The Journal of Law and Education

Volume 13
Issue 1 *1*

Article 8

1-1984

A Management Perspective

William F. Kay

Karen Reinhold

Kathy Andreola

Legal Problems in Administering Agency Shop Agreements—A Management Perspective

WILLIAM F. KAY*
KAREN REINHOLD**
KATHY ANDREOLA***

I. Introduction

Once an agency fee provision is in effect, the most significant problem facing the public sector employer is the provision's enforcement. Unlike the bulk of the collective agreement, which the union enforces against the employer on behalf of covered employees, an agency fee provision usually requires the public sector employer to enforce its obligations on the union's behalf and against covered employees.

The role of enforcing the provision against individual employees often results in employer involvement in litigation, sometimes at both the state and federal levels. It also frequently draws an employer into unfair labor practice or arbitration proceedings. Moreover, the disputes regularly extend into the political area, where a public employer gets caught between competing interests and values of individual employees, the union and an interested public.

This article reviews from the public employer's perspective problems created by implemented agency fee provisions. Focus falls on those issues which are peculiar to enforcement of the agency fee obligation and the consequences for the employer of such enforcement. Absent, as beyond this article's scope, is any discussion of the substantive merits of the agency fee concept.[1]

---

* Partner, Whitmore & Kay, Palo Alto, California. Graduate of Yale University and George Washington University Law School.

** Associate, Whitmore & Kay, Palo Alto, California. J.D., University of Santa Clara School of Law, B.A., University of California, Riverside.

*** Associate, Whitmore & Kay, Palo Alto, California. J.D., University of Santa Clara School of Law, B.A., Mount Holyoke College.

[1] The legal research underlying this discussion is intended to be illustrative only, not an exhaustive compilation.

II. Means of Enforcement Of Agency Fee

A. Conventional Means: Dismissal, Payment Of Agency Fee As A Condition Of Employment

Most public sector labor relations statutes authorizing agency fee arrangements are modeled on federal law and provide that the payment of an agency fee may be required as a "condition of employment".[2] When included in a collective bargaining agreement, these provisions place on the employer the burden of enforcing the agency fee payment through discharge proceedings. While discharge is the conventional private sector enforcement method, public sector employees have various constitutional and statutory rights which protect their employment status.[3] Public sector teachers are protected by tenure and civil service laws which limit discharge to specified causes. Nonpayment of agency fee is typically not one of the specified causes. Thus, a conflict often exists between discharge statutes and agency fee statutes allowing payment as a condition of employment. The employer's problem is that it may become involved in tedious discharge proceedings as well as costly litigation over the conflict between these statutory schemes.

In Michigan, that state's supreme court, in *Detroit Board of Education v. Parks*,[4] resolved this conflict in favor of contractually compelled dismissal. The court held that provisions of Michigan's Public Employment Relations Act authorizing the negotiation of agency fee as a condition of employment supersede Michigan's Teacher Tenure Act. The court based this holding on the Legislature's stated intent to have PERA dominate the field of public labor relations. Moreover, the *Parks* court held that dismissal for nonpayment need not follow the statutory discharge procedures requiring written charges and a hearing. The court held that the appropriate process for challenging the dismissal is to file an unfair labor practice charge against the union and/or the employer. The court noted that an unfair labor practice charge may also be filed to contest the factual claim that the agency fee has not been paid or to challenge the agency fee on some other basis.

California, like Michigan, permits the negotiation of an agency fee obligation as a condition of employment.[5] California also has statutory

---

[2] 29 U.S.C. § 158(a)(3).

[3] *See* N.L.R.B. v. General Motors, 373 U.S. 734 (1963); Radio Officers' Union of The Commercial Telegraphers' Union v. N.L.R.B., 347 U.S. 17 (1954); N.L.R.B. v. Brotherhood of Teamster, Local 85, 458 F.2d 222 (9th Cir. 1972); Int'l Union of Elec., Radio and Mach. Workers, Frigidaire Local 801 v. N.L.R.B., 307 F.2 679 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 936 (1962).

[4] 417 Mich. 268, 335 N.W.2d 641 (1983).

[5] CAL. GOV'T. CODE §§ 3540.1(i)(2), 3546 (West 1980).

provisions governing the causes and procedures for teacher dismissal.[6] In California, the labor relations and tenure laws have been reconciled. The Public Employment Relations Board has stated that the statutory language which authorizes payment of a service fee as a condition of employment permits enforcement of the obligation through termination.[7] As to the appropriate dismissal procedure, it is the California Attorney General's opinion that teachers may be discharged for nonpayment of agency fee only in accordance with the teacher dismissal statute.[8] At a minimum, the district is required, prior to discharge, to order the employee to pay the fee. Persistent refusal to pay the fee upon being ordered constitutes insubordination, one of the statutory grounds for discharge. The teacher may then be dismissed pursuant to the statutory scheme.

Where there is no statutory authorization of agency shop, an opposite result has been reached, as in the Maine Supreme Court's decision in *Churchill* v. *S.A.D. No. 49, Teachers Association*.[9] The court held that an agency fee provision which forces payment as a condition of employment is unlawful as violative of the public employees' statutory right "voluntarily to join, form, and participate in the activities of organizations of their own choosing".[10] Unlike California and Michigan, the Maine public labor relations statute does not contain express authority to negotiate agency fee arrangements.

The Indiana courts have used a different rationale to reach the Maine court's conclusion. In *Anderson Federation of Teachers* v. *Alexander*,[11] the court held that "[s]chool corporations may not make collective bargaining agreements requiring the discharge of teachers."[12] While Indiana's public labor relations law contains no express authorization of agency fee arrangements, the court did not base its conclusion on this absence. Rather, the court found that the district was statutorily invested with sole authority to dismiss teachers and that this discretion may not be encumbered by entering into collective bargaining agreements requiring the payment of agency fee as a condition of employment.[13]

Many state courts have been reluctant to address the conflict between

---

[6] CAL. EDUC. CODE §§ 44932, 87732 (West Supp. 1983).

[7] King City Joint Union High School Dist., P.E.R.B. Order No. 197, 6 CAL. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 13065 (March 3, 1982).

[8] 60 Op. Att'y Gen. 370 (1977).

[9] 380 A.2d 186 (Me. Sup. Jud. Ct. 1979).

[10] *Id.* at 192.

[11] 416 N.E.2d 1327 (Ind. Ct. App. 1981).

[12] *Id.* at 1330.

[13] *Id.* at 1332 & n.4 (citing 1973 Certificated Educ. Employees Bargaining Act, I.C. 20-7.5-1-6(b)(4), (6)).

tenure laws and agency fee provisions. The Massachusetts Supreme Court sidestepped the issue in *School Committee of Greenfield* v. *Greenfield Education Association*[14] on the ground that no decision to discharge had yet been made. Similarly, in *Dauphin County Technical School Education Association* v. *Dauphin County Area Vocational-Technical School Board*,[15] the Pennsylvania Supreme Court avoided the issue by finding that the collective bargaining agreement did not expressly provide for termination.

It is obvious from these cases that the conflict between dismissal as the means of enforcing an agency fee obligation and teacher tenure laws poses a potential problem for public sector employers. Dismissal effected pursuant to an agency fee provision is subject to several possible employee challenges. A challenge may be based on alleged conflict with the causes for dismissal outlined by the relevant tenure law. A separate challenge may be based on alleged conflict with the statutory procedure for dismissal.

In order to avoid unnecessary litigation, the employer must take these potential legal challenges into consideration while negotiating an agency fee provision. Unless the applicable statutory and decisional law clearly allows dismissal for failure to fulfill a negotiated agency fee obligation, the employer should avoid dismissal as an enforcement tool. If dismissal is acceptable under the statutory and decisional law, attention should be given to the appropriate procedure for effecting the dismissal. If the agency fee dismissal procedure is well established under state law, the contractual provision need not address the problem. If it is unclear whether dismissal should be pursuant to the statutory procedure provided for just cause dismissals, the agency fee provision should specify the procedure to be used. This will relieve the employer of sole responsibility for choosing the procedure and at a minimum will require the union to be involved in defending the chosen procedure. Also, it will allow the employer to successfully defend the dismissal procedure based on its contractual obligation.

B. Mandatory Payroll Deduction In Lieu Of Dismissal

The most frequently used enforcement method in the private sector is dismissal. As discussed above, dismissal poses particular problems in the public sector. As an alternative, some states' statutes allow automatic removal of the agency fee from the employee's paycheck. From the union's perspective, automatic deduction is desirable because it relieves

---

[14] 385 Mass. 70, 431 N.E.2d 180 (1982).

[15] 483 Pa. 604, 398 A.2d 168 (1978).

the union of administrative problems associated with enforcing the fee obligation. Because it is carried out by the employer, it directs critical attention away from the union and toward the employer. From the employer's perspective, automatic deduction is a mixed blessing. It clearly is a less painful method of enforcement than dismissal of the dissenting employee; however, it can create a myriad of problems all its own by placing the employer squarely in the middle of disputes between the union and dissenting employees.

Generally, payroll deductions must be expressly authorized by the employee and are subject to employee revocation.[16] However, some state statutes either specifically provide for mandatory deduction without employee authorization or allow the union and employer to negotiate an agreement requiring mandatory deduction of the fee without authorization. For example, statutes in Hawaii and New York provide for mandatory deduction once an exclusive representative has been recognized.[17] However, both statutes specifically prohibit mandatory deductions from non-member employees unless the union provides a rebate procedure for that portion of the fee spent for political or ideological purposes. In contrast, California permits the employer and the union to negotiate mandatory deduction of the fee from non-member employees.[18]

Regardless of the statutory scheme, there are a number of issues associated with mandatory deductions which must be dealt with by the employer. As noted above, mandatory deduction places the employer in the middle of disputes between the union and dissenting employees over the type of costs which may appropriately be charged to non-member employees through the fee. As discussed fully in Section III, there are a number of preventive approaches to this problem.

The employer may also get caught in conflicts between the union and employees claiming to have religious or philosophical objections to paying the agency fee. Some states, for example California, have incorporated into the public employee bargaining statute the religious exemption concept developed by Title VII cases.[19] If a statutory definition exists, the employer needs to negotiate the actual statutory definition into the agency fee provision, or should reference the applicable statute as the appropriate standard for religious exemptions. This will minimize the number and extent of disputes over whether a religious exemption should be granted.

---

[16] *Report of the Committee on State and Local Government Bargaining*, 1978 A.B.A. SEC. LAB. REL. L. 433.

[17] HAWAII REV. STAT. § 89-4 (1976); N.Y. Civ. Serv. Law § 208(b) (McKinney 1983).

[18] CAL. GOV'T CODE § 3540 *et seq.* (West 1980, Supp. 1983); CAL. EDUC. CODE § 45061 (West Supp. 1983).

[19] CAL GOV'T CODE § 3546.3 (West Supp. 1983).

If the relevant bargaining law contains no standard for religious exemptions, the employer should negotiate a definition consistent with established statutory and decisional law.

Finally, in order to limit the employer's involvement in religious exemption disputes, the negotiated agency fee provision should require the employer to place any deducted fees in a neutral escrow account pending resolution of the dispute between the employee and the union over the appropriateness of a religious exemption.

C. Alternatives To Employer Enforcement Of Fee

Both above-mentioned enforcement methods assign the burden of compelling or facilitating payment to the employer. As a result, the employer becomes inextricably involved in legal conflicts over the enforcement tools. One alternative is to shift the enforcement burden back to the union by negotiating language requiring the union to collect the fees directly from employees through civil action.

Initially, this shift presents a conceptual problem. The parties to a collective bargaining agreement are the union and the employer. Individual employees, while represented by the union, are not necessarily parties to the contract. Rather, they can be likened to third party beneficiaries of the agreement reached between the union and employer. As a result, they enjoy benefits under the contract, but typically are not party to the agreement. The question then is whether the union may enforce the agency fee provision against an employee who is not a party to the collective agreement.

This shift of enforcement was recently endorsed by the California Supreme Court in *San Lorenzo Education Association v. Wilson*.[20] The association and district had negotiated an agency fee provision which expressly made enforcement the union's responsibility. The agreement did not specify that union membership or payment of the service fee functioned as a condition of employment, nor did it provide for discharge as a remedy for noncompliance. Upon refusal of several employees either to join the union or pay the service fee, the association sought and obtained judgments against the employees in small claims court. The employees appealed, arguing that pursuant to California statutory law, dismissal was the sole remedy for failure to pay the service fee. The court held that "civil suit is a proper and often preferred method of enforcing such a provision."[21] It reasoned:

> [A] civil action is appropriate against one who violates a duty owed another

---

[20] 32 Cal.3d 841, 654 P.2d 202, 182 Cal. Rptr. 432 (1983).

[21] *Id.* at 844, 654 P.2d at 204, 182 Cal. Rptr. at 434.

> which arises out of a 'public policy statute' dealing with labor relations. (*Montalvo* v. *Zamora* 7 Cal.App.3d 69, 76, 86 Cal.Rptr. 401 (1970)). Under the labor relations system established for public education employees by the EERA, a collective bargaining agreement executed by an exclusive bargaining representative binds all the members of the unit as to all terms within the organization's scope of representation. The organization may enforce through a civil action the agency shop obligations of individual employees arising out of that agreement.[22]

The court emphasized that the union and the employer should be permitted to negotiate the remedy they find most appropriate to enforce an agency fee provision.

Similarly, in *Jefferson Area Teachers Association v. Lockwood*,[23] the Ohio Supreme Court endorsed the union's resort to small claims court to compel payment of agency fees. The court noted the benefits the employee received by virtue of the agreement, and therefore concluded that the association was entitled to assess and collect from him the agency fee.

The Michigan Supreme Court has also upheld a contract provision shifting the agency fee enforcement burden to the union by civil suit. In *Eastern Michigan University v. Morgan*,[24] the faculty association filed a civil suit against a non-member dissenting employee seeking damages or specific performance. The collective bargaining agreement specifically designated civil suit as the only means of enforcement. Like the California Supreme Court, the Michigan Supreme Court refused to find that dismissal was the sole means of enforcing agency fee arrangements. Again, the court encouraged the parties to formulate, at the bargaining table, their own mechanism for enforcing agency fee.

Nevertheless, the burden of negotiating such a mechanism still exists for the public employers; and shifting the burden of enforcement from the employer to the union may only add to the employer's labor relations problems.

III. Disputes Concerning The Amount Of The Fee

In 1977 the United States Supreme Court decided in *Abood v. Detroit Board of Education*[25] that a state statute permitting an agency shop agreement did not violate dissenting employees' first amendment rights, provided the fees were used for "collective bargaining" and not for "political or ideological" purposes. Since that decision, a continuing battle has been waged over which union activities qualify as political or

---

[22] *Id.* at 847, 654 P.2d at 206, 182 Cal. Rptr. at 436.

[23] 69 Ohio St.2d 671, 433 N.E.2d 604 (1982).

[24] 100 Mich. App. 219, 298 N.W.2d 886 (1980).

[25] 431 U.S. 209 (1977).

ideological. While the real combatants are dissenting employees and the union, the employer may be dragged into the fray through its enforcement role.

Regardless of the enforcement mechanism used, the employer may be named in any legal action by a dissenting employee over the amount of the fee. The union may demand that the dissenting employee pay the full agency fee and seek a refund for objectionable expenditures through the union's rebate system. The dissenting employee may refuse to pay any part of the agency fee until there has been a judicial or administrative determination regarding what percentage of the fee goes for "political or ideological" purposes. If the enforcement mechanism is automatic deduction, the employer will be caught between the union's demand that the employer deduct the full amount of the fee and the dissenting employee's demand that the employer make no deductions until the dispute has been resolved. If the enforcement mechanism is dismissal, the union may demand dismissal if the employee fails to pay any part of the fee. Submitting to any of these demands could subject the employer to unfair labor practice charges or civil suit in state or federal court.

While the primary respondents in *Abood* proceedings have been the unions, employers have been consistently named as co-respondents whether the proceeding is brought in state or federal court, or, as an unfair labor practice charge before an administrative tribunal. For example, in *King City Join Union High School District*[26] an employee challenged the agency fee amount through an unfair labor practice proceeding. Although originally the charge was filed solely against the union, the hearing officer determined after hearing the charging party's prima facie case that the employer should be named as a respondent and testimony regarding its role be taken.[27] The charge against the employer was predicated on its collection of a fee which allegedly included amounts for political or ideological purposes. The dissenting employees argued that through such collection the employer effectively interfered with or coerced non-member employees in the exercise of their statutory right to refrain from participating in union activities.

A similar theory was accepted by the Michigan Employment Relations Commission in *Chamberlain v. Garden City Board of Education*.[28] The Commission held the employer committed an unfair labor practice by agreeing to a contract which allowed the union to collect assessments from non-member employees not required of member employees. The

---

[26] *Supra* note 7.

[27] 4 CAL. PUB. EMPL. REP. (LAB. REL. PRESS) ¶ 11156 at 674 (August 29, 1980), *vacated*, P.E.R.B. Order No. 197.

[28] 1978 M.E.R.C. Lab. Op. 1145.

Commission reasoned that by maintaining such an agreement the employer was discriminating against employees on the basis of their decision to participate or refrain from participating in the activities of employee organizations.

Arguments regarding the agency fee's permissible uses have also been made in the federal and state court forums. Disputes in these forums have generally focused on whether dissenting employees can be forced to rely on a union's rebate procedure when challenging the use of fees. In *School Committee of Greenfield v. Greenfield Education Association*,[29] the Massachusetts State Supeme Court cautioned against reading the state statute as requiring employees to pay the disputed fee and thereafter exhaust the internal rebate procedure as their primary remedy. The court noted such an interpretation would render the statute constitutionally suspect on first amendment grounds. Instead, the court held that dissenting employees need not rely exclusively on a union rebate procedure.[30] It went on to note that during the challenge process the union should not be given use of the agency fee since the constitutional rights of dissenting employees require payment of the disputed fee into a neutral escrow account pending a judicial determination.[31]

By contrast, in *Haag v. Hogue*,[32] a New York court rejected the argument that the constitutional rights of dissenting employees require deposit of the fees with a third party until the union has shown what part of the fee represents the dissenting employee's pro rata share of collective bargaining expenses. The court concluded that dissenting employees' rights are violated not by the union's receipt of the money, but rather by the money's use for impermissible purposes. As a result, the court in *Haag* held there is no basis for denying the union control over the full fee[33] until the dissenting employee has made a prima facie showing of unauthorized use.

A Michigan court of appeals reached the same conclusion in *White Cloud Education Association v. Board of Education of the White Cloud Public Schools*.[34] Backtracking on language in *Ball v. Detroit*,[35] which endorsed use of a third party neutral pending judicial determination, the court suggested a dissenting employee's first amendment rights can be "adequately safeguarded if the disputed fee is paid to the union and the

---

[29] 385 Mass. 70, 431 N.E.2d 180 (1982); *See also* Ball v. City of Detroit, 84 Mich. App. 383, 269 N.W.2d 607 (1978).

[30] 385 Mass. 70, 431 N.E.2d 180, 186-87 (1982).

[31] *Id.*, 431 N.E.2d at 189.

[32] 116 Misc. 2d 935, 456 N.Y.S.2d 978 (1982).

[33] *Id.*, 456 N.Y.S.2d at 983.

[34] 101 Mich. App. 309, 300 N.W.2d 551 (1980).

[35] 84 Mich. App. 383, 397, 269 N.W.2d 607 (1978).

employee immediately files suit for declaratory judgment."[36] The court reasoned the dissenting employee's constitutional rights could be quickly vindicated through expedited hearing procedures under the declaratory judgment rules.

Regardless of the forum, the potential problem for the employer is the same. What action should a public employer take by way of deduction or dismissal pending resolution of a dispute over the amount of the fee? The solution to this problem is to negotiate an agency fee provision which defines the procedure to be used by employees who wish to contest the amount of the fee, including the requirement that disputed fees be placed in an escrow account pending a determination of the permissible amount of the fee. Establishing a contractual requirement that the disputed fee be paid into an escrow account avoids any conflict over whether the employer should deduct the full fee and forward it to the union or refuse to deduct any portion of the fee until the dispute is resolved. The employer's role in the dispute is limited by contract to forwarding the fee to a neutral account pending resolution of the dispute.

To limit potential liability for violation of a dissenting employee's constitutional and/or statutory rights the employer should also negotiate a contractual definition of the agency fee. The definition should comport with the standards of *Abood* by limiting the fee to expenses for collective bargaining, contract administration and grievance adjustment and specifically excluding expenses for political or ideological purposes.

A few states define by statute the permissible agency fee amount. For example, Minnesota provides that the agency fee may equal the amount of regular membership dues less the cost of "members only" benefits, but in no event more than 85% of regular membership dues.[37] Massachusetts explicitly lists the types of expenditures for which refunds may be demanded.[38] However, absent specific statutory authority defining the dollar amount of the fee, the employer should not attempt to negotiate a dollar maximum on the amount charged to non-members. The actual dollar amount of the fee has generally been found to be outside the scope of bargaining.[39] Instead, the employer should negotiate a provision which limits the fee to permissible expenditures, using the language from *Abood*.

In addition, the negotiated provision should require the union to certify that the total amount of the fee conforms to the definition contained

---

[36] 101 Mich. App. 309, 300 N.W.2d 551, 555 n.14 (1980).

[37] MINN. STAT. ANN. § 179.65(2) (West 1966).

[38] MASS. GEN LAWS ANN ch. 150E, § 12 (West 1982).

[39] *See, e.g.*, Fresno Unified School Dist., P.E.R.B. Order No. 208, 6 CAL. PUB. EMPL. REP. (LAB. REL. PRESS) § 13110 (April 30, 1982); Township of Hamilton, P.E.R.C. No. 82-121, 4 Nat'l Pub. Empl. Rep. (LAB. REL. PRESS) 31-13169 (N.J. June 4, 1982).

in the contract. The negotiated provision should require this certification as a condition precedent to the employer's enforcement of the fee. Any actions taken by the employer are taken in express reliance on the union's certification that the fee meets the contractual standard. This shifts the risk of determining which costs are appropriate onto the union.

The purpose of this negotiated approach is to avoid a scenario in which the employer is forced to bear the risk of deciding which costs are properly charged to the dissenting employee. The contractual definition of the agency fee as well as the certification requirement effectively shifts the responsibility for determining which costs are included in the fee to the union. The contractual requirement of an escrow account avoids the need for a judicial determination of the escrow account issue, and to the maximum extent possible, balances the interests of the dissenting employee and the union. As discussed below, the negotiated provision should also minimize the possibility of having agency fee disputes pending concurrently in more than one forum by contractually designating a single forum for resolving disputes over the amount of the fee.

IV. Multiple Forums Available To Raise Agency Fee Issues

Another problem employers face in living with a negotiated agency fee is the number of forums available to the union, employee, and employer to resolve conflicts over the agency fee provision. This problem is a function of the variety of issues raised by agency fee. An agency fee dispute can easily raise at once contractual, constitutional, and labor relations issues. An employer may be forced to enter a number of these forums and to bear the attendant legal fees.

As part of the collective bargaining agreement, the negotiated grievance procedure becomes a natural forum in which to raise conflicts over its enforcement or administration. Many of the cases discussed previously were initiated by the union filing a grievance alleging that the employer failed to comply with the terms of the contract by not firing a reluctant employee or otherwise not enforcing the agency fee provision.[40] In many instances, the public employer ends up seeking declaratory relief from the courts as to the validity of the agreement prior to arbitration.[41]

More and more courts are requiring that grievances based on enforcement of agency fee provisions be brought in the form of unfair labor practice charges before the appropriate state administrative agency. In

---

[40] Churchill v. S.A.D. #49 Teachers Ass'n, 300 A.2d 186 (Me. Sup. Jud. Ct. 1977); Dauphin County Area Vocational-Technical School Board, 483 Pa. 604, 398 A.2d 168 (1978); School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982).

[41] *See, e.g.*, School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982).

Board of Education v. Parks,[42] the Michigan Supreme Court stated that an employee's remedy for challenging an improper discharge based on non-payment of agency fees is to file an unfair labor practice charge against the union or the employer. In California, the state courts have deferred jurisdiction over the amount of fee, the deduction procedure, and refund disputes to the California Public Employment Relations Board on the ground that the Board has initial exclusive jurisdiction over alleged unfair practices. The court has also reasoned that resolution of the unfair practice charge may obviate the employee's constitutional claims.[43] Thus, dissenting employees are required to contest the amount of the fee through an unfair labor proceeding.[44] In Massachusetts, the state high court construed its public labor relations statute to give a dissenting employee the option of bringing a prohibited practice complaint before the Labor Relations Commission to challenge the fee amount.[45]

In other jurisdictions, state courts have retained initial jurisdiction over agency fee disputes pursuant to the applicable statutory scheme. For example, in Minnesota the public employee may bring an action in court to enjoin the use of a deducted agency fee by a union, to enjoin the collection of the fee in some circumstances, and for a hearing on the validity and proper amount of the fee.[46] In addition, state courts have jurisdiction over breach of contract causes of action, requests for specific performance, or small claims complaints, all remedies available to the disgruntled employee or union.[47]

Public employers may also be sued in federal court in *Abood*-type litigation by employees claiming their constitutional rights are denied by the use or amount of agency fee,[48] or by being required to contribute an agency fee.[49] In *Jehnert v. Ferris Faculty Association*,[50] several faculty members sued the union and the public college under 42 U.S.C. 1982, 1985, and 1986 claiming, among other things, that requiring agency fees as a condition of employment impaired their contract rights in violation of the Constitution.

---

[42] 417 Mich. 268, 335 N.W.2d 641 (1983).

[43] Leek v. Washington Unified School Dist., 124 Cal. App. 3d 41, 177 Cal. Rptr. 196 (1981).

[44] *See supra* note 7.

[45] School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 431 N.E.2d 180 (1982).

[46] Threlkeld v. Robbinsdale Fed'n of Teachers, 316 N.W.2d 551 (Minn. Sup. Ct. 1982).

[47] Eastern Michigan University v. Morgan, 100 Mich. App. 219, 298 N.W.2d 886 (1980); Jefferson Area Teachers Association v. Lockwood, 69 Ohio St. 2d 671, 433 N.E.2d 604 (1982); San Lorenzo Educ. Association v. Wilson, 32 Cal. 3d 831, 187 Cal. Rptr. 432, 654 P.2d 202 (1983).

[48] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

[49] 316 N.W.2d 551 (Minn. Sup. Ct. 1982). While a Minnesota Supreme Court decision, the employees in this case sued on a fourteenth amendment due process theory that could have been initiated in federal court.

[50] 556 F. Supp. 309 (W.D. Mich. 1982).

Finally, when an agency fee provision requires payment as a condition of employment, and discharge proceedings are commenced before an administrative law judge or tenure commission, that body becomes involved in agency fee issues.[51]

The number of forums available to litigate agency fee issues in itself presents a problem to public employers. Employers must be aware of all the possibilities for liability when negotiating the fee provision. These possibilities are becoming increasingly complex given the labor, constitutional, employment and contractual issues involved. Further, the employer has little control over the forum used to resolve a particular dispute. Despite this lack of control, the employer will undoubtedly be named as a respondent. In addition, the employer may become a party to costly litigation over the basic issue of which forum has jurisdiction.

As has been suggested above, to alleviate these problems the public employer should consider negotiating a procedure for enforcement of the agency fee, compatible with the applicable statutory context and the employee's constitutional rights, which designates the forum to be utilized in the event a dispute arises. As discussed below, to alleviate the costly burden of litigation in several forums, the employer should consider negotiating a hold harmless provision into the collective bargaining agreement.

V. The Hold Harmless Approach

As the foregoing discussion illustrates, the public sector employer bears the risk of expensive litigation associated with agency fee enforcement. In addition to such litigation's financial costs, there are morale problems connected with any litigation which pits the employer against individual employees. Moreover, such litigation focuses attention on the employer's enforcement role, and as a result of this increases potential political repercussions. While the agency fee provision can be structured to reduce potential financial liability, there is no structure which will entirely eliminate the risk of legal action either by dissenting employees or the union. The best approach for dealing with this risk and the financial costs associated with it, is to negotiate a hold harmless and indemnity clause which shifts to the maximum extent possible the risk of such costs to the union.

It has generally been recognized that the employer has a legitimate interest in protecting itself from any potential liability associated with an agency fee provision.[52] Therefore, hold harmless and indemnity clauses

---

[51] *See* Bd. of Education v. Parks, 335 N.W.2d 641 (Mich. Sup. Ct. 1983) (Appeal from decision of Tenure Commission).

[52] Fresno Unified School Dist., P.E.R.B. Order No. 20-8, 6 CAL. PUB. EMPL. REP. (LAB. REL.

have typically been found to be within the scope of bargaining.[53]

At a minimum, the employer should be aware of the following issues when negotiating a hold harmless clause. Assuming the hold harmless provision shifts the expense of any litigation to the union, who will control the path the litigation takes when the employer is a named party? Assuming the employer has some control over the legal services used to defend it, how will the reasonable cost of handling the litigation be determined for purposes of reimbursement? The employer generally has a significant interest in the manner in which any litigation involving an agency fee provision is handled. To protect this interest, potential areas of dispute should be anticipated and specifically dealt with in the hold harmless provision.

First, if the employer is a named party in any litigation, which attorney should defend the employer? Second, how much control does the employer have over how the litigation is handled: for example, which issues are raised for purposes of defense? Third, assuming the employer is going to defend itself and then seek reimbursement, what kind of notice should be given to the union of its intended course of action? Fourth, what parameters will be used to determine which expenses are reimbursed by the union? Finally, assuming a dispute arises over the reimbursement of certain expenses, in what forum should that dispute be resolved?

The negotiated language should contemplate these potential dispute areas and, if possible, provide specific answers. Preferably, the employer should retain the right to be represented by its own attorney in any litigation in which it is a named party. At a minimum, it should retain a separate representation right in those situations where its interest in the outcome of the litigation is separate and distinct from the union's. The union may seek language which would deny reimbursement in those circumstances where the employer's actions in defending are duplicative of the union's. If such language is included, the concept of duplication should be carefully defined to exclude those circumstances in which the employer has a separate and distinct legal interest in the outcome of the litigation.

Careful definition of the separate representation right will prevent most disputes over the course of action taken in defending against any particular claim. In order to avoid arguments over whether the costs associated with a particular course of action are reimbursable, provision should be made for the employer and the union to meet and discuss whether a particular claim should be compromised or defended. The

---

PRESS) ¶ 13110 (April 30, 1982).

[53] *Id.*

union's role should be limited to notice and the opportunity to discuss with the employer the contemplated action.

Another potential problem area which should be specifically addressed by the indemnity clause is the question of which costs will be reimbursed by the union. The clause should contain an affirmative statement that all costs associated with defending or otherwise resolving any claims against the employer arising out of the agency fee provision are reimbursable. If specific types of costs are listed, the list should be identified as exemplary and noninclusive, so that the employer's recovery is not limited to the specific cost items listed.

Finally, the hold harmless clause should anticipate disputes over reimbursement and designate a forum for the resolution of such disputes. If the collective agreement contains a grievance procedure culminating in binding arbitration, the agency fee/hold harmless clause should specify whether it is subject to arbitration. If hold harmless disputes are not made subject to arbitration, the employer will have to compel indemnification through civil action in the event of a dispute. To avoid unnecessary conflict, the clause should specifically designate the appropriate forum for resolving such disputes.

The hold harmless approach can significantly reduce the potential litigation expenses associated with an agency fee provision. However, a generally worded hold harmless clause may result in as much litigation as the agency fee provision itself. To insure that the hold harmless clause does not itself result in unnecessary litigation, it should specifically address the potential dispute areas discussed above.

VI. Conclusion

This article has not discussed whether agency fee is a good idea for the public school employer. It has reviewed potential problems for the public employer once an agency fee provision is in place, with an emphasis on preventative approaches.

Specifically, it has focused on the employer's role in enforcing the agency fee obligation against objecting employees. Attention has been given to dismissal as an enforcement tool and its possible conflict with dismissal and tenure laws. As to the mandatory deduction approach, preventative suggestions have been made which limit the public employer's role in any disputes between dissenting employees and the union.

Because the bulk of disputes between the union and employees arise over the appropriate amount of the fee, emphasis has been given to methods of preventing such disputes or, to the maximum extent possible, removing the employer from such disputes. Common to each suggested method is the purpose of shifting onto the union the risks associated with

the amount of the fee and whether an employee qualifies for an exemption from the fee obligation.

This article has suggested that regardless of the preventative approaches used, public sector employers must be prepared for involvement in litigation in a number of forums over enforcement of the agency fee obligation. To contain the cost of such involvement this article has advocated the use of a hold harmless clause which forces the union to bear the financial costs of any litigation over the agency fee provision.

Enforcement of an agency fee obligation against objecting employees raises constitutional as well as labor relations issues. In negotiating an agency fee obligation, public sector employers must anticipate and provide for the resolution of these issues.