Respecting Nonunion Member Employees' Rights While Avoiding a Free Ride, Lehnert v. Ferris Faculty Association

Charles J. Ogeka

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol10/iss1/8

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
RESPECTING NONUNION MEMBER EMPLOYEES’ RIGHTS WHILE AVOIDING A
FREE RIDE, LEHNERT v. FERRIS FACULTY ASSOCIATION

I. INTRODUCTION

Throughout the history of United States labor law, the guiding principle has been the protection of employees’ rights. The primary protector of employees’ rights has been labor unions and as these unions have developed and grown, employees gradually have been able to attain better wages, hours, and working conditions. Unions were able to accomplish faster results by becoming the exclusive collective bargaining agents of employees. Nonetheless, a situation occasionally arises where an employee does not want to become a member of the union. “Our First Amendment jurisprudence therefore recognizes 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.” The designation of a union as exclusive representative carries with it great responsibilities. The union is obliged

3. See International Ass’n of Machinists v. Street, 367 U.S. 740, 760 (1961) (proclaiming that “Congress has given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry”).
7. Abood, 431 U.S. at 221.
“fairly and equitably to represent all employees . . . , union and nonunion,” within the relevant unit. In addition to its obligations, the union is concerned with the problem of “free riders” and the lack of support the “free riders” provide to the union. “Free riders” are those who “refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.”

On the other hand, nonunion member employees are concerned with their rights in the context of being compelled to support the union. The question of whether these nonunion member employees should have to support a union they do not want, needs to be addressed. “To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee’s freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.” A balance needs to be achieved between the union and these nonunion member employees so that the objecting employees do not receive a “free ride.” However, at the same time, rules or measures need to be set in place so that unions cannot take advantage of these nonunion member employees who are required to contribute to the collective bargaining agent.

Lehnert v. Ferris Faculty Ass’n addresses the problems created by an agency shop arrangement when nonunion member employees

8. Abood, 431 U.S. at 221 (quoting International Ass’n of Machinists v. Street, 367 U.S. 740, 761 (1961)).
10. Abood, 431 U.S. at 222. See Roger C. Hartley, Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases, 41 HASTINGS L.J. 1, 3 (1989) (stating that unions assert “that everyone receiving the benefit of union representation should pay a fair share of its cost, and that modern collective bargaining costs extend well beyond traditional bargaining table activities”); Mitchell, supra note 9, at 699; Burt, supra note 9, at 524. This lack of contribution often leads to tension between union members and those employees who do not pay dues to the collective bargaining agent.
11. See Kenneth Cloke, Mandatory Political Contributions and Union Democracy, 4 INDUS. REL. L.J. 527, 532 (1981); Roger C. Hartley, Constitutional Values and the Adjudication of Taft-Hartley Act Dues Objector Cases, 41 HASTINGS L.J. 1, 2 n.7 (1989); see also R.J. Staaf & E.G. West, Paying for Compulsory Union Services: The Entanglement Consequences of Agency Shops in the Public Sector, 17 WAKE FOREST L. REV. 359, 362-64 (1981) (concluding that compelled affiliation with a union through mandatory contributions invades first amendment interests).
object to certain uses of their compelled service fee. The petitioners in Lehnert were members of the Ferris State College faculty and objected to certain uses of their service fee by the unions.

As a part of the collective bargaining agreement between the union, Ferris Faculty Association (FFA), and Ferris State College, both parties agreed to include an agency-shop provision in the

---

16. Ferris State College is an agency and arm of the State of Michigan, established by the state's constitution and required to be funded by the state. Lehnert v. Ferris Faculty Ass'n-MEA-NEA, 643 F. Supp. 1306, 1308 n.1 (W.D. Mich. 1986) (referring to MICH. CONST. art. VIII, § 4 (1979)).
17. See infra notes 79-136 and accompanying text.
19. The agency shop provision of the collective bargaining agreement for 1981-1984 provides in pertinent part:

A. Each employee covered by the negotiated Agreement between the Board of Control of Ferris State College and the Ferris Faculty Association (Dated November 19, 1981) shall, as a condition of employment, on or before thirty-one (31) days from the date of commencement of professional duties or July 1, 1981, whichever is later, join the Ferris Faculty Association or pay a service fee to the Association equivalent to the amount of dues uniformly required of members of the Ferris Faculty Association, less any amounts not permitted by law; provided, however, that the bargaining unit member may authorize payroll deduction for such fee. In the event that a bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the College shall, at the request of the Association, deduct the service fee from the bargaining unit member's salary and remit the same to the Association under the procedure provided below.

B. The procedure in all cases of non-payment of the service fee shall be as follows:

1. The Association shall notify the bargaining unit member of non-compliance by certified mail, return receipt requested, explaining that he or she is delinquent in not tendering the service fee, specifying the current amount of the delinquency, and warning him or her that unless the delinquent service fees are paid or a properly executed deduction form is tendered within fourteen (14) days, he or she shall be reported to the College and a deduction of service fee shall be made from his or her salary.

2. If the bargaining unit member fails to comply, the Association shall give a copy of the letter sent to the delinquent bargaining unit member and the following written notice to the College at the end of the fourteen (14) day period: The Association certifies that (name) has failed to tender the periodic service fee required as a condition of employment under the 1981-84 Faculty Agreement and demands that under the terms of this Agreement, the College shall deduct the delinquent service fees from the collective bargaining unit member's salary. The Association certifies that the amount of the service fee includes only those items authorized by law.

3. The College upon receipt of said notice and request for deduction, shall act pursuant to Section A above. In the event of compliance at any time prior to deduction, the request for deduction will be withdrawn. The Association in enforcing this provision, agrees not to discriminate between bargaining unit
agreement. The provision required all employees who were part of the bargaining unit, but not part of the union, FFA, to pay a service fee equivalent to the amount of dues required of union members.

Faced with compelled support to the union, the petitioners in Lehnert instituted an action in the United States District Court for the Western District of Michigan. The dissenting employees asserted that their service fees were being used for purposes other than the negotiation and administration of a collective bargaining agreement. The petitioners asserted that a violation of their rights secured by the

members.

C. With respect to all sums deducted by the College pursuant to this Article, The College agrees promptly to disburse said sums directly to the Association.

D. Bargaining unit members paying the service fee provided for herein or whose service fees have been deducted by the College from their salaries may object to the use of their service fee for matters not permitted by law. The procedure for making such objections is that officially adopted by the Association. A copy of the Association policy will be provided by the Association upon a request of a bargaining unit member.

* * * *

F. This Article shall be effective for each academic year of this Agreement and all sums payable hereunder shall be determined from the beginning of each academic year. Persons becoming members of the collective bargaining unit during the course of an academic year shall have their service fee prorated over the academic year.

* * * *

I. The Association will certify at least annually to the College, fifteen (15) days prior to the date of the first payroll deduction for professional fees or service fees, the amount of the service fee to be deducted by the College, and that said service fee includes only those amounts permitted by the Agreement and by law.

J. Should the provisions of 2.6, Agency Shop, be found contrary to law as a result of a final decision from which no appeal is processed, and which is binding on the parties of this Agreement, the parties agree to meet on written request of either party to negotiate to bring Section 2.6 into compliance with any such final decision, such negotiations to be limited to the provisions of Section 2.6 and will not affect the terms and conditions of this Agreement which shall remain in full effect for the life of this Agreement.

Lehnert v. Ferris Faculty Ass'n-MEA-NEA, 643 F. Supp. 1306, 1308 n.3 (W.D. Mich. 1986) (referring to Section 2.6, Agency Shop, of the union defendants' exhibit I).


21. The service fee for the 1981-82 period amounted to $284.00. The breakdown of this service fee provided the local union, Ferris Faculty Association (FFA), with $24.80; the state union, Michigan Education Association, with $211.20; and the national union, National Education Association, with $48.00. Id. at 1955-56. See infra notes 104-07 and accompanying text for a further discussion of the interaction between the three unions.

22. Id. at 1955.

23. Id. at 1956.

24. See infra notes 112-69 and accompanying text.

First\textsuperscript{26} and Fourteenth\textsuperscript{27} Amendments of the United States Constitution had occurred.\textsuperscript{28}

Lehnert provided an excellent opportunity for the Supreme Court to examine the parameters of the agency shop arrangement and an interesting opportunity to explore the limits of the chargeability of union nonmember dissenters. This note will first explore how the Supreme Court has addressed this issue in the past\textsuperscript{29} and will then examine the Lehnert v. Ferris Faculty Ass’n\textsuperscript{30} decision to determine how the law has developed in this area.\textsuperscript{31}

II. THE EVOLUTION OF THE RIGHTS OF UNION NONMEMBER EMPLOYEES IN THE CONTEXT OF COMPULSORY UNION DUES AND FEES.

Prior to Lehnert v. Ferris Faculty Ass’n\textsuperscript{32}, the Supreme Court had considered dissenting nonunion members’ objections to the union’s uses of their dues.\textsuperscript{33} A series of Supreme Court cases have evolved in this agency shop arrangement area with the parameters of what is permissible being preliminarily established.\textsuperscript{34} By looking at the progression of the law in this area, a more thorough understanding of Lehnert will be obtained.

---

26. The First Amendment provides that:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

\textit{U.S. Const. amend. I.}

27. The Fourteenth Amendment provides in pertinent part:
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviledges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\textit{U.S. Const. amend. XIV, § 1.}

29. \textit{See infra} notes 32-95 and accompanying text.
31. \textit{See infra} notes 102-69 and accompanying text.
33. \textit{See infra} notes 35-95 and accompanying text.
A. A Preliminary Look at the Implications of Agency Shop Arrangements: Railway Employees’ Department v. Hanson

Within the context of the Railway Labor Act\textsuperscript{35}, Railway Employees’ Department v. Hanson\textsuperscript{36} was the first case which considered the constitutional dimensions of an agency shop agreement.\textsuperscript{37}

Claiming that a union shop agreement violated their first amendment rights, the petitioners in Hanson challenged a provision\textsuperscript{38} of the Railway Labor Act.\textsuperscript{39} However, the Hanson court rejected the employees’ claim and upheld the Railway Labor Act as a valid exercise of the power by Congress under the Commerce Clause.\textsuperscript{40} Noting that the required financial support related to the union’s work in

37. Id.
38. Section 2, Eleventh of the Railway Labor Act provides:
   ELEVENTH. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted:
   (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.
   (b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner . . .
39. See Hanson, 351 U.S. at 228.
40. Hanson, 351 U.S. at 238. See Norman L. Cantor, Uses and Abuses of the Agency Shop, 59 NOTRE DAME L. REV. 61, 66 (1983) (noting that Congress upheld the "promotion of union security provisions as a 'stabilizing force' in industrial relations").
collective bargaining^{41}, the Hanson court held that requiring financial support for collective bargaining by those who receive its benefits does not violate the First or the Fifth Amendments.^{42}

Nevertheless, in addressing the union security issue, the Hanson court also stated that “[i]f ‘assessments’ are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented.”^{43} This situation of “assessments” being used for purposes not “germane” to collective bargaining arises in Lehnert.^{44} Consequently, the Hanson decision provides the foundation upon which further discussion of union security issues grows.

B. Compelled Ideological and Political Association,  

*International Ass’n of Machinists v. Street*

Although not addressed in the Hanson decision, the question of the chargeability of compelled ideological and political association first arose in *International Ass’n of Machinists v. Street.*^{45} In Street, the employees, who were operating under the same Railway Labor Act provision^{46} that was present in Hanson, charged that the compelled union fees they were paying were, in substantial part, being used to finance the political doctrines and ideologies of the union.^{47}

Before addressing the political association question, the Street court reaffirmed the Hanson decision, finding that “the requirements for financial support of the collective-bargaining agency by all of those who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments.”^{48} The Street court then went on to note that it had not passed on the issue of using union service fees for political causes in Hanson.^{49} Upon examining the record, the Street court determined that it contained detailed information of the union utilizing the nonmember dissenters’ fees for political causes.^{50}

41. Hanson, 351 U.S. at 235.  
42. Id. at 238.  
43. Id. at 235.  
44. See infra notes 124-42 and accompanying text.  
46. See supra note 38 and accompanying text.  
47. Street, 367 U.S. at 744.  
49. Street, 367 U.S. at 749.  
50. Id. at 748; see also Cantor, supra note 40, at 67.
Consequently, the *Street* court held that unions using the dissenting employees' service fee “to support candidates for public office, and advance political programs, is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes.” 51 Accordingly, this use by the union “falls clearly outside the reasons advanced by the unions and accepted by Congress [as to] why authority to make union-shop agreements was justified.” 52

*Street* provides a solid foundation and a strong indication to the approach the Court eventually takes in *Lehnert* with regard to union lobbying. 53 Compelled ideological and political association are closely tied to lobbying, hence, it is no surprise that the *Lehnert* Court does not allow unions to use dissenting employees' service fees for these purposes when they are not germane to collective bargaining. 54

C. The “Germane to Collective Bargaining”

Test, *Railway Clerks v. Allen*

The final case in the initial trilogy of Railway Labor Act cases is *Railway Clerks v. Allen.* 55 Once again, Section 2, Eleventh of the Railway Labor Act 56 was at issue. The nonunion railroad employees in *Allen* objected to political expenditures by the union. 57 The *Allen* Court noted that nonunion dissenters could only be charged for expenditures “germane to collective bargaining.” 58 Thus, the Court deemed it necessary in future cases to draw a boundary between political expenditures and those germane to collective bargaining. 59

One important step that the *Allen* Court took in refining the principles regarding recovery of their service fee was reducing the employees’ burden by demanding that there only be a general objection to the service fee’s use. 60 This differed from the Court’s earlier approach in *Street*, where more specific objections were required. 61

51. *Id.* at 768.
52. *Id.*
53. *See infra* notes 112-23 and accompanying text.
54. *See infra* notes 114-16 and accompanying text.
55. 373 U.S. 113 (1963).
56. *See infra* note 38 and accompanying text.
57. *Allen*, 373 U.S. at 118.
58. *Id.* at 121.
59. *Id.* The idea that the Supreme Court was trying to establish is that a close tie to collective bargaining is needed in order to justify charging nonunion member employees.
60. *Id.*
The *Allen* Court noted that “[i]t would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to which he objected.”62 As a result, “it is enough that [the dissenter] manifests his opposition to any political expenditures by the union.”63

Additionally, the *Allen* Court placed upon the unions the burden of proving the proper proportion between political expenses which were not “germane” and those expenses which were related to the collective bargaining process.64 The *Allen* Court reasoned that “[s]ince the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they [the unions], not the individual employees, bear the burden of proving such proportion.”65 This burden of proving the proportion of political expenditures to total union expenditures may appear monumental, but it is feasible. Nevertheless, the Supreme Court concluded that “difficult accounting problems” will arise and that if the political activity is germane to collective bargaining then it will be chargeable.66

D. The Public Sector Employment Context:

*Aboud v. Detroit Board of Education*67 represents the first time that the Court addressed the constitutionality of union security provisions in the public-employment context.68 Faced with the issue of whether or not a union shop arrangement authorized by a Michigan statute69 violates the constitutional rights of government employ-
The Abood Court followed the precedent established by the
Court's earlier decisions in Hanson, Street, and Allen. However, the Abood Court held that "the Constitution requires . . . that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of government employment." In addition to the holding, the Abood Court made several other conclusions. First, the Court noted that "[a] union shop arrangement has been thought to distribute fairly the cost . . . among those who benefit." Second, they reasoned that "[t]o compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests." Third, the Court determined that using the service charge "to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," is also proper in the public context. Finally, the Abood Court noted that "[p]ublic employees are not basically different from private employees; on the whole, they have the same sort of skills, the same needs, and seek the same advantages."
Additionally, the Court reasoned that drawing the line between that which is collective bargaining related and what is simply unrelated political support may be “somewhat hazier” in the public sector. Therefore, in addressing the balance between the union and the dissenters, they concluded that “the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union’s ability to require every employee to contribute to the cost of collective bargaining activities.” With this objective in mind, but without a system in place, the Lehnert decision attempts to provide a solution in the area of nonunion dissenter’s service fees.

E. A Proposed Test for Determining the Validity of Challenged Expenses: Ellis v. Railway Clerks

In addressing section 2, Eleventh of the Railway Labor Act, Ellis v. Railway Clerks passed upon the “statutory or constitutional adequacy” of suggested remedies for refunding the dissenting non-union members’ money. The Ellis Court held that “the pure rebate approach is inadequate.” The Court then reasoned that “[b]y exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization.” Thus, Ellis concluded that unions cannot be allowed to utilize dissenter’s funds for non-germane activities, even if the use is only temporary.

After declaring the “pure rebate approach” inadequate, the Supreme Court established a new test for determining the validity of the challenged expenses. The Court provided that “when employees such as [the] petitioners object to being burdened with particular

---

80. Id. at 236.
81. Id. at 237. See Retail Clerks Int’l Ass’n v. Schermerhorn, 373 U.S. 746, 753-54 (1963).
82. See infra notes 102-69 and accompanying text.
83. 45 U.S.C. § 152, Eleventh (1988); see also supra note 38 and accompanying text.
85. Ellis, 466 U.S. at 443.
86. Id.; see also Developments, supra note 14, at 1733 (noting that “the Court’s invalidation of the union’s rebate scheme is not wholly detrimental to union interests”).
87. Ellis, 466 U.S. at 444.
88. Id.
89. Id.
union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." 90 Furthermore, Ellis reasoned that:

objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. 91

Looking at the challenged expenses involved, 92 the Ellis Court was faced with the issue of whether the additional infringement on the dissenter's First Amendment rights was sufficiently supported by a governmental interest. 93 The Court perceived little additional infringement of First Amendment rights beyond those already accepted and nothing that is not justified by the government's interests behind the union shop. 94 Finally, the Court concluded that "[t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." 95

F. A Summary of the Precedent in the Area of Compelled Support of Unions By Nonunion Member Employees

In establishing its test for determining the chargeability of nonunion dissenting employees, Lehnert concluded that:

Hanson and Street and their progeny teach that chargeable activities must (1) be "germane" to the collective-bargaining activity; (2) be

---

90. Id. at 448.
91. Id. It is interesting to note that "[w]hen Congress authorizes an employer and a union to enter into union-shop agreements and makes such agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it had imposed them by statute." Cantor, supra note 40, at 68.
92. The petitioners in Ellis challenged the union's expenditures in six areas: conventions, social activities, publications, organizing, litigation, and death benefits. See Ellis, 466 U.S. at 448-55.
93. Id. at 456.
94. Id.
95. Id.
justified by the government’s vital policy interest in labor peace and avoiding “free riders”; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.96

Nevertheless, the aforementioned five Supreme Court cases are not the only helpful precedent available for a discussion about agency shops. In Chicago Teachers Union v. Hudson,97 the Court determined that an agency shop arrangement is supported by the government’s interest in promoting labor peace and avoiding the free rider problem.98 Additionally, Keller v. State Bar99 determined that the Ellis test provided “useful guidelines for determining permissible expenditures.”100 The numerous decisions which preceded Lehnert allowed the Lehnert Court to expand and further define the law in the agency shop area.101 Consequently, in addressing the chargeability of certain union expenditures to dissenting nonunion member employees, the Lehnert Court had a solid foundation in which to make its decision.

III. LEHNERT V. FERRIS FACULTY ASSOCIATION

A. Background into Lehnert.

Lehnert presents issues concerning the constitutional limitations, if any, upon the payment of dues by a nonmember to a union in the public sector which is required as a condition of employment.102 The petitioners were members of the Ferris State College faculty during the period in question, 1981-82, and objected to the union’s use of their service fees.103 The respondent, Ferris Faculty Association (FFA), serving as the exclusive collective bargaining representative104 of the faculty of Michigan’s Ferris State College (a public

96. Lehnert, 111 S. Ct. at 1959; see also supra notes 35-95 and accompanying text.
98. Id. at 302-03.
100. Id. at 2236.
103. Id. at 1956.
104. Michigan’s Public Employment Relation Act provides that a duly selected union shall
institutions) entered into an agency-shop arrangement with the college. This arrangement provided that the bargaining unit employees who did not want to join the FFA were required to pay the FFA and its state and national affiliates (Michigan Education Association (MEA) and National Education Association (NEA) respectively) a service fee equivalent to a union member’s dues. Discontented with

serve as the exclusive collective-bargaining representative of public employees in a particular bargaining unit. Id. at 1955. The statute provides:

[representatives designated for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representative of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer . . . .

MICH. COMP. LAWS § 423.211 (1978).

105. An agency shop arrangement compels employees who decline membership in the union to pay a service fee to the union. Lehnert, 111 S. Ct. at 1955. The Michigan Public Employment Relations Act allows agency shops as it provides:

[nothing in this act or any in law of this state shall preclude a public employer from making an agreement with an exclusive bargaining representative . . . to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative . . . .


106. Lehnert, 111 S. Ct. at 1955. The agency-shop provision of the collective-bargaining agreement for 1981-84 provided in pertinent part:

A. Each employee covered by the negotiated Agreement between the Board of Control of Ferris State College and the Ferris Faculty Association (Dated November 19, 1981) shall, as a condition of employment, on or before thirty-one days from the date of commencement of professional duties or July 1, 1981, whichever is later, join the Ferris Faculty Association or pay a service fee to the Association equivalent to the amount of dues uniformly required of members of the Ferris Faculty Association, less any amounts not permitted by law; provided, however, that the bargaining unit member may authorize payroll deduction for such fee. In the event that a bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the College shall, at the request of the Association, deduct the service fee from the bargaining unit member’s salary and remit the same to the Association under the procedure provided below . . . .

Id. at 1955 n.3.

107. Id. at 1955. Part D of the agency shop provision of the collective bargaining agreement sets forth:

Bargaining unit members paying the service fee provided for herein or whose service fees have been deducted by the College from their salaries may object to the use of their fee for matters not permitted by law. The procedure for making such objections is that officially adopted by the Association. A copy of the Association policy will be provided by the Association upon a request of a bargaining unit member.

Id. at 1955 n.3.
the uses of their service fee, the petitioners filed a civil rights action against the Ferris Faculty Association contending that the use of the service fee for purposes other than negotiation and administration of a collective bargaining agreement violated the petitioners constitutional rights under the First and Fourteenth Amendments of the Constitution. The petitioners’ objections came in six areas, “(1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in petitioners’ bargaining unit; (3) public relation efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; (6) preparation for a strike.” By examining the Lehnert decision and arguments made by the parties, a greater appreciation of the concept of agency-shops will be attained.

B. Lobbying and Electoral Politics

In Lehnert, the petitioners proposed limitations on the use of the dissenting nonunion members’ contributions. The petitioners did not want to be charged for lobbying activity that did not concern the legislative ratification nor the fiscal appropriation of their collective bargaining agreement.

The Court of Appeals held that the unions can constitutionally use the fees if they are “pertinent to the duties of the union as the collective bargaining representative” The Supreme Court agreed with this observation, however in Lehnert, it reasoned that the challenged lobbying activities related not to the ratification of a dissenter’s collective-bargaining agreement, but to financial support of the employee’s profession generally, thus the connection to the union’s function as bargaining representative was too attenuated to justify compelling objecting employees to support the union. The Court based its reasoning on the governmental interests underlying its

108. See note 26 and accompanying text.
109. See note 27 and accompanying text.
110. Lehnert v. Ferris Faculty Ass’n, 881 F.2d 1388, 1389-90 (6th Cir. 1989); see also Chicago Teachers Union v. Hudson, 475 U.S. 292, 301 (1986) (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977) and indicating that requiring nonunion member employees to support their collective bargaining representative has an impact upon their First Amendment interests).
111. Lehnert, 111 S. Ct. at 1956.
112. Id. at 1959.
113. Lehnert, 881 F.2d at 1392 (quoting Robinson v. New Jersey, 741 F.2d 598, 609 (3d Cir. 1984)).
114. Lehnert, 111 S. Ct. at 1959-60.
acceptance of union security arrangements, promoting labor peace and avoiding the “free rider” problem. It is well recognized that public employee unions typically must lobby vigorously in order to represent their members’ interests effectively. Moreover, general lobbying to secure legislative assistance is helpful to unions in their efforts to secure rights for employees. However, the union charging the petitioners for lobbying which is extrinsic to the collective bargaining agreement creates an “additional interference with the First Amendment interests of [the] objecting employees, [which is not] adequately supported by a governmental interest.” Additionally, the union’s use of the petitioners funds for lobbying which is not collective bargaining related would force each dissenter into being “an instrument for fostering public adherence to an ideological point of view which he finds unacceptable.”

Looking at the lobbying section of the Lehnert decision, it becomes apparent that the First Amendment concerns outweigh the “free-rider” problems generally associated with collective bargaining concerns. Consequently, the Lehnert Court holds “that the state constitutionally may not compel its employees to subsidize legislative lob-


116. Id. Furthermore, the Supreme Court noted that when compelled speech is in a public context, the burden upon freedom of expression is particularly great. Id.


118. See Easter, Inc. v. NLRB, 437 U.S. 556 (1978) (stating that “labor’s cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context”).


bying or other political union activities outside the limited context of contract ratification or implementation.”^{122} Additionally, the portions of the Teacher’s Voice which reports about lobbying or political activities may not be supported by the funds of objecting employees.^{123} This portion of the Lehnert decision appeals to a sense of fairness which is needed in the agency shop context. It also allows both union and nonunion employees the freedom to lobby and support the political ideologies of their choice.

C. Bargaining, Litigation, and Other Activities on Behalf of Persons not in the Petitioners’ Bargaining Unit.

One of the more important questions decided in Lehnert dealt with whether the petitioners could be charged for union activities not directly undertaken for the benefit of their unit. The Supreme Court has consistently held that charges “germane to collective bargaining”^{124} are chargeable, however, it has never required a direct relationship between the expenses and some tangible benefits to the petitioner’s bargaining unit.^{125}

Requiring a direct connection would be detrimental to the unified-membership structure under which many unions operate.^{126} In addition, “[t]he essence of the affiliation^{127} relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them.”^{128} The idea is that even if the money paid by the local union to the national is not utilized during the particular membership

---

122. Lehnert, 111 S. Ct. at 1960-61. The Supreme Court acknowledged that labor peace would not be especially served by allowing charges in this area, because unlike collective bargaining negotiations between the union and management, political discourse is usually in a public forum which is open to all. Id. at 1960. To require the objecting employees to financially support the unions political activities would not further the cause of harmonious industrial relations. Id.

123. Id. at 1963.

124. Hanson, 351 U.S. at 235.


126. Id. (stating additionally that “membership in the local union constitutes membership in the state and national parent organizations”); see also Cumero v. Public Employment Relations Bd., 778 P.2d 174, 192 (Cal. 1989) (highlighting the inherent “close organizational relationship”).

127. See Bridgeport-Spaulding Community Sch., 1986 MERC Op. 1024, 1057 (explaining that restricting “chargeability to only those activities directly related to the local bargaining unit is to totally ignore the fact of affiliation”); Garden City Sch. Dist., 1978 MERC Op. 1145, 1155-66.

year it has still served as insurance for the bargaining unit’s protection.129

Realizing that costs arise beyond those used directly for negotiating, administering, and handling grievances and disputes, the Ellis Court noted that “objecting employees may be compelled to pay . . . the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.”130

Consequently, the Lehnert Court concluded “that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees’ bargaining unit.”131 However, it is important to note that the union cannot use the dissenters’ service fee without limitation.132 The payment to the state133 and national affiliates134 must be for services that may take effect to benefit the local union by virtue of its affiliation with the parent organization.135

Proving the proportion of chargeable expenses to total expenses remains the union’s responsibility.136 Lehnert merely concludes that the union does not have to prove a “direct and tangible impact” upon the petitioners’ unit.137

Despite being allowed to charge objecting employees for activities which do not directly benefit them, Lehnert held that “the expenses of litigation that does not concern the dissenting employees’ bargaining unit” is not chargeable to the dissenting employees.138 The prior precedent of the Court has established that litigation on

---

129. Id. It is true that quite often the economic and political powers of the parent union are not needed by the local union. Nevertheless, the security provided by the parent is warmly embraced by the local union.

130. Ellis, 466 U.S. at 448.


132. Id.

133. In Lehnert, the state affiliate of the Ferris Faculty Association (FFA), which the petitioners belong, is the Michigan Education Association (MEA). Id. at 1955.

134. The national affiliate of Ferris Faculty Association and Michigan Education Association is the National Education Association. Id.

135. Id. at 1961-62.


137. Lehnert, 111 S. Ct. at 1962.

138. Id. at 1963.
behalf of one bargaining unit may ultimately benefit another unit.\textsuperscript{139} Nevertheless, the Court found the “extra-unit litigation to be more akin to lobbying in both kind and effect.”\textsuperscript{140} As a result, the Court reasoned that union litigation could cover a wide range of activities.\textsuperscript{141} Thus, Lehnert concluded that “[w]hen unrelated to an objecting employee’s unit, such activities are not germane to the union’s duties as exclusive bargaining representative.”\textsuperscript{142}

By predicated the charging of nonunion member employees as to whether or not such activities are germane to the union’s duties as an exclusive bargaining agent, the Supreme Court sought to protect the objecting employees’ rights in this area. While defining an activity as germane gives rise to difficulties, the objecting employees are now provided with yet another shield for their interaction with the union.

D. Public Relation Expenditures

The next area the petitioners objected to was the union’s use of their service fee in the area of public relation expenditures.\textsuperscript{143} In Lehnert, the public relation expenditures were the type that were designed to enhance the reputation of the teaching profession.\textsuperscript{144}

Analogizing the public relation expenditures to lobbying, the Lehnert Court found that the public relation activities “entailed speech of a political nature in a public forum.”\textsuperscript{145} Moreover, the Court determined that “public speech in support of the teaching profession generally is not sufficiently related to the union’s collective-bargaining functions to justify compelling dissenting employees to support it.”\textsuperscript{146} Consequently, Lehnert differed from the Court of Appeals\textsuperscript{147}

\begin{flushleft}
\textsuperscript{139}. Id. The idea implicit in this assertion is that one bargaining unit’s success in litigation will relieve another bargaining unit from having to pursue litigation. \\
\textsuperscript{140}. Id. \\
\textsuperscript{141}. Id. at 1963-64. \\
\textsuperscript{142}. Id. at 1964. The Supreme Court is concerned that charging the objecting employees in this context would be financing the union past the point where the objecting employees are receiving a benefit. \\
\textsuperscript{143}. Id. \\
\textsuperscript{144}. Lehnert, 881 F.2d at 1394. \\
\textsuperscript{145}. Lehnert, 111 S. Ct. at 1964. \\
\textsuperscript{146}. Id. \\
\textsuperscript{147}. Id. The Court of Appeals compared the public relation expenditures (which covered informational picketing, media exposure, signs, posters, and buttons) to the costs of union social activities which the Ellis Court declared to be chargeable to dissenters. Id.; see also Ellis v. Railway Clerks, 466 U.S. 435, 449-56 (1984); Lehnert, 881 F.2d at 1394; Lehnert v. Ferris Faculty Ass’n, 643 F. Supp. 1306, 1313 (W.D. Mich. 1986).
\end{flushleft}
in concluding that a substantial burden upon First Amendment rights beyond those already incurred, occurs when dissenters are charged with public relation expenditures.\textsuperscript{148}

At first glance, it may look foolish for the objecting employees not to want to enhance the public’s perception of the teaching profession. Nevertheless, it appears that the objecting employees simply want to enhance the teaching profession in their own words and not through the union’s voice. Taken in this light, the Supreme Court is simply ensuring that these nonunion member employees have a chance to voice their own opinions without having to support the union’s opinion.

E. Miscellaneous Professional Activities: Programs Securing Funds for Public Education in Michigan and the Publications which Report on Such Activities.

Addressing the issue of miscellaneous professional activities, the Supreme Court followed the decisions of the District Court and the Court of Appeals.\textsuperscript{149} Both of the lower courts allowed “charges for those portions of the Teacher’s Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters.”\textsuperscript{150}

\textit{Lehnert} determined these informational support services are neither “political or public” in nature.\textsuperscript{151} The Court went on to reason that despite the fact that these services do not directly concern the dissenters’ bargaining unit, “these expenditures are for the benefit of all”\textsuperscript{152} and there is “no additional infringement of First Amendment rights.”\textsuperscript{153} \textit{Lehnert} based its decision on the fact that the miscellaneous expenses were “de minimis” in nature.\textsuperscript{154} The Supreme Court made a practical decision concerning these expenditures. Taking into account the “de minimis” nature of the expenses, the benefits avail-

\begin{flushright}
\textsuperscript{148} Lehnert, 111 S. Ct. at 1964.
\textsuperscript{149} Id.; see also Lehnert v. Ferris Faculty Ass’n, 881 F.2d 1388 (6th Cir. 1989).
\textsuperscript{150} Lehnert, 111 S. Ct. at 1964.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Id.; see also Ellis, 466 U.S. at 456 (addressing the chargeability of de minimis social activities). The \textit{Lehnert} Court agreed with the Court of Appeals analogy that was drawn between the miscellaneous expenditures and the social activities present in \textit{Ellis}. \textit{Lehnert}, 111 S. Ct. at 1964.
\end{flushright}
able to all far outweigh the cost of supporting these expenses.

F. Meetings and Conventions of the Parent Union

The next issue which Lehnert addressed is whether unions may constitutionally require dissenting nonmember employees to subsidize the participation in state and national conventions by delegates from the local union.155

Lehnert held that the unions may charge the dissenting nonmember employees.156 The Court determined that the fact “the conventions were not solely devoted to the activities of the FFA does not prevent the unions from requiring petitioner’s support.157 Furthermore, Lehnert concluded that the First Amendment does not mandate such a close connection.158 Additionally, the Court supported its decision by stating that “participation by members of the local in the formal activities of the parent is likely to be an important benefit of affiliation.”159 The Supreme Court makes a clear determination that convention expenses are chargeable with the underlying understanding that the local union will receive a benefit from the convention which will have a positive effect on collective bargaining negotiations between the local union and management.

G. Preparation for a Strike

The final area of dispute in Lehnert was the union charging the petitioners for preparation for a strike.160 In negotiating the collective bargaining agreement in the fiscal year 1981-82, the union perceived negotiations to be ineffective and thus began a “job action” to prepare to go out on strike.161 A crisis center was created.

155. Id.
156. Id. at 1965.
157. Id.
158. Id.
159. Id. Bargaining strategies and representational policies are often established at these conventions. It often benefits the local union to use the national union’s experience so that the local union can bargain more effectively.
160. Id.
161. Id.
162. Id.; see also Lehnert, 643 F. Supp. at 1313 (finding that “whatever label is attached to this facility, prior to a strike it serves as a meeting place for the local’s membership, a base from which tactical activities such as informational picketing can be conducted, and serves to apply additional pressure on the employer by suggesting, whether true or not, that the local is prepared to strike if necessary”).
Both sides concede that if the strike actually took place it would have been illegal under Michigan Law.\textsuperscript{163} Furthermore, \textit{Lehnert} determined that the union could not have charged the petitioners for expenses related to an illegal strike.\textsuperscript{164} In making its determination, the Court reasoned that "no legitimate governmental interest... would be served by compelling objecting employees to subsidize activity that the State has chosen to disallow."\textsuperscript{165} However, the Court noted that the petitioners did not identify any law which stated "that mere preparation for an illegal strike is itself illegal or against public policy."\textsuperscript{166}

Accepting the rationale set forth by the Court of Appeals, the Supreme Court allowed the expenditures for strike preparation to be charged to the dissenters because they were reasonable bargaining tools. The Court reasoned that "these expenses are substantively indistinguishable from those appurtenant to collective-bargaining negotiations."\textsuperscript{167} Hence, \textit{Lehnert} concluded that the strike related expenses aid in the negotiations and provide a direct benefit to the dissenters.\textsuperscript{168} Therefore, the union may charge the dissenters for the costs of strike preparation.\textsuperscript{169}

It appears that the Supreme Court is taking a quite liberal approach in allowing the union to charge nonunion member employees for the preparation of a strike — which if ever actually undertaken would be illegal. Nevertheless, the Supreme Court points out the effective nature this strike preparation has on collective bargaining negotiations. The burden that is placed on the shoulders of the objecting employees is not outweighed by the benefits these employees receive. Thus, even though at first glance the charging may seem

\begin{itemize}
\item \textsuperscript{163} Michigan's Public Employment Relation Act provides that:
\item \textsuperscript{164} \textit{Lehnert}, 111 S. Ct. at 1965.
\item \textsuperscript{165} \textit{Id.; see also} Male v. Grand Rapids Educ. Ass'n, 295 N.W.2d 918 (Mich. App. 1980) (holding that compulsory service fees under Michigan law cannot include money which is allocated to support public sector strikes).
\item \textsuperscript{166} \textit{Lehnert}, 111 S. Ct. at 1965.
\item \textsuperscript{167} \textit{Id.} The Supreme Court makes an interesting point by asserting that only one out of every seven or eight strike preparations actually cumulates in a strike. \textit{Id.}
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.} at 1966.
\end{itemize}
unfair, it is actually legitimate provided that good faith negotiations are taking place on behalf of the union.

IV. JUSTICE SCALIA’S DISSENT AND THE IMPOSITION OF THE STATUTORY DUTIES TEST

Although agreeing with the Court’s decision pertaining to many of the challenged expenditures, Justice Scalia views the test the Court utilizes in *Lehnert* as ineffective. 170 Justice Scalia posits that he “would hold that contributions can be compelled only for the costs of performing the union’s statutory duties as exclusive bargaining agent.” 171

In his dissent, Justice Scalia sees problems with the majority’s three part test 172 involving “germaneness”, “governmental policy interest”, and “burdens on free speech.” 173 Specifically, Justice Scalia questions the implicit “judgement call” which each of the three parts creates. 174

Therefore, Justice Scalia “would hold that to be constitutional a charge must at least be incurred in performance of the union’s statutory duties.” 175 Consequently, Justice Scalia asserts that he “would make explicit what has been implicit in [Supreme Court] cases since *Street*: a union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.” 176

Justice Scalia then went on to apply his statutory duties test to the *Lehnert* expenditures. 177 In determining that both the public relation expenditures and the lobbying expense were nonchargeable, Justice Scalia reasoned that they were not part of the collective bargaining process. 178 Analogously, Justice Scalia does not agree with the Court’s decision to charge the nonmembers for the miscellaneous

170. *Id.* at 1975 (Scalia, J., dissenting).
171. *Id.*
172. *See supra* note 96 and accompanying text.
174. *Id.* Justice Scalia highlights the problem that future courts will have to address. Without defining what is “germane,” “justified,” and “additional burden,” a nebulous standard has been created which will simply serve to perpetuate litigation. *Id.*
175. *Id.* at 1979.
176. *Id.*
177. *Id.*
178. *Id.* at 1980.
Next, Justice Scalia determined that union attendance at all conventions is not properly chargeable, however, there may be some meetings which are relevant to the union’s bargaining responsibilities which would be chargeable. Finally, Justice Scalia would not allow the union to charge the dissenters for preparing for a strike because in this situation the union is not acting “in its capacity as the government appointed bargaining agent for all employees.”

V. CONCLUSION

Entering the twenty-first century, accountability for spending is coming to the forefront of most economic discussion. The 1992 Presidential candidates all incorporated this concept into their messages. Consequently, the field of labor relations is also incorporating this idea.

Employees face problems such as employer cutbacks, layoffs, and the ever increasing cost of living. Employees need unions to continue to play the vital role which they have for years, but now the unions must be monitored to ensure that their actions are in furtherance of collective bargaining.

*Lehnert* attempts to address the questions that arise in this difficult area of labor relation law. Although the three part test which the Supreme Court established may involve difficulties in application, it nevertheless appeals to a needed sense of fairness. Justice Scalia is perceptive in forecasting difficulties in applying the majority’s test. However, *Lehnert* adds to the foundation that the numerous cases before it had established. Each aspect of the *Lehnert*

---

179. *Id.; see also supra* notes 149-54 and accompanying text. Justice Scalia did not understand how these expenditures could be upheld under the test the *Lehnert* Court proports to use. Moreover, Justice Scalia explains the differences between the de minimis social activities in *Ellis* and the *Lehnert* expenditures. Justice Scalia reasoned that the social expenditures in *Ellis* were not only de minimis in amount, but also in First Amendment impact. The miscellaneous expenditures in *Lehnert*, however, all deal with items that are “inherently communicative”. *Lehnert*, 111 S. Ct. at 1980 (Scalia, J., dissenting). See *Ellis*, 466 U.S. at 456 (1984).


181. *Id.* at 1981.

182. For a further discussion concerning *Lehnert* and an extensive discussion of the legislative history involved in the area of agency shop arrangements, see Calvin Siemer, Comment: *Lehnert v. Ferris Faculty Association: Accounting To Financial Core Members: Much A-Dues About Nothing?*, 60 FORDHAM L. REV. 1057 (1992).

183. The three part test established by the majority in *Lehnert* basically involves the question of “germaneness,” the governmental policy interest, and the burdens which the expenditure places on free speech. *Lehnert*, 111 S. Ct. at 1959.
holding addresses yet another issue in the agency shop area. Emotions are extremely high in the context of charging nonunion member employees compulsory union dues because the unions are seeking support for their work which they argue is “germane” to collective bargaining. Additionally, the conflicting political interests of allowing free choice while avoiding the union nonmember dissenters receiving a “free ride” are at work making this an extremely pivotal labor issue. Although *Lehnert* answers many questions, the work of defining terms, such as “germaneness” and the term’s relationship to collective bargaining, will continue to be open to debate and discussion for years. Unequivical answers are not given by the *Lehnert* decision, but a clearer understanding of what is chargeable to nonunion member employees is gained.

*Charles J. Ogeka*

---

184. *See supra* notes 112-169 and accompanying text.