



### **The Fate Of The Union “Agency Fee”**

Both employers and unions are waiting for the Supreme Court’s decision in *Janus v. AFSCME*. The issue in the case is whether public sector unions can compel workers who have declined to become members to pay them an “agency fee” that covers the union’s activities other than political action.

The Court’s decision, which is expected this summer, is likely to significantly impact the future of public sector unions. It may also impact municipal employers if the agency fee is found to violate the First Amendment. In that case, negotiated agency fee arrangements would no longer be valid and would need to cease immediately.

Municipal employers are encouraged to assess their ability to make payroll changes if the agency fee is deemed illegal, and to review those changes with affected unions.

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### **SJC: Sharing Evaluations By Email Is OML “Deliberation”**

**O**n April 5, 2018, the Supreme Judicial Court of Massachusetts found that the town administrator evaluation procedures followed by members of a board of selectmen violated the Open Meeting Law (OML). A case of first impression, the opinion provides clarification on what constitutes a “deliberation” under the OML, and provides guidance to public bodies on maintaining a transparent process in an age of electronic communication.

In *Boelter v. Board of Selectmen of Wayland*, the board agreed each member would submit an evaluation of the town administrator to the chair, who would compile the evaluations into a composite document containing the opinions of all members. The chair created the composite document and sent it, with the individual evaluations, to each member, by-email, as part of an agenda packet for the then-upcoming open meeting. No opinions were expressed in the body of the email. At the meeting, the board reviewed and discussed the composite evaluation and approved it as final. The composite and individual evaluations were subsequently released to the public.

A Wayland resident filed a complaint with the Attorney General’s (AG) office claiming the board’s procedure for conducting the annual evaluation violated the OML. The AG responded with a determination finding that the board’s conduct had not violated the OML. In February, 2014, five Wayland voters filed a complaint in Superior Court. The Superior Court judge found that the board’s procedure violated the OML. The Town appealed and the SJC transferred the case on its own motion to consider, for the first time, the OML’s exemption to the definition of “deliberation,” which permits members of public bodies to distribute “reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” G.L. c.30A, §18 (definition became effective July, 2010).

The Court found that while a composite evaluation containing board members’ opinions is a “permissible and necessary function for public bodies”, the AG’s determination overlooked the fact that the chair circulated, by email, the composite and individual evaluations to the board members prior to the meeting. The effect of circulating these materials was that members were aware, prior to the meeting, of each other’s opinions; “thus, the circulation, in effect, constituted a deliberation, or a meeting, to which the public did not have access.” It did not matter that the e-mail message to the board did not contain any advocacy or invite comment.

According to the SJC, if a public body wishes to circulate materials containing board member opinions among a quorum in advance of an open meeting, “prior and relatively contemporaneous public disclosure of those documents,...is necessary in order to comply with the open meeting law and to advance the statute’s over-all goal of promoting transparency in governmental decisionmaking.” The Court cautioned that efficiency cannot come at the expense of the OML’s overarching purpose.

Questions regarding this or other OML issues? Contact your CLP attorney.