BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF MADISON

and

TEAMSTERS UNION LOCAL NO. 695

Case ID: 256.0012
Case Type: MA

AWARD NO. 7954

Appearances:

Erin Hillson, for the City.

Kyle A. McCoy, Sr., for the Union.

ARBITRATION AWARD

Pursuant to the terms of their 2014-2018 collective bargaining agreement, the parties asked me to serve as the arbitrator of a union security grievance. Hearing was held in Madison, Wisconsin, on November 27, 2018. A transcription of the hearing was prepared, the parties filed written argument, and the record was closed on January 29, 2019.

ISSUE

The parties did not agree on a statement of the issue but did agree that I had the authority to frame the issue after considering their respective positions. Having done so, I conclude the following issue before me is:

> Did the City violate the bargaining agreement when it stopped collecting and remitting dues from certain Union members and, if so, what is the remedy?

DISCUSSION

The Union serves as the collective bargaining representative of certain transit employees of the City. The parties' 2014-2018 bargaining agreement states in part:

> **3.1 Dues Check Off**. The Employer agrees to deduct, biweekly or monthly, as certified by the Union, membership dues from the pay of those employees who individually request in writing that such deduction be made.

Prior to the June 27, 2018 issuance of *Janus v. AFSCME Council 31* by the United States Supreme Court, the City was deducting Union membership dues from the paychecks of all employees who had previously provided individual written requests pursuant to Article 3.1 above.[1] Following its review of the *Janus* decision, the City concluded that it had potential liability if it did not advise all such employees they had the right to end those payroll deductions for membership dues. Over the objection of the Union, the City proceeded to so advise all such employees, and several individuals indicated they wanted to end the payroll deduction. The City honored those requests.

While it is always prudent for the City to be concerned about liability, in this instance that concern is misplaced. Both parties agree that the focal point of the *Janus* decision was the constitutional First Amendment free speech rights of public sector employees who were **not members** of a labor organization but who were nonetheless contractually obligated to make payments to a union that served as the collective bargaining representative. Both parties further agree the Court concluded **nonmembers** cannot be compelled to make payments to their collective bargaining representative and must affirmatively and voluntarily consent to do so. The City nonetheless believes there is language in the Court's decision that indicates the "affirmative consent" standard is also applicable to dues checkoff for **union members**, and that the already existing written individual employee dues checkoff requests do not meet that standard. A close reading of the Court's decision does not support the City's belief.

The Court summarized its holding at page 48 of the decision which states:

> Neither an agency fee nor any other payment to the union may be deducted from a **nonmember's** wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, **nonmembers** are waiving their First Amendment rights, and such a waiver cannot be presumed. (emphasis added)

The Court's use of the term "nonmembers" rather than "employees" persuades me the scope of the *Janus* decision does not extend to dues checkoff provisions applicable to union members. Further, if the Court had intended the reach of its decision to extend to dues checkoff, it would have had to grapple with the question of whether voluntary pre-*Janus* checkoff authorizations (such as those present here) met the "affirmative consent" standard. There is no such discussion in the Court's decision. Therefore, I conclude that the City's interpretation of *Janus* is not correct.

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[1] While current Wisconsin law prohibits the existence of contractual dues checkoff provisions for most municipal public sector unions, Section 111.70(3)(a)6, Stats. makes clear that such provisions remain viable for public safety and transit employee unions so long as "the municipal employer has been presented with an individual order therefor, signed by the municipal employee personally, and terminable by at least the end of any year of its life ..." The dues checkoff authorizations provided to the City by Union members are compliant with Wisconsin law.

The Union contends the City's actions warrant an award requiring City payment of the dues improperly not deducted and remitted, as well as City resumption of compliance with Article 3.01. The City asserts that even if its interpretation of *Janus* is rejected, the contractual hold harmless language in Article 3.01 insulates it from any financial liability.

The last sentence of Article 3.1 states "[t]he Employer shall be saved harmless in the event of any legal controversy with regard to the application of this provision." A conventional understanding of the intent of this language makes it applicable to a scenario in which the City faces a lawsuit as a consequence of honoring/following Article 3.1 – not where, as here, the City has decided not to honor/follow said Article. I have no persuasive basis for departing from the conventional understanding of this "hold harmless" language and conclude it does not insulate the City from remedial liability.

Should the hold harmless argument be rejected, the City then contends that all but one of the authorizations in dispute were nonetheless timely revoked and thus that its financial liability is very limited. Consistent with § 111.70 (3)(a)6, Stats., the authorizations in question allow for revocation once a year provided timely written notice was given to the City and the Union. As the Union points out, there is no evidence the Union received the required timely written notice and, on that basis alone, none of the revocations are valid. Further, it does not appear[2] any of the revocations were received by the City "at least sixty (60) days, but not more than seventy-five (75) days" before the month and day the employee originally authorized dues checkoff. Therefore, none of the revocations are valid and none of them serve to reduce the City's liability.

Lastly, the City argues that I ought not order resumption of dues deductions because the employees in question would not be able to revoke their authorizations for potentially multiple years. As discussed above, by law and by the terms of these authorizations, individual employees have the right to revoke the dues checkoff authorizations once a year. Thus, the City's concern is unfounded.

In light of the foregoing, it is my award that the City immediately resume the deduction and remittance of dues to the Union and that the City shall pay the Union an amount equal to the dues the City failed to remit to the Union. I will retain jurisdiction over this matter for at least 60 days from the date of this award to resolve any remedial issues.

Signed at the City of Madison, Wisconsin, this 13th day of February, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Arbitrator

[2] Although the parties' briefs make reference to the timing of the communications from employees to the City, the communications themselves are not in the record.