The Burger Court Opinion Writing Database

Teachers v. Hudson

475 U.S. 292 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 27, 1986

RE: 84-1503 - Chicago Teachers Union v. Hudson, et al.

Dear John:

I had written out some thoughts paralleling Byron's but I will drop them and join his concurring opinion.

Regards,

Justice Stevens

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

January 24, 1986

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

Chicago Teachers Union v. Hudson
No. 84-1503

Dear John,

I shall, of course, join your excellent opinion in this case. May I presume to offer some suggestions?

1. Footnote 13, at page 11, disposes of respondent's argument that the Union's procedures constitute a deprivation of property without due process. But is it surely the case that "[w]hatever procedures are required to justify any deprivation of property are necessarily subsumed by the First Amendment protections"? The analysis in cases like Fuentes is quite different from First Amendment analysis. While the First Amendment may require as--or more--protective procedures, do we need to address that question here? Respondents' simply have no claim that they were deprived of property without due process. There is no question that respondents owe the Union money for the services it provided and continues to provide in collective-bargaining and contract administration. And, like a Union member's dues, the cost of these services may be fixed by the Union unilaterally unless some other rule of law--like the First Amendment--imposes a limitation. Thus, respondents cannot claim a property deprivation with respect to the amount of the fee. Their only other basis for a due process property claim is that the money is paid directly to the Union by the School Board rather than collected by the Union from the employees. But respondents have no basis to challenge this form of payment since they agreed to it in collective-bargaining. If there is anything improper in the Union's having negotiated such a checkoff (for the sake of its own convenience), isn't the remedy an action against the Union for breach of its duty of fair representation, a suit the respondents have not brought (and would certainly lose)?

2. You address the matter of an "advance reduction" of dues at page 13. Shouldn't we make clear before pages 16-17, however, that such an advance reduction is required and must be performed by an independent auditor? Could not that be done in the discussion at page 13? My own view, as expressed at the conference, is that both the advance reduction and the independent auditor requirement follow from the Union's burden to utilize reasonable procedures to minimize infringement of non-members' First Amendment rights. Even with a 100% escrow system, allowing the Union to assess full dues without an advance reduction is not the method most likely to protect the non-members rights. On the contrary, since we know that the Union

members rights. On the contrary, since we know that the Union will not be entitled to assess full dues, it is a method guaranteed to violate those rights. Indeed, I have a strong feeling that Unions choose such a method precisely because the burden of protesting and litigating claims will discourage many of the objectors from making the claim made in the first place. While ultimately the burden of protecting his or her rights rests on the objector, the Union must, in the first instance, utilize reasonable procedures that make it less rather than more likely that the objector will have to do so. An advance reduction is such a procedure, especially since, as you point out in footnote 16, most of the information necessary to make a reduction is already compiled and classified by Unions for reporting purposes under the LMRDA and other laws.

Similarly, as this case demonstrates, isn't an advance reduction determined by the Union tantamount to no advance reduction at all? The principle that no man can be his own judge has more than history behind it. Does not allowing the Union to make the determination itself invite the Union to exaggerate the expenses "germane to collective-bargaining" in the hopes that many will not find it worth the time and expense to pursue an objection? Since having the audit done by an independent auditor will not add much to the expense of having the audit done in the first place (and can presumably be included among the costs to be recouped from the agency fees), should not this protection accompany the requirement of an advance reduction? In addition, I am uncertain whether you think that full disclosure by the Union of the basis for its calculation suffices as an alternative to an independent auditor. I am dubious that this is adequate, since it still permits the Union choose a procedure that maximizes the Union's opportunity to "get away" with taking more money than it is entitled to take. But I can readily be persuaded to your view.

3. I confess to some confusion as to Part V. With respect to your first reason for rejecting the escrow (contained in the second full paragraph on page 16), I understand you to say that because the court may have found some remedy other than escrow appropriate, the Union's adoption of such a procedure cannot dispose of the case. However, since we go on to conclude that the escrow system does not cure the constitutional infirmities, do we need to say this? May not this paragraph confuse lower courts?

With respect to your second reason (beginning in the paragraph at the bottom of page 16), what am I to understand by your first sentence? Is what you mean to say that, while the escrow system may eliminate the risk that non-member's contributions may be temporarily used for impermissible purposes, it is not adequate unless accompanied by procedures for a properly justified advance reduction and a reasonably prompt decision by an impartial decision-maker? I get that thrust

the remainder of this paragraph. However, would it be possible to reform the sentence somewhat to make this clearer?

I understand your third reason (at the middle of page 17) to be that an escrow limited to amounts reasonably in dispute would be adequate. But isn't this less a reason for rejecting the Union's escrow than it is a limitation on the rejection? If so, rather than calling it a third argument against the escrow, should it not simply be a further elaboration on your second argument? In addition, should not this paragraph clearly state that this limited escrow is constitutionally required where a challenge is made by an objector?

4. Finally, might it be helpful to add a statement of the holding at the ending of the opinion? The opinion establishes general guidelines for unions, while leaving the unions flexibility to implement them. Thus, could not the opinion end with a sentence like: "All that we hold today is that the minimal procedures constitutionally required for the collection of agency fees by a Union include some form of advance reduction by an independent auditor and a reasonably prompt opportunity to challenge this reduction before an impartial decision-maker. In addition, unions must employ an escrow for at least the amounts reasonably in dispute while such challenges are pending. We leave the development of specific procedures to implement these requirements to unions."

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 30, 1986

No. 84-1503

Chicago Teachers Union v. Hudson

Dear John,

Please join me. I may add a few words of my own.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 31, 1986

84-1503 - Chicago Teachers v. Hudson

Dear John,

I have decided to fold up my tent and join all or most all of your suggested opinion. I do have a comment or two, however.

First, although you save the issue, I shall probably say something about Posner's view that the Constitution permits the union to collect only for those activities directly connected with collective bargaining and contract administration. What he said remains the law of the Circuit.

Second, I take it that the union cannot insist on the exhaustion of any internal union remedies before the non-member is entitled to arbitrate. It might be desirable to say so expressly. But may the non-member waive arbitration, which is imposed on the union strictly for his benefit, and go directly into court to litigate the matter under §1983?

Third, I agree that the non-member cannot insist on escrowing the entire amount of the payment the union claims of him; there will be an amount or percentage that no one could reasonably challenge as being available to the union for carrying out its unit duties. But how will this portion be decided? Objectors are not always reasonable and may be quite the opposite. In any event, the non-member cannot resist paying into escrow the amount the union claims pending arbitration; he may not keep it in his pocket.

Fourth, I think it would be helpful to provide more guidance on how the union can modify the procedure for selecting an arbitrator so as to avoid a claim of arbitrariness. The opinion says only that the selection may not be the union's unrestricted choice, while at the same time striking down a plan under which the union's choice is not wholly unrestricted.

Fifth, I'm not sure whether the infirmity in the union's belated 100% escrow proposal rests on the right to speak or on property rights.

I'll be away for a time and will be in touch when I return.

Sincerely yours,

Justice Stevens

cc: Justice Marshall
Justice Rehnquist

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

FEB 26 1986

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1503

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL., PETITIONERS *v.* ANNIE LEE HUDSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February ——, 1986]

JUSTICE WHITE, concurring.

I join the opinion and judgment of the Court with the following observations. First, since the Court, as did Judge Flaum in the Court of Appeals, deems it unnecessary to reach the issue of non-germane, non-ideological expenditures, the panel's remarks on the subject are therefore obvious dicta. Under our cases, they are also very questionable.

Second, as I understand the Court's opinion, the complaining non-member need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: FEB 28 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1503

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL., PETITIONERS *v.* ANNIE LEE HUDSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[March ——, 1986]

JUSTICE WHITE, with whom the THE CHIEF JUSTICE joins, concurring.

I join the opinion and judgment of the Court with the following observations. First, since the Court, as did Judge Flaum in the Court of Appeals, deems it unnecessary to reach the issue of non-germane, non-ideological expenditures, the panel's remarks on the subject are therefore obvious dicta. Under our cases, they are also very questionable.

Second, as I understand the Court's opinion, the complaining non-member need only complain; he need not exhaust internal union hearing procedures, if any, before going to arbitration. However, if the union provides for arbitration and complies with the other requirements specified in our opinion, it should be entitled to insist that the arbitration procedure be exhausted before resorting to the courts.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 30, 1986

Re: No. 84-1503 - Chicago Teachers Union v. Hudson

Dear John:

I await further writing in this one.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 20, 1986

Re: No. 84-1503-Chicago Teachers Union v. Hudson

Dear John:

Please join me.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 19, 1986

Re: No. 84-1503, Chicago Teachers v. Hudson

Dear John:

I am happy to join your recirculation of February 13 in this case.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 28, 1986

84-1503 Chicago Teachers Union v. Hudson, etal

Dear John:

Your opinion is very well written, and I expect to join it.

I do have one suggested change. In the last sentence of n. 17, p. 14, your draft would permit a union merely to make "a representation that [no part of $2,167,000] was used to subsidize political activities." It would be difficult for me to agree that a mere "representation" by a union would be acceptable for "adequate disclosures." Id. Such a representation by most unions would be honest and accurate, but as recent articles in the media about organized crime have indicated some unions are less dependable.

I do not think non-members should be required to accept a union's representation rather than - as your footnote properly says earlier - an "adequate disclosure [that] would include the major categories of expenses."

This also will confirm our conversation Monday morning in which Bill Brennan suggested that an audit should be required for adequate disclosure. My notes do not indicate whether there was a consensus on this. I do agree with Bill that this is desirable, and think it would be beneficial to the Union and its entire membership.

I am sending this note only to you and Bill.

Sincerely,

L. Lewis

Justice Stevens

cc - Justice Brennan
LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 10, 1986

84-1503 Chicago Teachers Union v. Hudson

Dear John:

Please join me.

Sincerely,

L

Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1986

Re: 84-1503 - Chicago Teachers Union v. Hudson

Dear John:

Please join me.

Sincerely,

Justice Stevens

cc: The Conference

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: 1-22-86

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1503

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL., PETITIONERS *v.* ANNIE LEE HUDSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January ——, 1986]

JUSTICE STEVENS delivered the opinion for the Court.

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984). The *Ellis* case was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ibid.* In contrast, this case concerns the constitutionality of the procedure adopted by the Chicago Teachers Union, with the approval of the Chicago Board of Education, to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.

I

The Chicago Teachers Union has acted as the exclusive collective bargaining representative of the Board's educational

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

6, 7, 11, 12, 14, 16, 17

From: **Justice Stevens**

Circulated: _____

Recirculated: JAN 28 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1503

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL., PETITIONERS *v.* ANNIE LEE HUDSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January —, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984). The *Ellis* case was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ibid.* In contrast, this case concerns the constitutionality of the procedure adopted by the Chicago Teachers Union, with the approval of the Chicago Board of Education, to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.

I

The Chicago Teachers Union has acted as the exclusive collective bargaining representative of the Board's educational

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 11, 1986

Re: 84-1503 - Chicago Teachers v. Hudson

Dear Byron:

Needless tc say I am delighted to have your letter.

Except for your first paragraph--which I think would be an appropriate subject of a separate opinion--I would like to accommodate the suggestions you make. I will fuss with the draft myself and, in addition, will welcome any specific suggestions for change that you'd like to propose.

Respectfully,

Justice White

cc: Justice Marshall
Justice Rehnquist

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: FEB 13 1986

STYLISTIC CHANGES THROUGHOUT.
12-17

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1503

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL., PETITIONERS *v.* ANNIE LEE HUDSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February ——, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984). The *Ellis* case was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ibid.* In contrast, this case concerns the constitutionality of the procedure adopted by the Chicago Teachers Union, with the approval of the Chicago Board of Education, to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.

I

The Chicago Teachers Union has acted as the exclusive collective-bargaining representative of the Board's educational

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

P. 15

From: **Justice Stevens**

Circulated: _____

Recirculated: FEB 26 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1503

CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL., PETITIONERS *v.* ANNIE LEE HUDSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[February ——, 1986]

JUSTICE STEVENS delivered the opinion of the Court.

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), "we found no constitutional barrier to an agency shop agreement between a municipality and a teacher's union insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984). The *Ellis* case was primarily concerned with the need "to define the line between union expenditures that all employees must help defray and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters." *Ibid.* In contrast, this case concerns the constitutionality of the procedure adopted by the Chicago Teachers Union, with the approval of the Chicago Board of Education, to draw that necessary line and to respond to nonmembers' objections to the manner in which it was drawn.

I

The Chicago Teachers Union has acted as the exclusive collective-bargaining representative of the Board's educational

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

Justice - ——
I agree with
both recommendations.
-Larry

March 6, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Chicago Teachers Union v. Hudson, 84-1503

1. Kramer v. Public Employment Relations Commission, 85-684.

Petitioner, a public school teacher, challenged substantive and procedural aspects of New Jersey's public employment "agency shop" statute. The New Jersey Supreme Court construed her action as a facial challenge to the statute, and rejected her arguments.

With respect to the procedural challenge, the New Jersey statute specifies that the agency shop fee may not be more than 85% of the union membership fee. The New Jersey court further interpreted the statute to require a computation of the agency fee on the basis of the expenditures for the prior year, with a deduction for the percentage of unchargeable expenses during the prior year. The court also required "an uncomplicated, efficient, and readily accessible process for contesting the representation fee." Pet. App. 34a. Additionally, the New Jersey statute requires that an objector be given an opportunity to appeal to a three-member board, consisting of a representative of public employers, a representative of public employee organizations, and a neutral member. Finally, the Court observed that the statute provided a "demand-and-return system" for the return of disputed amounts; that Ellis suggested the advisability of interest-bearing escrow accounts; and that other means might also serve the goal of preventing the use of funds for impermissible purposes. The Court stressed that, in view of the facial nature of the attack, it was unnecessary to consider possible alternatives with greater specificity.

Our opinion in Hudson requires an appropriately justified advance reduction; a fair and expeditious

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 28, 1986

No. 84-1503 Chicago Teachers Union, Local No. 1, ADL-CIO v. Hudson

Dear John,

Please join me.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference