Long Island Chapter

Labor and Employment Relations Association

Newsletter

ADVANCING WORKPLACE RELATIONS

LERA
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Winter 2016

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PRESIDENT'S PERSPECTIVE:

Thomas B. Wassel, President

There may be changes on the horizon for colleges and their graduate assistants. Recently, the National Labor Relations Board ("NLRB") voted 3 to 1 to reconsider whether graduate students who work as teaching assistants or research assistants at private universities are protected by the National Labor Relations Act (the "Act" or "NLRA") and whether they can participate in collective bargaining with institutions.

By way of brief background, in 2004, the NLRB held in Brown University, 342 N.L.R.B. 483 (2004) that an educational relationship between graduate students and the University precluded the existence of an economic relationship and that the NLRA protected only economic relationships. More specifically, the NLRB found that the graduate students' relationship with the University was not an economic relationship because the University required graduate students to serve as teaching assistants as part of completing their degrees, and that the graduate students received stipends for serving as teaching assistants rather than payment for their services. Thus, the NLRB held that the students were not "employees" within the meaning of the NLRA and therefore not entitled to collective bargaining rights.

In a similar case, the New York regional office of the NLRB recently ruled against New School graduate teaching assistants represented by the United Autoworkers ("UAW"), citing to precedent that graduate students are primarily students, not employees, as per the Brown decision. However, on October 21, 2015, the NLRB agreed to review the New York regional director's decision in the New School case, No. 02-RC-143009 (N.L.R.B., Oct. 21, 2015) finding that the request for review "raises substantial issues warranting review."

Upcoming 2016 Meetings

Regular Meeting
Wed., March 9, 2016
Bonwit Inn, Commack, NY

Friday, May 13, 2016
Annual Spring Conference
Hamlet Golf and Country Club
Commack, NY

Regular Meeting
Wed., June 8, 2016
Davenport Press, Mineola

Regular Meeting
Wed., September 14, 2016
Suffolk location to be announced

Regular Meeting
Wed., December 14, 2016
Davenport Press, Mineola

Graduate students at private universities have long argued that they should have the rights of employees. The Obama administration has sought to make it easier to unionize at private higher education institutions, and the current majority of the NLRB is viewed as sympathetic to unions, which may, in the New School case, lead to the NLRB's reversal of the Brown University precedent.

The NLRB almost had an opportunity to address this unionization issue back in 2011 when a similar case involving New York University graduate students was filed. However, the NLRB never decided the case on its merits because the graduate students and New York University settled the dispute and the parties agreed to allow the graduate students to unionize.

continued on p. 2, col. 1

In any event, as in the New York University case, it is anticipated that the New School graduate students will emphasize the growing trend in universities in utilizing their graduate students to fill the roles of teachers and argue that the graduate students should be entitled to bargain for better pay and working conditions. Higher education management is anticipated to raise concerns that unionization would stifle academic decisions made by faculty who supervise graduate students.

Private institutions should closely follow the development of the New School case as it has the potential to have significant practical as well as legal implications. If the New School graduate students win, many other graduate students across the country will seek to organize to have stronger bargaining powers against universities.

UPDATE: In my last column, I discussed the proposed rule from the U.S. Department of Labor which would increase the minimum salary required for the "white collar" exemptions from the Fair Labor Standards Act to $970 per week ($50,440 per year). The public comment period closed on September 4, 2015. It now appears that the Rule will be finalized in July, 2016. See http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1235-AA11. It is expected that once the Rule becomes final, there will be a 60 or 90-day compliance period, but that's not set in stone. We'll keep you posted.

FRIEDRICHS v. CALIFORNIA TEACHERS ASSOCIATON (CTA)

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Sometime in early 2016, the U.S. Supreme Court will hear arguments in Friedrichs v. the California Teachers Association et al., a closely watched California-based lawsuit with major implications for the state's teachers unions and potentially all public-employee unions. The lawsuit challenges the authority of the CTA and other public-employee unions to collect mandatory fees, a main source of their income and, by extension, their power. Here's a crash course in the case.

WHAT IS FRIEDRICHS v. CTA?

Friedrichs is a lawsuit brought by 10 California teachers and a teachers group, Christian Educators Association International, that the U.S. Supreme Court has agreed to hear. The plaintiffs want the court to overturn a four-decades-old court decision in Abood v. Detroit Board of Education. That ruling said states could require all employees represented exclusively by a public-employee union to pay "fair-share" or "agency" fees – an equal portion of the bargaining costs related to wages, benefits and working conditions. Even employees who aren't members must pay these fees, although if the plaintiffs prevail, dues and fees for members and nonmembers would no longer be mandatory. Dues that union members pay include an additional, voluntary amount that covers the union's costs of campaigning for candidates who back the union and lobbying for issues that a majority of members view as important.

WHO WOULD IT AFFECT?

Half of the states, including California, have adopted laws establishing mandatory "fair share" or "agency" fees employees pay to unions. The remaining 25 "right to work" states either prohibit collective bargaining by public workers or ban mandatory dues. Although the case involves the CTA, and, though not a plaintiff, it would also affect the smaller California Federation of Teachers. A decision could affect all unions representing public workers, depending upon how narrowly or broadly the Supreme Court rules.

WHO IS FRIEDRICHS?

Rebecca Friedrichs, a California elementary school teacher, is the lead plaintiff, an outspoken opponent of her teachers union who agreed to let her name become identified with the case. Friedrichs has taught elementary school for 28 years, mostly in the Savanna School District in Anaheim.

WHY IS FRIEDRICHS SUCH A BIG DEAL?

A victory by the teachers who filed the suit could significantly sap the financial strength and undermine the bargaining and political clout of the CTA and other public-employee unions by making all union dues voluntary. Unions would have to persuade employees to voluntarily pay hundreds of dollars to a union that is legally obligated to represent both members and non-members.

About 29,000 teachers – slightly less than 10 percent of the CTA's members – pay fair-share fees. If many of the remaining 90 percent of teachers stopped paying dues, the loss would jeopardize CTA's ability to adequately serve its members as well as the tens of millions of dollars the CTA and other powerful unions spend campaigning for union-friendly school board members and legislators. Two years after legislators rescinded Wisconsin's mandatory fees statute, in 2011, a third of that state's teachers had stopped paying dues.

HOW MUCH OF DUES GOES TO POLITICKING?

For California teachers, about $600 of their average $1,000 annual dues goes toward their fair-share fees; it is divided among their local union, the California Teachers Association and the National Education Association for their expertise and representation. The remaining money pays for lobbying and campaigning at the local, state and federal levels. Public-employee unions have been a key supporter of the Democratic Party in California and nationwide.

WHO IS UNDERWRITING THE CASE?

The Center for Individual Rights, a Washington, D.C.-based public interest law firm whose mission is "the defense of individual liberties against the increasingly aggressive and unchecked authority of federal and state governments." It has pursued lawsuits seeking to ban affirmative action and racial and gender preferences, including California's Proposition 209.

continued on p. 4, col. 1

THE BUREAU OF LABOR STATISTICS

by Jerry Grayson

The June 10th chapter meeting was held at the Davenport Press restaurant in Mineola In addition to the regular executive committee meeting held at 4:30, there was an opportunity for networking before dinner. The dinner speaker was Bruce Bergman, the head of the BLS New York, New Jersey Information Office. I must confess that I have a soft spot in my heart for the BLS (that may sound strange) since, my first professional job, after I was discharged from the Army, in 1963 was with the Northeast Regional Office of the agency. My title was "Labor Economist" and my responsibilities involved going to companies to collect data for the studies that the BLS published. My immediate supervisor was Herb Bienstock, and, he stayed and went on to bigger and better things. I decided that I wanted to return to school to earn my PhD so I left after a few months to start school and begin my teaching career.

However, as our guest indicated the BLS is still doing the excellent work that I tried to help them do for a short stint. Their mission statement expresses it:

> The U.S. Bureau of Labor Statistics is the principal fact-finding agency for the federal government in the broad field of labor economics and statistics. BLS is an independent national statistical agency that collects, processes, analyzes, and disseminates essential statistical data for the public, Congress, other federal agencies, state and local governments, business and labor. BLS also serves as a statistical resource for the U.S. Department of Labor.

Information can be obtained from the BLS from the internet, recorded messages, and the many publications that the BLS presents. Among these is the *Monthly Labor Review* (the principal journal of of fact, analysis and research published

In addition to the aforementioned publications the BLS also puts out the *Occupational Outlook Handbook* and compiles monthly updates on statitics that were originally featured in printed periodicals, such as *Employment and Earnings Online*, the *CPI Detailed Report* and the *PPI Detailed Report*.

Mr. Bergman's topic was "BLS Resources for Labor Relations." He began by presenting data on nonfarm employment growth in Nassau and Suffolk. He broke these figures down by industry, highlighting the growth of construction employment by 16%. He continued by presenting unemployment rates in Nassau (4.4%) and Suffolk (4.6%) as of April 2015, as compared to the US rate of 5.9%. Average weekly wages for all industries by county are $1,022 for Nassau and $1,031 for Suffolk. He went on to show a bar graph with union members as a % of all employed. About 7% in the private sector and 35% among government employees.

Mr. Bergman making his presentation.

Some of the other information that he presented was that there are more than 78,000 labor relations specialists nationwide and over 900 in Nassau/Suffolk in 2014. Long Island was one of the highest paid areas for this profession (not including independent contractors). The BLS collects a wealth of information on all aspects of the economy which can be accessed at **<www.bls.gov>**.

President Tom Wassel presents a plaque of appreciation to Mr. Bergman.

WHAT ARE THE ARGUMENTS FOR OVERTURNING MANDATORY FEES?

Friedrichs and the other plaintiffs argue that agency fees violate their First Amendment rights, because bargaining with the state is no different from lobbying; it's all "inherently political." They say that the CTA doesn't represent their interests on bargaining issues covered by fair-share fees. Therefore, the state shouldn't force them to financially underwrite a union they disagree with. "Whether the union is negotiating for specific class sizes or pressing a local government to spend tax dollars on teacher pensions rather than on building parks, the union's negotiating positions embody political choices that are often controversial," states the Center for Individual Rights, which is representing the plaintiffs.

WHAT ARE THE ARGUMENTS OF THE CTA?

They say the court struck the right balance in Abood, in concluding that the state as an employer is well served when there is a stable and orderly system to convey the views of workers. Since unions must represent members and nonmembers, it's appropriate to require all who benefit from negotiations to share the costs. The loss of money from "free-riders" – those who benefit without paying – would threaten a union's ability to effectively represent employees.

Unions also argue that they represent the views of the majority and those who disagree have the ability to make their views known. The plaintiffs "are simply wrong in declaring that it 'does not make a First Amendment difference' whether speech is part of lobbying the Legislature to enact a law or of negotiating a contract with the public employer," the CTA said in a brief to the Supreme Court.

WHEN WILL THE CASE BE HEARD?

The Supreme Court has not yet set a date for oral arguments, which means probably early next year with a decision no later than the end of June. Organizations and individuals supporting the plaintiffs have already filed two dozen amicus briefs.

WHO MIGHT BE THE DECIDING VOTE?

In this case, it's not Justice Anthony Kennedy, who usually is the swing vote in 5-4 cases, but conservative Justice Antonin Scalia. In a related 1991 Supreme Court decision, he wrote that mandatory fees were a permissible solution to the problem of free-ridership. "Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost," he wrote. Circumstances and the arguments haven't changed much in the past 25 years, so Court watchers are wondering how Scalia would justify reversing his position.

HOW DO CALIFORNIANS VIEW THE ISSUE?

Voters defeated an initiative to turn California into a right-to-work state in 1958, the last time they voted directly on the issue. However, like a seven-year itch, individuals and business groups seeking to reduce the political power of unions have unsuccessfully funded "paycheck protection" initiatives – in 1998, 2005 and 2012. They tried to ban automatic dues deductions for political purposes, and in the 2012 version, prohibited businesses and unions from making any campaign contributions to candidates. Friedrichs would go further by banning mandatory dues deductions for any purpose.

OTHER THAN OVERTURN ABOOD, WHAT ELSE MIGHT THE COURT DO?

Every fall, California teachers who don't want to join the union must fill out a form stating that; otherwise, the union automatically deducts the full union dues from their paychecks. Attorneys for the teachers argue the onus should be on the union to ask them to belong, and so, as a fallback position, have asked the court to require that unions ask employees to affirmatively opt in every year to pay agency fees, instead of having to opt out of automatic dues collection.

HOW DID LOWER COURTS DECIDE?

They didn't, really. Lawyers for the plaintiffs acknowledged that their lawsuit hinged on having the Supreme Court reverse its prior Abood decision and so asked lower courts to expedite their rulings so they could quickly appeal to the Supreme Court. The federal district and 9th Circuit Court of Appeal did, without hearing full evidence and oral arguments. California Attorney General Kamala Harris argued the lack of a record showing the teachers were harmed was one reason the Supreme Court should not have taken the case.

The Long Island LERA Newsletter is a quarterly publication of the Long Island chapter of the Labor and Employment Relations Association.

Notices of address change or new email address should be sent to Membership Chairman, **Thomas Wassel, <twassel@cullenanddykman.com>** Inquiries about this publication, as well as submissions, etc., should be sent to: Jerry Grayson at <graysonarb@gmail.com>.

Congratulations to Bill Hempfling for being accepted into the National Academy of Arbitrators.

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