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UNITED STATES SUPREME COURT UPHOLDS ALLOCATION OF AGENCY FEES FOR NON-UNION MEMBERS TO SUPPORT EXTRA-UNIT LITIGATION ACTIVITIES,

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Introduction

The United States Supreme Court issued a new opinion yesterday (January 21, 2009) in *Locke v. Karass* in which the Court upheld use of agency service fees to support litigation activities in other states for other bargaining units. This summary briefly reviews the opinion and its significance.

The Case

The Maine State Employees Association ("MSEA), a public employee union, allocates dues to litigation activities that generally support collective bargaining efforts in other states, but which have no relation to bargaining units actually represented by MSEA. The question raised in this case was whether such allocation is permissible.

In a 1984 opinion, *Ellis v. Brotherhood of Railway Clerks*, the United States Supreme Court held that under the Railway Labor Act, unions could not allocate dues to support extra-unit litigation that was not related to the bargaining unit in question. Seven years later, a fractured plurality issued an opinion in *Lehnert v. Ferris Faculty Assoc.*, that was generally understood to allow a union to allocate dues to political or other purposes so long as the allocation is germane to collective bargaining, supports labor peace and the avoidance of free riders, and does not significantly burden free speech rights of agency members. However, at least four justices in *Lehnert* appeared to conclude that extra-unit litigation should be excluded and not allowed because such an allocation could not be germane to the collective bargaining needs of an unrelated unit. But this statement was not actually part of the case and it was not accepted by a majority, and therefore the Court's statement in this regard has been characterized as an unnecessary comment that does not concern the resolution of the case (or what lawyers call "dicta" or "obiter dictum").

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Agency members filed suit arguing that MSEA's allocation of service fees violated their First Amendment rights. The district court upheld MSEA's practice so long as it was somehow germane to collective bargaining. The First Circuit affirmed. The aggrieved employees sought and secured review by the Court.

Review

The issue here arises under the *Chicago Teachers Union v. Hudson* line of cases. All employees in a collective bargaining unit are represented by the union. The union is their exclusive bargaining representative. Agency fee members are non-union members. They do not have to join the union as full members. However, they must pay dues. Under *Hudson*, a 1986 opinion, unions must provide notice to agency fee members concerning how dues are allocated, and agency fee members have the right to ask for an accounting and refund of dues allocated to political or other purposes that are unrelated to collective bargaining representation. The union must reimburse any percentage of dues that are allocated to such political or other purposes. Although the basic principles seem straightforward, numerous questions have arisen concerning when and whether dues may be allocated to extra-unit activities (to activities involving other bargaining units or national activities). The fundamental issue is always whether a given allocation is related to representation of the bargaining unit. In some instances, unions may pool resources with local, regional, or national affiliates or associations for purposes that are not directly related to collective bargaining representation for a specific unit.

The Opinion

In an opinion authored by Justice Breyer, the Court affirmed by a unanimous vote. Retreating from *Lehnert*'s dicta, the Court concluded that litigation expenses should not be treated any differently than any other national expense. Therefore, the Court held that unions may allocate service fees to support litigation expenses for activities in other states not related to the collective bargaining unit so long as "the subject matter of the national litigation bears an appropriate relation to collective bargaining and . . . the arrangement is reciprocal—that is, the local's payment to the national affiliate is for 'services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization."' The litigation activities here satisfied both prongs of this standard. The Court therefore affirmed.

Justice Alito concurred, joined by Chief Justice Roberts and Justice Scalia. The concurring Justices observed that the parties never disputed (and indeed assumed) that the fee sharing arrangement was reciprocal. However, they stressed that the Court's opinion did not explain when or whether "reciprocity" existed for purposes of satisfying the two-part test. They implied that a different result would have been reached had reciprocity been disputed.

Significance

This is one I got wrong. In my annual Term preview, I predicted:

> In *Locke*, I think the Court will reverse. In both *Ellis* and *Lehnert*, the Court disapproved allocating agency dues to extra-unit litigation that bore no relation to the bargaining unit. This case would not appear to be substantially different in any material (or discernible) respect. Justices Scalia, Souter, and Kennedy were in the "no extra-unit litigation costs" camp in *Lehnert*. Although a Justice may always change his or her views, I do not believe that there is anything to suggest this would be evident in this case on this specific issue. Moreover, it is probably safe to assume that Chief Justice Roberts, Justice Alito, and Justice Thomas would ascribe to similar views. Accordingly, there are probably at least five or six votes to adopt *Lehnert*'s dicta as an actual holding.

However, much of the discussion in both *Lehnert* and *Ellis* concerned non-reciprocal situations. Accordingly, one could view the result here as something of an anomaly that traces to the lawyers' decision to concede reciprocity. Had they disputed that critical issue, a different result with a different analysis may have resulted. As it is, the Court's test for allocating service fees to support extra-unit litigation is extremely broad. When does something "ultimately inure to the benefit" of local union members? In context, the broad concepts staked out by Justice Breyer probably mean that nearly all such financing would be permissible. However, the Court emphasized that its holding was based on the reciprocal nature of the funding and the fact that it was related to collective bargaining purposes. There may be other instances where allocating service fees to extra-unit litigation activities meets with less favor.

Students of the Court will find it interesting how far the Court evaded both *Lehnert* and *Ellis* without purporting to overrule or even criticize either opinion. Chief Justice Roberts has expressed a goal of moving towards a less fractious Court. The concurrence here may supply further proof of that goal being implemented.

Conclusion

This legal summary is for informational purposes and is not intended as legal advice. The summary presented here reflects the author's analysis. Mistakes are the author's alone. Employers with questions or seeking additional information should confer with counsel.