



## Questions and Answers for Unit Presidents After the Supreme Court's Decision in *Janus v. AFSCME*

### **Q: What did the United States Supreme Court rule in *Janus vs. AFSCME*?**

A: The Supreme Court ruled that the collection of “agency fees” (sometimes called “fair share fees”) by unions (sometimes called “bargaining units” or just “units”) from nonmembers violates the First Amendment of the United States Constitution. Agency fees were those amounts collected by a unit from a nonmember to ensure the nonmember paid his or her “fair share” of the cost of negotiating and enforcing a collective bargaining agreement from which the nonmember would benefit. Few administrative units had agency fee payers, which are to be distinguished from dues-paying unit members, although some units simply declined to assess agency fees of nonmembers even when (pre-*Janus*) they had the legal right to do so. Given the Court ruling in the *Janus* case, units no longer have a right to collect agency fees from nonmembers.

### **Q: What should unit presidents do?**

A: Check your constitution, by-laws, and contract to see if they contain agency fee provisions; many will. These provisions are no longer enforceable. Therefore, these documents will ultimately need to be amended. With respect to applicable contract provisions, in almost every collective bargaining agreement (CBA) there is a clause that any provision that is illegal will be void and all other terms will remain enforceable, so updating the CBA in the next round of collective bargaining should be sufficient.

### **Q: What is the next thing the unit president should do?**

A: Determine if your unit has any members currently paying agency fees to the local union and to SAANYS. Our research shows there are very few agency fee members of SAANYS, as unit/SAANYS members recognize the value of having SAANYS' membership. Such membership is like an insurance policy. However, those who choose to be nonmembers must be identified for unit and SAANYS recordkeeping, as there are many services nonmembers will not be eligible for (discussed further later in this document). It might be beneficial to schedule a meeting to attempt to persuade such individuals to become a full dues-paying member. It is likely most unit members will have to execute a payroll dues deduction form unless paying dues by check or credit card. Should an individual refuse, the unit is obligated to keep the nonmember informed of changes in the contract or working conditions, but he/she does not have the right to vote in unit elections or contract ratifications. There are other aspects of representation to which a nonmember is not entitled, which are described later in this document.

### **Q: What is SAANYS?**

A: Units voluntarily elect to affiliate with, and have members join SAANYS. SAANYS is not a labor organization as defined in the law, but rather a chartered professional organization, which provides many services to its membership, including collective bargaining and legal related services. As such, the *Janus* decision should not significantly impact SAANYS' membership, although units that elect to have SAANYS

representation and services cannot require nonmembers to pay the dues of either SAANYS or the local unit. In theory, administrators could refuse to join their local union but still be members of SAANYS. Conversely, they could agree to join the local union but not SAANYS. In either case, such a bifurcated membership should be discouraged. Such a situation would complicate the work of both the local union and SAANYS. Those individuals should be given clear messages about what services and rights they have. This would require even closer collaboration between the local leadership and SAANYS staff.

**Q: How does the *Janus* decision affect the collection of SAANYS dues?**

A: It is anticipated that public employers, be it a community college, school district, or BOCES, will now likely require an affirmative statement/representation from each individual whose title is included in a bargaining unit before processing payroll dues deductions. Employees must knowingly and voluntarily elect to have dues deducted from their wages. The form (a sample is attached with this document, entitled Dues Payroll Deduction Authorization) must also provide a means by which a member could change his/her mind and elect to become a nonmember.

**Q: How does the *Janus* decision affect the collection of local dues?**

A: It depends on how local dues are collected. For example, if the union collects dues by requesting each member pay the treasurer, any member can refuse without further paperwork. If local dues are taken from payroll deduction, then expect the employer to require each member to affirmatively agree to the dues deduction through an individually signed authorization form.

**Q: What should unit presidents do with these forms?**

A: When required by a district, it will be critical for unit presidents to assure that all members wanting payroll deduction for dues fill out and sign a verification form. Further, in addition to submitting a copy to the district, both the local union and SAANYS should have copies of each member's form on file; either hard copies or electronic copies are acceptable. SAANYS will work closely with unit leadership and district payroll offices to help process and track these forms, especially during this first year. We will all also have to carefully account for members paying dues by other means. This will require both the units and SAANYS to have accurate lists of all employees filling positions represented by the union, members and nonmembers. In subsequent years, there will be fewer forms to process. Once signed and submitted, payroll deduction may proceed annually with only an update of the amount owed. Unless, of course, the authorization is appropriately rescinded or the member no longer serves in a title represented by the local union.

**Q: If a current agency fee member or member in good standing decides to stop paying dues to the union and/or SAANYS, what obligation does the union have to represent the non-dues paying member?**

A: The *Janus* decision makes it clear that the union is still obligated to represent nonmembers under the duty of fair representation. The New York Legislature just passed an amendment to the Civil Service Law that stated that unions may, however, limit its services to, and representation of, nonmembers in accordance Civil Service Law Section 209-a(2).

**Q: Specifically, under the Civil Service Law and the common law duty of fair representation, does the union have to represent such individuals during collective bargaining who do not pay dues, and hence, are nonmembers?**

A: Yes. Since a nonmember's title is recognized in the collective bargaining agreement, they will receive the benefits of contract negotiations, including salary increases and improved benefits. Under the 2018 Amendment to New York Civil Service Law, unions are still required to negotiate for members and non-members alike. Thus, a union is prohibited from negotiating terms and conditions into a successor contract that discriminates against nonmembers.

**Q: Does the union have to represent nonmembers in contract grievances and/or PERB proceedings?**

A: Many contracts allow individual members of a union to grieve alleged contract violations themselves, so nonmembers in titles recognized as part of the bargaining unit may grieve contract violations to a certain level in the grievance procedure without the union. Some other contracts only allow the union to file grievances, and almost all provide that the union alone can decide whether or not to arbitrate a contract grievance. Regardless of the particular grievance procedure involved, unions shall still be required to enforce the terms of an agreement with the public employer on behalf of nonmembers. Therefore, the union will have to engage in a careful analysis of a nonmember's grievance and determine if it is in the union's best interests to proceed. If the decision is to not prosecute the grievance or improper practice charge, the decision will withstand administrative/judicial scrutiny if it was based on legitimate business reasons and not on discriminatory ones. When faced with these issues, units are strongly encouraged to consult with the SAANYS Legal Department.

**Q: Does the union have to represent nonmembers in interrogations that could lead to discipline when demanded by the employer?**

A: No. Individual nonmembers may be required to pay for representation in disciplinary proceedings or may be denied union representation altogether. The 2018 Amendment to the Civil Service Law now allows a union to not represent a nonmember during questioning by the employer without violating the duty of fair representation.

New York State

**Q: Does the union have to represent non-members in disciplinary proceedings?**

A: The Supreme Court opined that individual nonmembers could be required to pay for representation in disciplinary proceedings or could be denied union representation altogether. The amendment to the Civil Service Law further clarifies that a union does not have to represent a nonmember in an evaluation or disciplinary proceeding where the nonmember is permitted to proceed without the union and be represented by his/her own advocate. Hence, nonmembers would not typically be entitled to receive unit representation or SAANYS legal services in challenges to APPR determinations or disciplinary proceedings under Civil Service Section 75, Education Law Section 3020-a, or any negotiated alternative disciplinary procedures. Special care however should be given to situations where APPR determinations are challenged through the CBA grievance procedure. In such instances we strongly recommend the unit president consult with the SAANYS Legal Department.

**Q: Does the union have to represent nonmembers in legal proceedings, be they administrative or judicial relating to the enforcement of statutory or regulatory rights?**

A: Given the *Janus* decision and the amendment to the Civil Service Law, unions may refuse to represent a nonmember in statutory or administrative proceedings or to enforce statutory or regulatory rights. For example, if a nonmember civil service employee (i.e., non-certificated employee) or a

nonmember principal (i.e., certificated employee) is to be laid off, neither the union nor SAANYS will be obligated to represent that affected employee in fighting to keep his/her job. Likewise, if the employer creates a new position, and the laid off nonmember challenges who was hired off the Preferred Eligibility List, the union and SAANYS do not legally have to represent the person. Other examples of legal representation that may be provided to members, but denied to nonmembers, include proceedings against ERS or TRS relative to retirement benefit disputes, proceedings relative to tenure, job classification, position abolishment/layoff, civil actions such as defamation or harassment, or actions to enforce an administrator's statutory defense and indemnification rights.

**Q: Can a union provide additional legal, economic, and job-related services and benefits beyond those provided in the CBA to only members and not to nonmembers?**

A: Yes, unions may provide to its members only, and not nonmembers, the full array of benefits of SAANYS membership, including SAANYS' personal legal plan, SAANYS' online Career Center, SAANYS' life insurance and other insurance coverages, SAANYS' various discount programs related to travel, shopping, entertainment, cellular phones, driving courses, financial planning, and professional development opportunities.

**Q: What other issues may arise as a result of the *Janus* decision?**

A: The United States Supreme Court reversed a prior United States Supreme Court decision (*Abood v. Detroit Board of Education*) that has stood as settled law for over forty years, and which allowed the collection of agency fees. We acknowledge that there will be issues and questions that we have not anticipated, and the answers to which may be unclear. It will likely take years, and additional litigation, before the rights and responsibilities of all involved become more certain. We strongly urge all unit presidents to contact the SAANYS Legal Department without hesitation when faced with an issue or question that you believe needs research, analysis, or consultation. We will likely issue further guidance in the form of alerts to unit presidents as new *Janus*-related issues are encountered.

New York State