SPECIAL REPORT LABOR

# An introduction to Hudson rights

*By Paul Kersey, Director of Labor Policy*

## An introduction to Hudson rights

Under the U.S. Constitution, workers cannot be forced to support union political activism – even if they are covered by a union contract and are obligated to pay union dues. The legal mechanism that workers use to protect their rights is referred to as "Beck" rights in the private sector, while government workers can make use of "Hudson" rights.[1] In either case, workers may limit the dues amount they pay to the union to the costs of bargaining only.

For workers in government and the private sector, the basic idea is the same: workers are not obligated to join a union, and cannot be forced to pay dues in excess of their share of the costs of basic workplace representation, which includes collective bargaining, contract administration and grievance settlements. This report will focus on government workers and their Hudson rights, although many of the general principles will apply to private-sector workers as well.

Hudson rights are important to Illinois government employees, because under state labor law unions are entitled to collect union dues – or their functional equivalent – from every worker they represent, even if the employee does not support the union. While it is technically true that employees cannot be forced to join a union, a typical union contract will include a clause saying that workers covered by the contract must pay an agency fee in lieu of regular dues in order to keep their job. As a general rule, this agency fee is the same amount as regular dues, and is turned over to the union with no limitations on its use.

Not all states allow these agency-fee contracts in the public sector. A handful of states do not permit collective bargaining at all, while others protect government workers from forced dues through a general Right-to-Work law that applies to both public- and private-sector workers. As part of its 2011 labor reform law, Wisconsin bars agency-fee contracts for most public-sector employees. Illinois labor law specifically allows for forced dues in government.[2]

Forcing workers to join or give financial support to a private organization such as a union as a condition of public employment is arguably a violation of First Amendment rights of association and free speech. In Illinois alone thousands of police officers, firefighters, teachers and other government workers are forced to turn over a significant portion of their wages to unions they may not support and may end up harming the interests of individual workers.

Up to now, however, the U.S. Supreme Court has permitted forced-dues contracts, although it has slowly placed more limits on them. Hudson rights mitigate the harm done by forced dues, allowing workers to opt out of paying for union activities that go beyond basic workplace representation – union politics in particular.

***Hudson rights*** *are a process that was created by the U.S. Supreme Court to preserve the free-speech rights of unionized government employees. They allow government employees who are opposed to a union's political agenda to limit their dues to their share of the costs of collective bargaining.*

## The origin of Hudson rights

The case law governing forced dues was created in a rather roundabout fashion. The first steps were taken in a trio of cases involving the federal Railway Labor Act, or RLA. In the 1961 case of Machinists v. Street, the Supreme Court ruled that agency fees allowed by the RLA could only be imposed to fund union activities that were "germane" to its role as a collective representative – such things as actual bargaining, contract administration and the resolution of grievances. Consequently, railway laborers could not be forced to pay for union political or ideological activities that they objected to.[3] The following year, the high court expanded on the basic principle of Street. In Railway Clerks v. Allen the court ruled that a dissenting employee did not have to state which political activities he or she objected to – a general objection to union politics would suffice.[4]

The Supreme Court extended this general principle to government employees in 1977, in the case of Abood v. Detroit Board of Education.[5] Where its reasoning in earlier cases had been based on the language of the Railway Labor Act, in Abood, the court rooted the right to object to union political spending firmly in the First Amendment, and found that the right to object applied to government employees as well as it did to the railway employees.

This set the stage for Chicago Teachers Union v. Hudson, in which the court laid out the rights of government employees and the duties of unions in some detail.[6] In particular, the court ruled that the union must provide notice of the reduced agency fee it will impose on objecting employees along with an accounting of how that fee was calculated. The union is

also required to provide employees with an opportunity to challenge the fee before a neutral arbitrator. Because the Hudson decision went as far as it did to formalize what had been a case-by-case, ad-hoc legal process, the constitutional right of government employees to withhold support for union political activities has come to be known as Hudson rights, and employees who invoke these rights are commonly referred to as Hudson objectors.

## The court expands – and then questions – the right to object

Subsequent cases built on this foundation. One major milestone – not directly relevant to government employees but worth noting in order to underscore the importance and universality of the right to object – was Beck v. Communication Workers of America, a 1988 case in which the Supreme Court applied the principles of Abood and Hudson to private-sector workers.[7] All workers have the right to limit forced dues to their fair share of the costs of collective bargaining. Beck was an influential enough case that some commentators have used "Beck rights" as shorthand for the entire line of cases describing a worker's right to object to union political spending, encompassing the Railway Labor Act cases and Hudson.

In Lehnert v. Ferris Faculty Association, decided in 1991, the Supreme Court refined its definition of what union activities objecting workers could and could not be forced to pay for.[8] Up to this point, the court had not shown any indication that it would reconsider its treatment of agency fees.

This changed dramatically in Knox v. Service Employees International Union. In Knox, the court had to deal with the question of how a special union assessment – supplemental dues announced by the union to deal with some perceived emergency – would be treated. In Knox, the "emergency" was a pair of California ballot initiatives that the union responded to by temporarily raising dues in that state by 25 percent. Although the additional dues were almost entirely for political purposes, and therefore should not have been imposed upon Hudson objectors, the Service Employees International Union, or SEIU, attempted to collect a portion from objecting workers anyway. The Supreme Court rejected that attempt, ruling that when a union assesses supplemental fees, it must do a separate fee calculation for the supplemental fee.[9]

The background of the Knox case illustrates the low regard that many union officials have for workers' Hudson rights. SEIU officials had no qualms about using the flimsiest of excuses in order to extract dues for a political campaign. This contempt for First Amendment rights may have weighed heavily on Justice Samuel Alito, whose opinion expressed doubts that Hudson provided adequate protection for government employees rights. Justice Alito said "… acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles."[10] Alito went on to conclude that "[b]y authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate."[11]

In January 2014, Alito amplified his call for a reconsideration of the entire Hudson "opt-out" process in his majority opinion in Harris v. Quinn, in which the court ruled that agency fees could not be assessed against persons who were not actually government employees. Alito cited numerous legal and practical problems that have arisen as courts have attempted to apply Hudson rights.[12] These difficulties will be discussed later in this paper.

But while there is good reason to question the current state of the law, it remains the case in Illinois that government employees can be forced to pay an agency fee as a condition of employment, with the understanding that they may invoke Hudson rights to mitigate the damage done to their freedoms of speech and association. It is essential that government employees, their employers and union officials understand and respect Hudson rights.

## The basic mechanics of Hudson rights

In theory, the process for a worker to invoke his or her Hudson rights is fairly straightforward: the worker should resign from the union. As a nonmember, that worker will still be subject to the union contract and all its terms, including wages and benefits, assignments and promotions, and work rules. The union will still be expected to represent him or her fairly in the case of a grievance.

Nearly all union contracts involving government agencies in Illinois include some sort of agency-fee clause. Alternatively, it may be referred to as a "fair-share" or even "union-security" clause. This clause states that employees who are not union members must still pay a fee to the union.

There are a handful of union contracts in Illinois that do not include such a provision. For instance, contracts for teachers

employed by Streator Elementary District 44, Bloomington District 87 and Rantoul City Schools District 137 do not include agency-fee clauses. Teachers who are covered by these contracts do not need to invoke Hudson rights. Once they quit the union, they are not obligated to pay any fee.

If there is an agency-fee clause in the contract, as is usually the case, workers who quit the union are still obligated to pay an agency fee in place of regular dues. It is in these situations that Hudson rights are relevant. Workers can invoke Hudson rights by sending a letter to the union informing the union of the worker's intent to limit his agency fee to a pro-rata share of the costs of representation. It is a good practice to send this letter via certified mail, so that receipt can be confirmed. The worker should also send a copy to his or her employer, and retain a copy for his or her own files.

A worker may take both steps – resigning membership and invoking Hudson rights – simultaneously. (A sample letter is available in the appendix of this report).

Within a few weeks of invoking Hudson rights, the worker should receive a package of financial information from the union. This package should inform the worker of the reduced fee amount and include a statement from the union listing major spending items, describing which of those are chargeable – relating to workplace representation – and which are not. The reduced fee should represent the worker's share of the cost of chargeable union expenses.

The package may also include an appeal from the union for the worker to resume regular membership, and a form for the worker to indicate that he or she accepts the reduced fee.

The Hudson process has its share of pitfalls, and workers who wish to invoke their Hudson rights should be aware that school district officials may be unfamiliar with the procedures surrounding Hudson rights. Furthermore, union officials may attempt to hinder or confuse Hudson objectors. Unfortunately, the efficient administration of Hudson rights requires the cooperation of union officials who stand to lose a significant amount of dues revenue.

Workers should be aware of the critical difference between agency fees and Hudson rights: all workers who are covered by a union contract but are not union members will pay an agency fee. That agency fee is not necessarily reduced to reflect union political spending. An agency fee may be and often is the exact same amount that full union members pay. Or it may be reduced by a token amount that is well short of the reduction that a Hudson objector is entitled to.

Workers should be particularly wary of the term "fair-share fee" – this is a common euphemism for agency fees, but union officials, out of confusion (or perhaps an intent to confuse the would-be Hudson objector) may try to imply that this is the fee for Hudson objectors. ("This is your fair share of the cost of running the union.") Workers should assume that any reference to a "fair-share fee" means the full agency fee.

Workers should also insist on being given the Hudson package, which will describe the fees charged to Hudson objectors and the calculations used to determine the appropriate fee. If union officials fail to turn over the required papers in a reasonably timely manner, or otherwise are uncooperative, workers should not hesitate to contact the appropriate state agency, or an attorney, for assistance. (A list of useful contacts can be found in the appendix).

**Hudson rights, step by step**

**1a.** *Resign union membership – worker should now pay an "agency fee" in place of regular union dues*

**1b.** *Object to the use of agency fees for purposes other than collective bargaining (steps 1a and 1b can be and typically are combined)*

**2.** *Worker should receive package from union showing what spending the union claims is related to collective bargaining and what spending is not. The worker's fee should be reduced so that he is only paying for his share of costs related to collective bargaining.*

**3.** *If the worker accepts the union's calculations, he will begin paying the reduced fee. Otherwise he may challenge the fee, in which case any fees that are still in controversy will be put into escrow until an arbitrator or court has resolved the dispute.*

## Problems with Hudson rights

Even if union officials are cooperative, the procedures involved in enforcing Hudson rights have severe shortcomings, meaning that Hudson objectors are still likely to be paying more to unions than they ought to be paying.

To start, the criteria for what union activities are chargeable or not leaves much up to interpretation, hinging on extremely fine distinctions. For instance, in Lehnert v. Ferris Faculty Association, the U.S. Supreme Court ruled that a Hudson objector could be charged for activities that a union took in preparation for a strike, even if strikes are illegal under state law. However, once the illegal strike was underway, union spending in support of the strike could not be charged to Hudson objectors. The court rationalized this hair-splitting by saying that while an actual strike would be illegal and improper, unions are allowed to posture as if they might strike, and such posturing is a foreseeable and legitimate bargaining tactic.[13]

Chargeable and non-chargeable activities have shifted over time as well. In Lehnert, the Supreme Court ruled that Hudson objectors could not be charged for litigation expenses that did not concern their particular employer or workplace.[14] However, in Locke v. Karass, the Supreme Court determined that Hudson objectors could be charged for nationwide litigation under certain circumstances.[15] Confusion over what is and is not chargeable makes it more difficult for Hudson objectors to receive the full dues reduction that is their right under the First Amendment.

The process shortchanges objectors in other ways. A union's Hudson packet should be reviewed by an independent accountant before it is turned over to Hudson objectors. The accountant will verify that all the spending items listed by the union were made to the persons listed, but the auditor cannot verify the purposes of the union's expenditures, or rule on whether they are chargeable to Hudson objectors or not. In the first instance, at least, the Hudson objector must accept the union's assignments at face value. If he wishes to have the union's assessment of chargeability reviewed, the burden is on the Hudson objector to show that the item in question is not chargeable.

As a consequence, it is very likely that Hudson objectors are still paying more in dues than they ought to. One example of the inadequacy of the Hudson objection may be seen by comparing the Hudson objector dues charged by the Illinois Education Association with the LM-2 report filed by the same union. In the 2012-13 school year the IEA's Hudson packet reported that the union spent $45.7 million, of which just under $42 million could be charged to Hudson objectors.[16] But in its LM-2 report for the same school year the IEA reported spending only $9.6 million on representation.[17] Chargeable activities should only include those that are related to collective bargaining. Even after allowing for the vagaries of Hudson, and allowing the union to claim overhead and administrative expenses that might be needed to support bargaining but are listed separately from representation on the LM-2, Hudson objectors in Illinois could easily be paying twice as much to the IEA as they ought to be paying. This is a huge discrepancy that suggests serious problems with how Hudson rights are enforced.

| | Union dues | Agency fees | Hudson-objector fees |
|---|---|---|---|
| Who pays this? | Full union members | Non-members | Non-members who file a Hudson objection |
| What is covered? | All union activities including politics | All union activities including politics | Collective bargaining, contract administration grievances |

## How often do workers make use of Hudson rights?

To gauge how common Hudson objections are in Illinois, the Illinois Policy Institute submitted Freedom of Information Act, or FOIA, requests to the largest 250 school districts by enrollment. The FOIA requests asked for documents relating to Hudson rights objections raised by teachers and other employees, and also for information relating to agency-fee payers – that is, nonmembers who had not invoked Hudson rights. The Institute received valid responses from 226 districts, which employ 99,115 teachers.

Among those teachers, school records indicate that 545 had invoked Hudson rights. This number is disappointing, but not especially surprising. The obstacles facing teachers (or any other government employees) who want to protect their right to not contribute to union politics are daunting. Along with the obstacles listed above, employees may also be wary of the risk that union officials might retaliate, or at least might be half-hearted in representing their individual interests.

Understandably, Hudson objectors tend to be clustered in a handful of districts, where they can lean on fellow objectors for guidance through the process, and can see how individual Hudson objectors are treated. While most of the districts surveyed reported no Hudson objectors, a handful had a fairly sizeable number: 94 in Oswego District 308, 89 in East Aurora District 131, 64 in Batavia District 101, and 60 in Decatur District 61. In these districts, Hudson objectors made up nearly 10 percent of the teaching staff.

Agency-fee payers were even more clustered. Responses to

the FOIA requests indicated that there were 1,144 agency-fee payers who had not invoked Hudson rights. The overwhelming majority of these teachers, 1,079, were employed by Chicago Public Schools.

Barely 0.5 percent of teachers covered by the FOIA requests have made use of their Hudson rights. By comparison, a recent Google consumer survey showed that 30 percent of unionized workers in Illinois would quit their union if they could do so without being penalized.[18] There is little reason to think that this percentage would be dramatically lower for teachers compared to other employees. By contrast, the Michigan Education Association had its membership drop by 2.7 percent within the first year after the passage of a Right-to-Work law – a percentage that would have been higher except for the fact that many teachers were still unable to quit the union because of pre-existing contracts.[19] These results in Illinois suggest that either Hudson rights are insufficient, or that too many teachers remain unaware of their full rights.

## How Hudson rights could be strengthened

**There are three particular problems in the enforcement of Hudson rights:**

1. Lack of awareness among public-sector workers
2. A confusing process
3. Difficulties in determining the proper amount for objectors to pay

Each of these problems can be addressed with relatively modest changes to current labor law and practice.

1. To address the lack of awareness, all government employee unions should be obligated to make their Hudson fee calculations public. In other words, all unions should be required to post their Hudson objector fees, and the support documents for their fee determination, online. There is no reason why this information should only be distributed to those workers who have already invoked their Hudson rights. Publishing the Hudson packet would help to clarify the distinctions between union membership dues, agency fees and Hudson objector fees. It would also allow employees to decide, in advance, which dues or fees they would like to pay. Finally, the information would likely be useful for union members, as they would gain some understanding of their union's spending and priorities. Most local government unions are exempted from filing spending statements with the U.S. Department of Labor, something that is required from all private-sector unions. Publishing Hudson statements would narrow this information gap.
2. The process of invoking Hudson rights would be much simpler if the state were to make a policy of assuming that all agency-fee payers are Hudson objectors. Aside from a lack of knowledge of the legal details behind Hudson rights, it is difficult to imagine a scenario where a union opponent would wish to continue paying full union dues when a substantial reduction is available.
3. Much of the difficulty in determining the amount that Hudson objectors ought to pay comes from the fact that information about union spending and activities are limited to those documents that are created by union officials, and all the relevant records are in the hands of the union. Meanwhile, the assessment of Hudson objections is treated as a discount from union dues – dues for Hudson objectors start at the full amount and are whittled down. Courts and state agencies should apply a strict standard to determine if a union expenditure or activity is chargeable against Hudson objectors. Objectors should be liable only for those items that can be directly connected to one or more identifiable contracts, and the burden of proof should be squarely on the union to demonstrate which of its programs are related to bargaining.

The right to withhold support from an organization one does not support is based on our nation's foundational law – the U.S. Constitution. The unions' privilege of collecting agency fees is created by state labor law, and is not required by the U.S. or state constitutions. A worker's freedom of speech is not an exception from a general rule of mandatory union support. Agency fees are an exception to a general rule of freedom of association. That exception should be narrow, and union claims should be treated with some skepticism.

Improving protection for Hudson objectors is an area of labor law that needs immediate attention. If the General Assembly is unwilling to act to protect workers' First Amendment rights, the Illinois Labor Relations Board and Illinois Educational Labor Relations Board should address all three of these issues through close examination of cases involving Hudson rights that come before them, or through rulemaking.

## The case for abolishing forced dues

These suggestions are all offered on the assumption that Illinois continues to allow for union contracts that force nonmembers to pay union dues or fees. The best course of action is to abolish forced dues outright, through the passage of a state Right-to-Work law.

There are at least two reasons why government workers in particular should be free to decide for themselves whether or not to join a union.

First, government unions are hopelessly entangled in politics. Any action they take – even those that are genuinely meant to be for the benefit of government employees – is bound to affect the cost of government, or the operation of government, or both. When unions increase the compensation of government employees, they increase the cost of government and inevitably the burden placed upon taxpayers. When unions establish work rules or negotiate over standards and evaluations, they affect how government itself functions.[20]

In some cases, government employee unions can undermine state law. For instance, at the end of the Chicago teacher strike of September 2012, the Chicago Teachers Union extracted concessions from Chicago Public Schools that weakened teacher evaluation procedures – concessions that were contrary to the Performance Evaluation Reform Act, a state law meant to set higher standards for teaching in Illinois public schools.[21]

Under the First Amendment, political speech is particularly important and highly protected. State law, however, forces government employees to contribute to private organizations that cannot help but be highly politicized – even in conducting the worker representation that Hudson objectors are expected to pay for.

Second, even if one ignores the political nature of government unionism, it is doubtful that unions actually need any dues – other than those paid voluntarily by their own members – in order to fulfill their basic function as a workplace representative. Research into union spending, as disclosed in union spending reports, shows that worker representation makes up half or less of overall spending for many union groups in Illinois, while the rest goes to politics (by union officials' own admission) or is wasted on bloated administrative and overhead costs.[22]

Forced dues and agency fees are a violation of First Amendment freedoms of speech and representation. These fundamental rights ought to have primacy under state law. Mandatory dues have a significant impact on politics in the state, but are not needed for unions to represent workers effectively. Hudson rights, as set out by U.S. Supreme Court precedent, have the potential to mitigate the damage caused by mandatory union support if they are enforced. But none of the damage to basic freedoms or administrative difficulties associated with Hudson rights would be necessary if Illinois were to prohibit agency fees in contracts between unions and government agencies. This is the most effective method by which to put workers' fundamental rights ahead of union interests.

## Endnotes

[1] These names come from a pair of U.S. Supreme Court decisions, Chicago Teachers Union v. Hudson, 475 US 292 (1986) and Beck v. Communications Workers of America, 487 US 735 (1988)

[2] 5 ILCS 315/6, 115 ILCS 5/11

[3] 367 US 740

[4] 373 US 113 (1963)

[5] 431 US 209

[6] 475 US 292 (1986)

[7] 487 US 735

[8] 500 US 507

[9] 132 S.Ct. 2277 (2011)

[10] 132 S.Ct at 2290

[11] 132 S.Ct at 2291

[12] 134 S.Ct 2618

[13] 500 US 507 at 531 (1991)

[14] 500 US 507 at 528

[15] 555 US 207 at 216 (2009)

[16] http://media.ieanea.net/media/2013/07/Hudson-Packet-2013-2014.pdf

[17] Form LM-2 filed with the U.S. Department of Labor, Office of Labor Management Standards. For more analysis of IEA spending as reported on the LM-2 form, see Kersey, Paul, "Government unions in Illinois: Are members getting what they pay for?" Illinois Policy Institute, August 2014, at www.illinoispolicy.org/simplereport/government-unions-in-illinois-are-members-getting-what-they-pay-for/

[18] Google consumer survey on behalf of National Employee Freedom Week at http://employeefreedomweek.com/survey-results/

[19] Michigan's Right-to-Work law took effect in March 2013. Under that law, agency-fee clauses in new union contracts were unenforceable, but those in older contracts were allowed to remain in effect until the contract ran out. see: Mackinac Center, MEA sees membership, salaries decline, Michigan Education Digest, July 22, 2014, at http://www.mackinac.org/20329

[20] For more on the political problems created by government employee unions, see Kersey, Paul, "Roadblock to reform: how Illinois labor law empowers government unions at taxpayer expense" at www.illinoispolicy.org/policy_posts/roadblock-to-reform-how-illinois-labor-law-empowers-government-unions-at-taxpayers-expense/

[21] Kersey, Paul, "Chicago teachers strike: a postmortem" Manhattan Institute, Sept. 14, 2012, at http://www.publicsectorinc.org/2012/09/chicago_teachers_strike_-_a_postmortem/

[22] Kersey, Paul, "Government unions in Illinois: Are members getting what they paid for?" Illinois Policy Institute, August 2014, at http://www.illinoispolicy.org/simplereport/government-unions-in-illinois-are-members-getting-what-they-pay-for/