IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

LINDA MISJA, Plaintiff,	:	CIVIL ACTION
v.	:	No.: 1:15-cv-01199-JEJ
PENNSYLVANIA STATE EDUCATION ASSOCIATION, Defendant.	:	The Honorable John E. Jones, III ELECTRONICALLY FILED

REPLY BRIEF OF THE DEFENDANT
PENNSYLVANIA STATE EDUCATION ASSOCIATION
IN SUPPORT OF ITS MOTION TO DISMISS

Respectfully submitted,

Thomas W. Scott, Esquire
Attorney I.D. #15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
tscott@killiangephart.com

Date: October 2, 2015

Attorneys for Defendant,
Pennsylvania State Education Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

I. Introduction

The Pennsylvania State Education Association is lawfully and constitutionally applying the "religious objector" provisions of Pennsylvania's fair share fee law to the plaintiff. PSEA accepted her claim as a religious objector and "placed one hundred per centum (100%) of [her] fair share fee into an interest bearing account." PSEA will "pay the equivalent of the fair share fee to a nonreligious charity agreed upon by the nonmember and the exclusive representative" as soon as that agreement is reached. What PSEA has not and will not do is permit the plaintiff to turn her religious objector status, a statutory shield to insure her religious freedom, into a sword-- used to fund "charities" that advance causes antithetical to equally strongly held principles of PSEA.

The "Introduction" to the complaint filed on the plaintiff's behalf by The Fairness Center asserts: "The funds taken from Ms. Misja's paycheck are her earned income and hers to direct." (Compl. Doc. 1, pg.2). Actually, that is wrong on both counts. Before the plaintiff "earned" her salary, the union representing her interests "earned" *their* fair share portion of her salary by negotiating and enforcing her contract, one which benefits her as much as it benefits the union's members. The members of the union pay for those services through their dues; nonmember fee payers, such as the plaintiff, pay for those services through the fair share fees deducted from their negotiated salaries pursuant to negotiated and

ratified contracts. But for her claim of "religious objector status," the fair share fees withheld from the plaintiff's salary would have been paid over to and used by the union to defray the costs it incurs negotiating and enforcing her contract. Although she spurns their efforts, the plaintiff has received the benefit of the union's work on her behalf -- in the form of higher wages, favorable hours, better benefits, working conditions and enhanced job security. She continues to derive benefits because she is a represented employee. Even though she is not a member, the union has a continuing obligation to represent her interests and enforce her rights should the employer fail to abide by the contract. The funds in question (which approximate one-half of one percent of her salary) have been rightly "earned" by the defendant. Payment of her fair share fee to a nonreligious charity honors her right to the free exercise of religion, but it does so to the direct economic detriment of PSEA.

The notion that the plaintiff's fair share fee becomes "hers to direct" because she is a religious objector is contradicted by the express language of the religious objector provision of the statute, which says that the union holding the funds "shall pay the equivalent of the fair share fee to a nonreligious charity *agreed upon by the nonmember and the exclusive representative*." 71 P.S. §575(h) (emphasis supplied). The language could not be clearer. The plaintiff does not have the right to unilaterally "direct" where the fair share equivalent fees are paid any more than

PSEA can unilaterally direct such a payment. The statute requires agreement. That should not be and is not hard to achieve when both parties desire to agree and put the funds to work. Instead, in a thinly veiled stratagem to create an issue to litigate, this plaintiff advanced two "charities" whose mission was known to conflict with fundamental policies of the defendant, that would never be "agreed upon": the first, an anti-abortion pregnancy counselling service closely aligned with the plaintiff's religious views; the second, the "educational arm" of the nation's largest gun lobby.[1] Nevertheless, PSEA has done its part, as evidenced by its willingness to have the funds go to any pregnancy counselling agency that provides information on a comprehensive range of options, or to a non-aligned, apolitical gun/hunter safety educational resource. *See* Exhibit C attached to Plaintiff's Complaint.

[1] The lead story on every news outlet in the nation today is that there has been yet another mass gun murder at a school: this time a community college in Oregon. In his address to the nation last night President Obama stopped short of naming the NRA as the source of the political stalemate that has so far stymied passage of responsible gun control laws when he said: "*And I would particularly ask America's gun owners who are using those guns -- properly, safely, to hunt, for sport, for protecting their families — to think about whether your views are being properly represented by the organization that suggests its speaking for you."* Well, no such discretion is necessary here: it's the National Rifle Association, the NRA, the "charity" the plaintiff claims an entitlement to benefit, while complaining of "pernicious viewpoint discrimination" when PSEA says "No."

II. The Pennsylvania Fair Share Fee Law is constitutional on its face and as applied by PSEA.

Pennsylvania's fair share law was enacted in 1988. Act of July 13, 1988, P.L. 493, No. 84, adding section 575 to the Administrative Code of 1929. The date of enactment is significant because, by that time the Supreme Court had clearly established the constitutional landscape within which "agency shop fair share fees" can be charged and collected. In 1956 the Court upheld the constitutionality of a union shop clause authorized by the Railway Labor Act that required financial support of the exclusive bargaining representative by every member of the bargaining unit, regardless of union membership. *Railway Employees' Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714 (1956). While acknowledging that requiring a non-member to help finance a union as a collective bargaining agent might "interfere in some way" with an employee's freedom to associate (or refrain from doing so), the Court held that such interference as exists is constitutionally justified by the legislative assessment of the important contributions of the union shop to the system of labor relations established by Congress.

In 1977, the Court applied the logic and holding of *Hansen* to a Michigan statute authorizing union representation of local governmental employees in an "agency shop," whereby every employee represented by the union, even though not a union member, must pay a service charge equal to the union dues to the union, as a condition of employment. *Abood v. Detroit Board of Education*, 431

U.S. 209, 97 S.Ct. 1782 (1977). In the process the Court addressed the balance between the responsibilities of the union as the exclusive bargaining representative, the corrosive and dangerous implications of permitting "free riders," and the relationship between agency shop fees and the impact on First Amendment interests.

> The designation of a union as exclusive bargaining representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money (citation omitted). The services of lawyers, experts, negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . . , union and non-union," within the relevant unit. A union shop [fair share] arrangement has been thought to distribute fairly the cost of these activities among those who benefit and it counteracts the incentive that employees might otherwise have to become "free-riders" to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

Abood, 431 U.S. 407, 415-416, 97 S.Ct 1782, 1792-1793 (1977).

In *Abood* the Court acknowledged that, while the case involved "public employment," and therefore the agency shop authorization constituted "state action," there was no constitutional impediment to the collection of agency shop fees in public employment because, "there was no First Amendment violation." *Id.* at 226, 97 S.Ct at 1795. Following the logic of *Hanson*, the Court held that "the differences between public and private sector collective bargaining simply do

not translate into differences in First Amendment rights." *Abood,* at 232, 97 S.Ct. at 1798.

The justification for legislative imposition and judicial enforcement of agency shop fees has always been to prevent the significant harm created if employees can enjoy all of the benefits of the collective bargaining relationship and agreement without cost, as "free riders," merely by refusing to join the union. Although early cases required fee payers to pay "union dues," there was always a recognition that union dues could include money used to support the union's social, political or ideological agenda in addition to its costs incurred in the actual collective bargaining function. In 1985 the Supreme Court established the parameters and procedures necessary to insure that agency shop (fair share) fees would only recapture the expenses associated with collective bargaining and exclusive representation responsibilities, and would not collect funds to support the social, political or ideological activities of the union. In *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson,* 475 U.S. 292, 106 S.Ct. 1066 (1986) the Supreme Court outlined the procedural safeguards that must be in place to insure that only funds associated with collective bargaining are collected from non-members. Those safeguards include: (1) an adequate explanation of the basis for the fee to the non-member; (2) a reasonably prompt opportunity for the non-member to challenge the amount of the fee before an impartial decisionmaker; and

(3) an escrow for the amounts reasonably in dispute while such challenge is pending. *Id.* at 310, 106 S.Ct. 1078.

When the Pennsylvania General Assembly enacted the fair share statute, Act 84 of 1988, it was cognizant of the authority and limitations associated with agency shop (fair share) fees. The legislation reflects that knowledge. Section 575 of the Administrative Code not only complies with those strictures, it exceeds them. The statutory definition of "fair share fee" specifically excludes "the cost for the previous fiscal year of [union] activities and undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative." 71 P.S. §575 (a). The procedural requirements established by the Supreme Court in *Hudson* are explicitly incorporated into §575 (d), which requires an annual notice to all nonmembers with "sufficient information to gauge the propriety of the fee and that responds to challenges by nonmembers to the amount of the fee." Subsection (d) goes on to require a procedure for an impartial arbitrator to resolve disputes regarding the amount of the chargeable fee; subsection (g) requires the union to pay the arbitration cost to resolve all challenges regarding the propriety of the fee or the amount of the fee. Unlike many fair share fee laws that collect funds, escrow them, and then rebate, Pennsylvania's statute determines the proper amount first, and only ever collects collective bargaining costs. The collective bargaining

agreements that governed the relationship of the plaintiff to her employer and her union both contain explicit references to the collection of fair share fees consistent with the requirements of section 575. (*See* Exhibit A and E, attached to Plaintiff's Complaint) PSEA has complied with the requirements of section 575. The plaintiff has not asserted otherwise.

Pennsylvania's fair share fee statute has been challenged in Federal Court and upheld. In *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992) the Third Circuit Court of Appeals rejected the facial constitutional challenges to the act, noting: "As a general matter this court 'will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it cannot be applied consistently with the Constitution. "Therefore, plaintiff's facial challenge to the religious objector provisions of the statute will succeed only if the procedure "is unconstitutional in every conceivable application." *Id.* at 404. PSEA's application of the fair share statute has also been specifically challenged – and upheld. *Otto v. Pennsylvania State Educ. Association-NEA*, 330 F.3d 125 (3rd Cir. 2003). (The plaintiffs in *Otto* were represented by the National Right to Work Legal Defense Foundation – the "charity" Christopher Meier, a plaintiff in the companion case to this one: *Ladley and Meier v PSEA*, No. CI-14-08552, Lancaster County Court of Common Pleas, chose to receive his "religious objector fair share fee.")

The Plaintiff's fundamental claim is that she has a constitutional right to have her "religious objector fair share fee equivalent" paid to the "charity" of her choice, notwithstanding the language of the statute that requires agreement by the union, or the union's objection to her selected "charities." However, beyond the above-mentioned *Hudson* protections, no other First Amendment constitutional implications exist. Where the union has only collected fair share fees (i.e., a chargeable percentage of membership dues representing the chargeable expenditures covered by union dues)—as compared to full union dues—and has comported with the three constitutional requirements set forth in *Hudson*, no other due process or First Amendment issues exist. *Sorrell v. AFSCME*, 52 Fed. Appx. 285, 2002 WL 31688916 (7th Cir. 2002) (Appendix A).

As Judge Cullen found in *Ladley and Meier:* "Neither *Abood* nor *Hudson* supports Plaintiffs' proposition that the inability to unilaterally direct a fair share fee to the charity of Plaintiffs' own choosing is an infringement upon First Amendment rights. Further, neither party has cited any authority that gives Plaintiffs the right under either the United States or the Pennsylvania Constitution to refuse payment of a fair share fee because of a religious objection.
(Slip Opinion, pgs. 10-11, Exhibit D to Defendant's main brief).

Further strong evidence that the plaintiff does not possess the unfettered right to select the charity to receive her fair share fees emerges from a comparison

of the state statute with the analogous religious exemption under the National Labor Relations Act. Under the federal statute a religious objector feepayer has very limited choice in the selection of a charity to receive the fair share fee. The NLRA authorizes the union and the employer to designate three charities to receive religious objector fair share fees. If they do, the objector must select one of the three to receive the fees. The employee only has a choice if the employer and the union do not identify appropriate charities. 29 U.S.C. § 169. By contrast, religious objectors under Pennsylvania's state law always have input on the selection – what they do not have is unilateral designation authority. In *Ladley and Meier* Judge Cullen properly found that "Pennsylvania's statute does not run afoul of the United States Constitution by providing protection to a nonmember's First Amendment rights similar to that available under federal law." (Slip Opinion, pg. 11, Exhibit D to Defendant's main brief).

Since the First Amendment is not implicated by the collection of an agency shop fair share fee in the first place (*Hanson* and *Abood)* and the Plaintiff has no protected First Amendment right to direct payment to a charity she unilaterally selects simply because she is a religious objector, there can be no impermissible "pernicious viewpoint discrimination" when PSEA says "NO" when the feepayer wants to send the fair share fee equivalent to an organization that espouses viewpoints that are diametrically opposed to its strongly and sincerely held

organizational principles. For every one of those that exists there are thousands of charities that PSEA will gladly agree to and direct that payment be made.

III. The absence of a dispute resolution mechanism to select a charity does not violate the Constitution or create a federal issue.

The final issue is one of logistics. The statute establishes an arbitration mechanism to address the propriety of the fair share fees charged, and the amount of the fee, and whether a religious objection is *bona fide*. 71 P.S. 575(d), (g) and (h). However, it does not establish any mechanism to force "agreement" on a nonreligious charity, or to resolve disagreements if they exist. Presumably the legislature anticipated that religious objectors and certified bargaining agents would be able to agree. That collaborative process has worked without a hitch for 28 years. There have been hundreds of "agreed upon" charities and tens of thousands of dollars have been redirected to those agreed upon nonreligious charities. All that is required is good faith on both parts.

This issue, created solely by the actions of the plaintiff in this case, does not implicate constitutional rights requiring intervention by the federal courts. The Seventh Circuit Court of Appeals addressed a similar issue in *Sorrell v. AFSCME*, 52 Fed. Appx. 285, 287, 2002 WL 31688916, at *2 (C.A. 7 (Ill.) (Appendix A). A nonmember religious objector filed suit alleging First Amendment and Fourteenth Amendment due process violations after the union, AFSCME, allegedly delayed

sending the nonmember's fair share fees to a selected charity. The Seventh Circuit dismissed both the federal due process and First Amendment claims of the feepayer, stating:

> Had AFSCME failed to deliver Sorrell's money to her designated charity, she could complain only of a violation of state law or her collective bargaining agreement. But AFSCME certainly was not compelled by federal law to donate Sorrell's fees, and could have delayed the donation indefinitely without offending the First Amendment.

Sorrell, 52 Fed. Appx. at 287, 2002 WL 31688916, at *2 (Appendix A). The same is true here.

This court should grant the Defendant's motion to dismiss for failure to state a claim. If the court perceives that the defendant has created an inappropriate delay in the process of arriving at an agreed upon charity, the proper course is to abstain from addressing that issue and defer to the existing state court proceeding already in progress in Lancaster County.

Respectfully submitted,

/s/Thomas W. Scott

Date: October 2, 2015

Thomas W. Scott, Esquire
Attorney I.D. #15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
tscott@killiangephart.com

Attorneys for Defendant,
Pennsylvania State Education Association

CERTIFICATE OF LOCAL RULE 7.8(b)(2) COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Local Rule 7.8(b)(2).

/s/Thomas W. Scott

Date: October 2, 2015

Thomas W. Scott, Esquire
Attorney I.D. #15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
tscott@killiangephart.com

Attorneys for Defendant,
Pennsylvania State Education Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of the Pennsylvania State Education Association in Support of its Motion to Dismiss has on this date been forwarded to the individual listed below as addressed, and in the manner indicated:

Electronic Service
David R. Osborne, Esquire
The Fairness Center
225 State Street, Suite 303
Harrisburg, PA 17101
TEL: (844) 293-1001
david@fairnesscenter.org

Date: October 2, 2015

/s/Thomas W. Scott

Thomas W. Scott, Esquire
Attorney I.D. #15681
KILLIAN & GEPHART, LLP
218 Pine Street
P.O. Box 886
Harrisburg, PA 17108-0886
TEL: (717) 232-1851
FAX: (717) 238-0592
tscott@killiangephart.com