

HOW SCALIA'S DEATH MAY AFFECT UNION FEES

LEGAL CORNER

HARVEY MARS, ESQ.



Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to HsmLaborLaw@HarveyMarsAttorney.com. Harvey Mars's previous articles in this series are archived at www.HarveyMarsAttorney.com. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

SUPREME COURT JUSTICE Antonin Scalia's death in February was a considerable loss for the conservatives. To them, there is now a void in this country's highest court that will not be easy to fill. Nor will it be filled anytime soon, given the political infighting we now see revolving around the selection of his replacement. What Justice Scalia's death means to this country and its future constitutional jurisprudence remains to be seen. It is clear, however, that the impact of his death will be significant.

Justice Scalia was a practitioner of constitutional originalism, meaning that he believed that it was his job as a judge to determine constitutional issues according to the original intent of the framers of the Constitution. The impact of his legal inclination was that the decisions he rendered were often favorable

to business interests and bad for organized labor. Whether politics was the actual driving force behind his theory is anyone's guess, but he was consistent and invariably true to principles.

Thus, organized labor feared that he might be the swing vote in the court's much-anticipated upcoming decision in *Friedrichs v. California Teachers Association*. This, as I had noted previously, would be the end of mandatory union fee requirements for state employees. During oral argument, it appeared that Justice Scalia was leaning in this direction. However, prior decisions touching on union fee issues indicated that he actually might *not* have voted to overrule the precedent.

For instance, in a 1991 dissenting opinion he authored in *Lehnert v. Ferris Faculty Association*, Justice Scalia noted that without the ability to charge fees, a union's legal duty to represent its membership fairly would be adversely impacted. In his dissent, he wrote that there is "a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit on the other. Where the state imposes upon a 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."

Therefore, it cannot be a forgone conclusion that Justice Scalia was an opponent of union fee legislation when the union is required to serve all of its members. (Maybe years from now, when his memoirs are published, we will be given some insight into how he would have decided the case.) It seems likely that if *Friedrichs* is decided prior



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THE SUPREMES: Top row (left to right): Sonia Sotomayor, Stephen G. Breyer, Samuel A. Alito and Elena Kagan. Bottom row: Clarence Thomas, the late Antonin Scalia, Chief Justice John G. Roberts, Anthony Kennedy and Ruth Bader Ginsburg.

to the appointment of another justice, it will end in a four-to-four tie. Under the Supreme Court's procedure, if that is the result, the lower court decision remains intact. In this case it means that the precedent is safe for the moment, which is good for unions. Certainly it would have been preferable for the Supreme Court to uphold the constitutionality of mandatory union fees. For now, organized labor should breathe a collective sigh of relief, as it seems likely that a tie vote will be the result of the case.

Still, one cannot help but wonder what would have happened had Scalia voted in favor of overruling the court's 30-year precedent supporting mandatory union fees. A January 2016 decision of the U.S. District Court for the Northern District of New York, *Jarvis v. Cuomo*, 2016 LRRM 14,260 (Jan. 21, 2016),

foreshadows what the consequence of such a result would have looked like.

In that case, union members sought reimbursement for years of agency fees they had paid to their union after collection of fees had been overturned in a case called *Harris v. Quinn*. (We won't go into specifics here, but this case only applied to a certain kind of job that concerned a quasi-public employer.)

The upshot of the case was that the union members were *not* entitled to a reimbursement of all the fees they paid the union prior to the decision in the case. Therefore, even if Justice Scalia is replaced by another conservative and the *Friedrichs* case is decided against unions, it's pretty clear that it will not apply retroactively. That is, unions won't have to reimburse their members for years of fees paid. Thank goodness for small favors.

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