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

SHALEA OLIVER	:	
	:	
v.	:	**CIVIL ACTION NO. 19-891**
	:	***Judge McHugh***
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 668, ET AL.	:	

MEMORANDUM OF LAW IN OPPOSITION TO COMMONWEALTH DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Government employees have a First Amendment right not to join or pay any money to a union "unless the employee affirmatively consents" to do so. *Janus v. AFSCME*, 138 S. Ct. 2448, 2486 (2018). Prior to *Janus*, Ms. Oliver was given the unconstitutional choice between paying union dues as a member of the SEIU Local 668 ("Union" or "Local") or paying agency fees as a non-member of the Union. The Supreme Court in *Janus* recognized that Ms. Oliver should have been given the choice to pay nothing at all to the Union as a non-member. Ms. Oliver could not have provided affirmative consent when she joined the union because she was not given a choice to pay nothing to the union. This lack of freely given consent renders the union card she signed before *Janus* void, such that any dues withheld from Ms. Oliver's paychecks were taken unconstitutionally.

In addition, citizens enjoy a First Amendment right not to be forced by government to associate with organizations or causes with which they do not wish to associate. Yet Pennsylvania law grants public sector unions the power to speak

on behalf of employees as their exclusive representative. 43 P.S. §§ 1101.604, 606. Pursuant to this law and by agreement between the Union and Commonwealth, the Union purports to act as the exclusive representative of Ms. Oliver and other non-members. As the Supreme Court in *Janus* recognized, such an arrangement creates "a significant impingement on associational freedoms that would not be tolerated in other contexts" 138 S. Ct. at 2478. Ms. Oliver's rights of speech and association are violated by a government-compelled arrangement whereby the Union lobbies her government employer on her behalf without her permission and in ways that she does not support.

Ms. Oliver brought this case under 42 U.S.C § 1983 and 28 U.S.C. § 2201(a), seeking declaratory relief and damages in the amount of the dues previously deducted from her paychecks.

Ms. Oliver and Commonwealth Defendants agree that there are no material facts in dispute, and that all the relevant questions are matters of law. Ms. Oliver, therefore, submits this memorandum of law in opposition to the Commonwealth Defendants' motion for summary judgment.[1]

PROCEDURAL HISTORY & STATEMENT OF FACTS

Ms. Oliver accepts the Commonwealth Defendants' Procedural History and Statement of Facts as a complete and accurate rendition of the relevant facts.

[1] Plaintiff and SEIU Local 668 have agreed to file cross motions for summary judgment at a later date.

SUMMARY JUDGMENT STANDARD

"A party is entitled to summary judgment if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Young v. UPS*, 135 S. Ct. 1338, 1367 (2015) (quoting Fed. Rule Civ. Proc. 56(a)). Ms. Oliver and Commonwealth Defendants agree that there are no material facts in dispute and that all the relevant questions are matters of law.

ARGUMENT

I. Count I is not moot.

Count I alleges that Ms. Oliver never provided affirmative consent to SEIU Local 668 or the Commonwealth for them to withdraw union dues from her paycheck. The Supreme Court has held that requiring a government employee to pay money to a union violates that employee's First Amendment rights to free speech and freedom of association unless the employee "affirmatively consents" to waive his or her rights. *Janus*, 138 S. Ct. at 2486. Such a waiver must be "freely given and shown by 'clear and compelling' evidence." *Id*. When Ms. Oliver began employment with the Commonwealth, she was forced into an unconstitutional choice: pay an agency fee or pay membership dues. *See* 43 P.S. §§ 1101.301(18); 1101.401; and 1101.705; collective bargaining agreement between Union and Commonwealth (Compl. Ex. A, Doc. 1). Because Ms. Oliver was not given a free choice, the Commonwealth and the Union could not have obtained her affirmative consent to waive her First Amendment right to not join or pay the union. As such, the Commonwealth and the Union unconstitutionally withheld union dues from Ms. Oliver. Although Local 668 notified Ms. Oliver on January 30, 2019 that she was no

longer a union member and refunded all dues collected from Ms. Oliver from the time of her August 10, 2018 resignation letter until the January notification[2], Count I seeks the return of *all* dues deducted from Ms. Oliver's paycheck because her signing of the union dues authorization could not constitute affirmative consent because she was forced to pay money to the union either as a member or a non-member. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.")

Ms. Oliver seeks the following relief under Count I: First, a declaratory judgment that limiting her ability to revoke the authorization to withhold union dues from her paycheck to a window of time is unconstitutional because she never provided affirmative consent. Second, a declaratory judgment that her signing of the union dues deduction authorization could not constitute an affirmative consent to waive her First Amendment rights upheld in *Janus* because such authorization was based on an unconstitutional choice between paying the union as a member or paying the union as a non-member. Third, a declaratory judgment that withholding

[2] The passage of more than five months from the time that Ms. Oliver sent the resignation letter until her dues stopped being withheld and she was notified that she was no longer a union member was apparently due to a mistake, as Local 668 sent three letters – on September 20, 2018, November 27, 2018, and January 23, 2019 – to her employer informing the employer that Plaintiff had submitted her resignation from the union and asking the employer to terminate dues deductions. Report of Rule 26(f) meeting (Doc. 26), Exs. A (Doc. 26-1), B (Doc. 26-2), and C (Doc. 26-3).

union dues from her paycheck was unconstitutional because she did not provide affirmative consent. Fourth, a declaratory judgment that 43 P.S. §§ 1101.301(18), 1101.401, and 1101.705 are unconstitutional to the extent they limit an employee's ability to resign from the union and stop union dues from being withheld from their paychecks when that employee has not provided affirmative consent. Fifth, damages against Defendant SEIU for all union dues collected from Ms. Oliver after the date of the Supreme Court's decision in *Janus*, June 27, 2018. And sixth, damages against Defendant SEIU for all union dues collected from Ms. Oliver before June 27, 2018.

Commonwealth Defendants' brief is built on the assumption that Plaintiff's case is moot because injunctive relief is inappropriate in this case. But Plaintiff does not seek injunctive relief as to Count I, as she was excused from the union before the filing of this case. *See* Compl. Doc. 1. The only relief sought against the Commonwealth Defendants is declaratory relief.

As such, the Commonwealth Defendants cannot moot Count I entirely because the damages sought under Count I are against the Union. And Plaintiff's claims against the Union for damages are not moot because the Union only provided a refund for dues that were taken from Ms. Oliver as of the date of her resignation letter, August 10, 2018. Commonwealth Defendants' Br. at 5, Doc. 29. But Ms. Oliver's claim in Count I seeks damages in the form of the return of all dues deducted since she signed the union dues authorizations, subject only to a statute-of-limitations defense. Thus, the Commonwealth Defendants cannot moot Plaintiff's

request for damages in Count I because Plaintiff does not seek damages against the Commonwealth Defendants, and, in any event, the Union has not refunded Ms. Oliver all of the dues she seeks in her claim for damages.

Second, Plaintiff request for declaratory relief against the Commonwealth Defendants is not moot. Plaintiff asked this Court to declare unconstitutional 43 P.S. §§ 1101.301(18); 1101.401; and 1101.705, to the extent that they prohibit a government employee who has not provided affirmative consent, like Ms. Oliver, to stop union dues from being withheld from his or her paycheck. Sections 1101.301(18) and 1101.401 operate together to define and enforce a so-called "maintenance of membership" provision, which requires that anyone who joined or joins the union "must remain members for the duration of a collective bargaining agreement." Where an employee, like Ms. Oliver, has not provided affirmative consent, a provision of law that requires anyone who signed a union card must remain a member, and pay union dues, for the duration of a collective bargaining agreement is unconstitutional. Section 1101.705 authorizes state and local employers to enact maintenance-of-membership provisions in their collective bargaining agreements. Where these provisions of law force government workers who have not provided affirmative consent to pay union dues they violate the constitutional rights guaranteed in *Janus*. The Commonwealth's brief supporting its motion for summary judgment essentially ignores this request for declaratory relief by Plaintiff.

That the union has voluntarily chosen to let Plaintiff out of her membership even though these statutes permit it to force her to remain does not moot this request for relief. It is well settled that where a claim is capable of repetition but will evade review, courts are empowered to issue declaratory judgments. In *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 125 (1974), the Supreme Court recognized that "[i]t is sufficient…that the litigant show the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest." The Court there pointed to *Roe v. Wade,* 410 U.S. 113 (1973), where the birth of the plaintiff's child did not moot claims regarding a right to abortion. The Court explained that even if the need for an injunction had passed, declaratory relief was still appropriate where there was "governmental action directly affecting, and continuing to affect, the behavior of citizens in our society." *Super Tire,* 416 U.S. at 125.

Nor does the so-called "side letter" between the union and the Commonwealth render Count I moot or incapable of repetition. The side letter states that an SEIU member may resign at any time. But the Commonwealth's statutes mandate that "all employes who have joined an employe organization . . . must remain members for the duration of a collective bargaining agreement . . . with the proviso that any such employe . . . may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement." 43 P.S. § 1101.301(18)). The statutes, then, only permit employees to opt-out from the union during the specified fifteen-day window immediately prior to

the expiration of a multi-year collective bargaining agreement. A side letter between to a state agency and a private organization does not have the legal authority to override the plain text of a state statute. *State Org. of Police Officers v. Soc'y of Prof'l Journalists-University of Haw. Chapter*, 927 P.2d 386, 412 (Haw. 1996) (the proposition that a provision in a collective bargaining agreement "suspends the effect of a validly enacted statute of the state strains credulity."). Plus, though the Commonwealth has entered into a side letter with the SEIU, we have no evidence that the Commonwealth has stopped forcing employees to remain in the other unions with which it has collective bargaining agreements but where no one has sued it.

The lack of legal authority for the side letter, the ongoing application of the policy to other Commonwealth employees, and the Supreme Court's longstanding doctrine on capable-of-repetition claims all provide a firm foundation for this Court to issue Plaintiff's requested declaratory relief.

Count I is not moot. Ms. Oliver is entitled to substantial declaratory relief against the Commonwealth defendants – that limitations on her ability to revoke the dues authorization to a window of time is unconstitutional because she did not provide affirmative consent; that her signing of a dues deduction prior to *Janus* is not a basis for her affirmative consent to waive her rights because it was based on an unconstitutional choice between paying the union as a member or as a non-member; that the withholding of her dues was unconstitutional because there was no affirmative consent; and that the three state statutes are unconstitutional as

applied to Plaintiff to the extent they limit her ability to withdrawn her authorization based on her lack of affirmative consent.

II. Forcing Ms. Oliver to associate with the Union as her exclusive representative violates her First Amendment rights to free speech and Freedom of Association (Count II).

Recognizing the Union as Ms. Oliver's exclusive representative for bargaining purposes violates her First Amendment rights of speech and association. She cannot be forced to associate with a group that she disagrees with.

A. Forcing Ms. Oliver to have the Union serve as her exclusive representative is unconstitutional.

Under 43 P.S. §§ 1101.604-606, as a condition of her employment, Ms. Oliver must allow the union to speak (lobby) on her behalf on wages and hours, matters that *Janus* recognizes to be of inherently public concern. 138 S. Ct. at 2473. Pennsylvania law grants the union prerogatives to speak on Ms. Oliver's behalf on not only wages, but also "terms and conditions of employment." 43 P.S. §§ 1101.606. These are precisely the sort of policy decisions that *Janus* recognized are necessarily matters of public concern. 138 S. Ct. 2467. When the Commonwealth certifies the Union to represent the bargaining unit, it forces all employees in that unit to associate with the Union. This coerced association authorizes the Union to speak on behalf of the employees even if the employees are not members, even if the employees do not contribute fees, even if the employees disagree with the Union's positions and speech.

This arrangement has two constitutional problems: it is both compelled speech (the union speaks on behalf of the employees, as though its speech is the

employees' own speech) and compelled association (the union represents everyone in the bargaining unit without any choice or alternative for dissenting employees not to associate).

Legally compelling Ms. Oliver to associate with the Union demeans her First Amendment rights. Although the issue has not been directly before the Supreme Court, it has questioned whether exclusive-representation in the public-sector context imposes a "significant impingement" on public employees' First Amendment rights. *Janus*, 138 S. Ct. at 2483; *see Harris v. Quinn*, 134 S. Ct. 2618, 2640 (2014); *Knox v. Service Employees*, 567 U. S. 298, 310–11 (2012). Indeed, "[f]orcing free and independent individuals to endorse ideas they find objectionable is always demeaning. . . . [A] law commanding involuntary affirmation of objected-to beliefs would require even more immediate and urgent grounds than a law demanding silence." *Janus*, 138 S. Ct. at 2464 (2018) (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624, 633 (1943) (internal quotation marks omitted)). Exclusive representation forces the employees "to voice ideas with which they disagree, [which] undermines" First Amendment values. *Janus*, 138 S. Ct. at 2464. Pennsylvania laws command Ms. Oliver's involuntary affirmation of objected-to beliefs. The fact that she retains the right to speak for herself in certain circumstances does not resolve the fact that the Union organizes and negotiates as her representative in her employment relations.

Exclusive representation is also forced association: Ms. Oliver is forced to associate with the Union as her exclusive representative simply by the fact of her

employment in this particular bargaining unit. "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Yet Ms. Oliver has no such freedom, no choice about her association with the Union; it is imposed, coerced, by the Commonwealth's laws.

Exclusive representation is therefore subject to at least exacting scrutiny, if not strict scrutiny. It must "serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Knox*, 597 U.S. at 310. This the Defendants cannot show. *Janus* has already dispatched "labor peace" and the so-called "free-rider problem" as sufficiently compelling interests to justify this sort of mandate. 138 S. Ct. at 2465-69. And Ms. Oliver is not seeking the right to form a rival union or to force the government to listen to her individual speech, as will be discussed below; she only wishes to disclaim the Union's speech on her behalf. She is guaranteed that right, not to be forced to associate with the union, not to let the union speak on her behalf, by the First Amendment.

B. The Union's reliance on *Knight* is misplaced.

In defending Pennsylvania's exclusive representation scheme, the Commonwealth Defendants rely heavily on *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271(1984). *Knight* held that employees do not have a right, as members of the public, to a formal audience with the government to air their views. *Knight* does not decide, however, whether such employees can be forced to associate with the union; therefore, the case is inapposite. As the *Knight* court framed the

issue, "The question presented . . . is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees." 465 U.S. at 273.

The plaintiffs in *Knight* were community college faculty who dissented from the certified union. *Id*. at 278. The Minnesota statute at issue required that their employer "meet and confer" with the union alone regarding "non-mandatory subjects" of bargaining. The statute explicitly prohibited negotiating separately with dissenting employees. *Id.* at 276. The plaintiffs filed their suit claiming a constitutional right to take part in these negotiations.

The court explained the issue it was addressing well: "[A]ppellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting." *Id.* at 282. Confronted with this claim, the court held that "[a]ppellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education." *Id.* at 283.

The First Amendment guarantees citizens a right to speak. It does not deny government, or anyone else, the right to ignore such speech. Unlike the plaintiffs in *Knight*, plaintiff here do not claim that her employer—or anyone else—should be compelled to listen to her views. Instead, she asserts a right against the compelled association forced on her by exclusive representation. *Knight* is inapposite.

Commonwealth Defendants' misreading of *Knight* severely elevates and misinterprets dicta in the decision. The central issue of the *Knight* decision is whether plaintiffs could compel the government to negotiate with them instead of, or in addition to, the union. That question is fundamentally different from Ms. Oliver's claim that the government cannot compel her to associate with the Union by authorizing the Union to bargain on her behalf.

In arguing that these two distinct claims are the same, the Commonwealth Defendants pointed only to dicta towards the end of the *Knight* opinion that suggests the challenged policy "in no way restrained [plaintiffs'] freedom to speak on any education related issue or their freedom to associate or not associate with whom they please." *Knight*, 465 U.S. at 288. Yet the Defendants' own quotations from that portion of the opinion reinforced that the Court was still addressing the question of being heard. *See* Commonwealth Defendants Br. At 16. The Court explains that the government's right to "choose its advisers" is upheld because a "person's right to speak is not infringed when the government simply ignores that person while listening to others." *Knight,* 465 U.S. at 288. The Court raises the matter of association only to address the objection that exclusive representation "amplifies [the union's] voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices" impairs the ability of others to speak as well. *Id.* This, again, is another path to the same conclusion: First Amendment "rights do not entail any government obligation to listen." *Id.* at 287.

Knight is, therefore, not responsive to the question Ms. Oliver now raises: whether someone else can speak in her name, with her imprimatur granted to it by the government. She does not contest the right of the government to choose whom it meets with, to "choose its advisors," or to amplify the Union's voice. She does not demand that the government schedule meetings with her, engage in negotiation, or any of the other demands made in *Knight*. She only asks that the Union not do so in her name.

CONCLUSION

For the forgoing reasons, the Court should deny the Commonwealth Defendants' motion for summary judgment.

Dated: July 29, 2019

Respectfully Submitted,

/s/ Jeffrey M. Schwab

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CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, hereby certify that on July 29, 2019, I served Plaintiff's Memorandum of Law in Opposition to the Commonwealth Defendants' Motion for Summary Judgment on Defendants' counsel by filing it through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab