend, reimburse, and hold the State harmless (**collectively, "Indemnification"**) 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; ***provided that, nothing herein shall require Indemnification for any intentional deprivation of an individual's constitutional rights by the State.*** 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.

Walo Aff., ¶ 5 and Exhibit A attached to that Affidavit.

Response: Qualified; the indemnification clauses, and the intent of the parties entering into them, speak for themselves.

12. In the event that the State were asked by the MSEA to terminate any of the members of the bargaining units represented by the MSEA, for non-payment of the service fee, the BER would have the responsibility for acting on that request, and it would not act on the request until it had undertaken a complete investigation and review of the facts to satisfy itself that the service fee had been properly assessed and that all of the requirements of *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) had been satisfied. Even then, the BER would not proceed with termination of the affected employee until he or she was provided with a notice of delinquency and given thirty days to pay the service fee in arrears. Walo Aff., ¶ 6.

Response: The assertions of fact contained herein are Denied as speculative.

13. The BER has not been asked by the MSEA to initiate or take any steps to terminate any of the named Plaintiffs in this case for non-payment of the service fee, and it has not initiated or taken any steps to terminate any of the named Plaintiffs in this case for non-payment of the service fee. Walo Aff., ¶ 7.

Response: Denied. BER initiated and/or took steps to terminate the named Plaintiffs when the State entered into forced-unionism agreements stating 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.” FAC, ¶ 22; Clerk’s Docket No. 48, ¶ 22; Clerk’s Docket No. 49, ¶ 22. Furthermore, on or about 11 May 2005, Defendant Walo sent to the Nonmembers 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. FAC, Exhibits B(1), B(2), and B(3); Clerk’s Docket No. 48, ¶ 25.

14. The BER has not been asked by the MSEA to initiate or take any steps to terminate any of the other members of the bargaining units represented by the MSEA, for nonpayment of the service fee, and it has not initiated or taken any steps to terminate any of the other members of the bargaining units represented by the MSEA, for non-payment of the service fee. Walo Aff., ¶ 8.

Response: Denied. BER initiated and/or took steps to terminate other nonmembers when the State entered into forced-unionism agreements stating 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.” FAC, ¶ 22; Clerk’s Docket No. 48, ¶ 22; Clerk’s Docket No. 49, ¶ 22. Furthermore, on or about 11 May 2005, Defendant Walo sent to the Nonmembers 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. FAC, Exhibits B(1), B(2), and B(3); Clerk’s Docket No. 48, ¶ 25.

DATED: 21 February 2006

Respectfully submitted,

/s/ W. James Young

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H:\WP\Maine\Locke\State Defendants' SJ\Disputations of Fact.wpd
Tuesday, 21 February 2006, 18:57:02 pm, E.D.T.

CERTIFICATE OF SERVICE

I hereby certify that on 21 February 2006, I electronically filed the foregoing **Plaintiffs' Opposing Statement of Material Facts in Opposition to the State Defendants' 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

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