PSBA
Pennsylvania School Boards Association

TESTIMONY OF THE PENNSYLVANIA SCHOOL BOARDS ASSOCIATION BEFORE THE HOUSE COMMITTEE ON LABOR AND INDUSTRY ON HOUSE BILL 2571, P.N. 3883 RELATING TO PUBLIC EMPLOYEE "FAIR SHARE" REPRESENTATION FEES

STUART L. KNADE
PSBA SENIOR DIRECTOR OF LEGAL SERVICES

SEPTEMBER 5, 2018

Good morning Chairman Kauffman, Chairman Galloway and members of the House Labor and Industry Committee. Thank you for inviting the Pennsylvania School Boards Association to present testimony regarding House Bill 2571, proposing to repeal the Commonwealth's 1993 "Public Employee Fair Share Fee Law" pertaining to public employees other than state employees and public school employees, and its 1988 counterpart in the Administrative Code pertaining to public school employees and state employees. The bill also would add provisions to the Public Employee Relations Act assuring that non-members of unions will not be required to make involuntary payments of any kind to unions representing the collective bargaining units within which they are employed. I am Stuart L. Knade, PSBA's Senior Director of Legal Services.

PSBA commends the sponsors and the committee for responding to the United States Supreme Court's June 27, 2018 ruling in *Janus v. American Federation of State, County, and Municipal Employees*, in which the Court declared unconstitutional an Illinois law that operated essentially the same as the Pennsylvania statutes noted above, by permitting public employers to agree in collective bargaining agreements to require employees who did not wish to be regular union members to nonetheless pay the union a reduced version of union dues, the so-called "fair share fee." The fee supposedly excludes the portion of regular dues used by the union for political and other purposes not directly reflecting the costs of representing employees in workplace matters.

Union security clauses of various types mandating union membership or payment of a fee in lieu of regular membership have existed in collective bargaining agreements since the dawn of collective bargaining, as a condition of employment negotiated between the employer and union. When states later began to permit collective bargaining by public employees, it was eventually recognized that in the public sector, when the employer was a government entity, such clauses implicated free speech and associational rights of employees protected by the First Amendment to the United States Constitution. However, in its 1977 decision in *Abood v. Detroit Board of Education*, the U.S. Supreme Court rejected a constitutional challenge to public sector fair share fees, ruling that such compelled non-member agency fees were permissible and did not violate the First Amendment rights of objecting non-member employees, where the amount of the fee was calculated so as to exclude amounts used for union political activity. As in other states, Pennsylvania later enacted statutes expressly allowing fair share fees in public sector labor contracts, mandating payroll deduction of the fees, and establishing procedures for questioning whether the fees were properly calculated.

In several cases in recent years prior to *Janus*, the Supreme Court began to question the continuing First Amendment vitality of its 1977 decision in *Abood*, most directly in its 2014 decision in *Harris v. Quinn*. Many legal scholars forecast that *Abood* would be overturned in 2016, when the issue was directly presented to the Court in *Friedrichs v. California Teachers Association*, but an equally divided Court following the death of Justice Scalia that year meant that the Ninth Circuit's decision in *Friedrichs* upholding the fees would be left undisturbed.

With this writing on the wall as the *Janus* case ripened before the Court, PSBA was able to help public school entities prepare well in advance of the Court's eventual ruling this June. Working primarily through local school district solicitors, PSBA provided recommendations for immediate implementation of a possible decision declaring fair share fees unconstitutional, and for appropriate preparatory communications with the affected employees and their unions. Within hours of the *Janus* decision being issued, PSBA members received PSBA's analysis confirming the impact on the Pennsylvania statutes and that the fees could no longer be collected consistent with employee First Amendment rights. School entities were thus able to quickly execute immediate cessation of payroll deductions in an orderly manner that came as no surprise to any employee or union.

Timely action by public school employers thus was able to stop ongoing violation of employee First Amendment rights, but that in and of itself does not end the matter entirely. At the local level, variations in the language of collective bargaining agreements may prompt discussions of how best to clean up contract language that now cannot be followed as written, as well as other details associated with the fees and their collection. For example, under some contracts, the collection of fees may have been pursuant to an accelerated annual schedule, frontloading some portion of fees attributable to parts of the dues year occurring

after the *Janus* decision was issued. Those frontloaded fees will need to be calculated and refunded, which PSBA understands likely has already occurred at this point.

At the state level, it is rarely wise to leave on the books statutes that have been declared unconstitutional, or that can no longer be followed as written for constitutional reasons. Repeal of such statutes or affected portions is appropriate. There is also considerable merit in ensuring that both public employees and employers are aware that public employees who have not chosen to be regular members of unions must not be compelled involuntarily to make payments to those unions. House Bill 2571 would accomplish both of these goals. To the extent that specific aspects of the language of the bill can be improved, PSBA will be happy to work with appropriate legislative staff to offer our suggestions.

PSBA thanks you for your attention and this opportunity to provide our input. I will be happy to try to answer any questions you may have.