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A Guide to the Changing Court Rulings on Union Security in the Public Sector: An Introduction

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The legal obligations and liabilities of education employers and unions representing their employees have changed so swiftly with regard to union security arrangements that the set of articles the Journal printed in the January 1984 issue is already out of date.

The set of articles entitled "Legal Problems in Administering Agency Shop Agreements" did contain information and guidance of continuing utility. There was also a detailed analysis of a Ninth Circuit Court of Appeals case, *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*[1] which was soon to bring about change so vast that one needs a road map to avoid perhaps financially disasterous hazards ahead.

Unfortunately, those in the field of education tended to disregard that case because it dealt with an interpretation of the Railway Labor Act. When the Supreme Court rendered a decision with the same case caption[2] in 1984, the education community failed to recognize what was ahead. Not only was the public sector greatly affected, but it was the area of education that was most affected.

It did not take very long for the New York Public Employment Relations Board to rely on *Ellis* to reverse itself with regard to a higher education agency shop refund procedure.[3] The Third Circuit soon applied *Ellis* to Rutgers University faculty.[4] Similarly, the Seventh Circuit applied *Ellis* to the Chicago Teachers Union.[5]

If it was not clear before then, the Seventh Circuit Court of Appeals

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[1] 685 F.2d 1065 (9th Cir. 1982).

[2] ___ U.S. ___, 104 S. Ct. 1883 (1984).

[3] United University Professions and Thomas C. Barry, NY PERB Case U-7449 (September 19, 1984), Public Employees Bargaining (CCH) ¶ 43,809.

[4] Robinson v. State of New Jersey, 741 F.2d. 598 (3d. Cir. 1984).

[5] Hudson v. Chicago Teachers Union Local No. 1, 743 F.2d. 1187 (7th Cir. 1984).

made it clear that it was not just unions and their members who should be concerned with two very important issues:

1. Which union expenditures may be used to compute an agency shop or fair share fee?

2. What procedures must be provided for dissenters to receive rebates from fees charged by the union acting as exclusive representative?

The Seventh Circuit stated:

> *the public employer* must establish a procedure that will make reasonably sure that the usages of nonunion employees will not be used to support those of the union's political and ideological activities that are not germane to collective bargaining[6] (emphasis added).

The court went on to add:

> the procedure must make reasonably sure that the agency fee is not used for any unrelated activities.[7]

We are indebted to Richard J. Darko and Janet C. Knapp, who previously presented the union perspective and who identified *Ellis* at its appellate stage as a seminal decision, for again providing the Union Perspective and dissecting for us the Supreme Court's decision in *Ellis*. We are equally grateful to R. Theodore Clark, Jr., who has a national practice and is a celebrated author, for providing the Management Perspective. He also offers some guidance on coping with the doctrine that a union's failure to establish legally valid agency shop fees or a rebate procedure could create an equal liability for the employer. Although new decisions surely will continue to flow out, the insightful analysis provided by the two perspectives are sure to aid in understanding those new decisions and in recognizing what lies ahead.

Perhaps the impact of *Ellis* will make more people concerned with labor relations in education recognize that private sector cases and non-education cases cannot be ignored and may have the greatest effect on judicial and administrative decisions involving education bodies and unions representing their employees.

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[6] *Id.* at 1194.

[7] *Id.*