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# DEFENDENT PERC'S MOTION TO DISMISS (Ann Smith et.al)

## BACKGROUND AND SUMMARY OF ARGUMENT

The Fifth Amended Complaint is brought by six public school teachers.<sup>1/</sup> The summary table lists these claims against the PERC defendants as the basis for obtaining declaratory and injunctive relief:

I, II. Enforcement of unconstitutional statute and orders; issuing orders compelling Board Defendants to (I) collect representation fees; (ii) not obtain membership re-authorization.

As will be more fully explained, infra., the Fifth Amended Complaint fails to state a claim against the PERC defendants upon which relief can be granted because:

1. Following the issuance of Janus v. American Federation of State, County, and Municipal Employees Council 31, 138 S. Ct. 2448 (2018), no Board of Education, or other public employer in New Jersey has been ordered to deduct representation fees in lieu of dues; and
2. Directives to public employers that union members are not required to make post-Janus re-authorizations for dues deductions comports with decisions of federal courts, including rulings issued post-Janus; and
3. PERC does not have jurisdiction to enforce N.J.S.A. 52:14-15.9e as amended by Section 6 of Public Law 2018, Chapter 15.<sup>2/</sup>

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<sup>1/</sup> Originally there were five plaintiffs, current or recently retired public school teachers in districts in southern New Jersey. Rachel Curcio, the sixth plaintiff, teaches Special Education at Teaneck Community Charter School in Bergen County located in northern New Jersey.

<sup>2/</sup> Sections 1 through 5 of Public Law 2018, Chapter 15 added N.J.S.A. 34:13A-5.11 through 5.15 to the New Jersey Employer-Employee Relations Act. These new laws are known collectively as the Workplace Democracy Enhancement Act (WDEA). Section 6 amended N.J.S.A. 52:14-15.9e, enacted in

Paragraph 19 of Plaintiffs' Fifth Amended Complaint incorrectly asserts:

[PERC is] charged with enforcing section 6 of the Workplace Democracy Enhancement Act, codified at N.J. Rev. Stat. § 52:14-15.9e (2013), which the plaintiffs are challenging as unconstitutional. They are sued in their official capacity.

Paragraphs 106 and 107 assert, without factual or legal foundation:

Plaintiffs may maintain causes of action against PERC under 42 U.S.C. §1983 and 28 U.S.C. §2201.

The Court should order dismissal of Plaintiffs' Fifth Amended Complaint as to the PERC defendants as, inter alia:

1. The Fifth Amended Complaint fails to state a claim on which relief can be granted as PERC does not, and has never had, the responsibility, authority or jurisdiction to administer or implement N.J.S.A. 52:14-15.9e. That law does not and has never mentioned PERC much less given it authority to administer it through rule-making, adjudication, or in any other manner. Thus PERC is without jurisdiction:
  - a. To grant the relief to Plaintiff Rachel Curcio and purported class members sought in Paragraph 103(a) of the Fifth Amended Complaint; and
  - b. To grant the relief sought by the named plaintiffs and purported class members sought in Paragraph 103(b) (1) of the Fifth Amended Complaint and
2. As PERC lacks discretion to cease carrying out the jurisdiction delegated to it by the Legislature and does not possess the authority to declare a statute unconstitutional, PERC is without jurisdiction to grant the relief sought by the named plaintiffs and purported class members sought in Paragraph 103(b) of the Fifth Amended Complaint
3. Following the issuance of Janus v. American Federation of State, County, and Municipal Employees Council 31, 138 S. Ct. 2448 (2018), PERC has not ordered any public employee in New Jersey to pay, or continue to pay, a representation fee in lieu of dues to any majority representative organization.



Thus the relief sought in Paragraph 103(d) of the Fifth Amended Complaint is moot.<sup>3/</sup> In addition, Janus does not provide a basis to order that representation fees in lieu of dues, assessed and collected prior to Janus, be refunded.<sup>4/</sup>

4. The Unfair Practice Charge in Delanco Board of Education and Delanco Township Education Association, (Docket No. CO-2019-043) was withdrawn and the case was closed on November 20, 2018. Thus any claim for relief made in the Fifth Amended Complaint in connection with the Delanco decision is moot. The reasoning of Delanco that (1) union members are not required to give post-Janus consent in order to continue having union dues deducted from their paychecks and (2) pre-Janus consent is a valid authorization for the continuing deduction of union dues is consistent with the decisions of United States District Courts and Circuit Courts of Appeal.<sup>5/</sup>
5. PERC, as a state administrative agency, enjoys eleventh amendment and sovereign immunity from suit. That protection applies not only to plaintiffs' 42 U.S.C. §1983 action, but also to its declaratory judgment claim given the circumstances surrounding this litigation including PERC's obligation to carry out its legislatively delegated jurisdiction and the agency's inability to declare a statute unconstitutional.
6. As no claims, including declaratory or injunctive relief are

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3/ The order cited by plaintiffs, In the Matter of Harrison Tp. Bd. of Ed. and Harrison Tp. Ed. Assoc., No. PD-2012-01 preceded Janus by seven years and has no current viability. The cessation of representation fees in New Jersey post-Janus renders this claim moot. See Danielson v. Inslee, 345 F. Supp. 3d 1336 (W.D. Wash. 2018).

4/ Following the remand from the United States Supreme Court plaintiff Mark Janus unsuccessfully sought to obtain damages equal to the amount of the agency shop fees he paid prior to the Supreme Court ruling. See Janus v. Am. Fedn. of State, 2019 U.S. Dist. LEXIS 43152 (N.D. Ill. 03/18/2019). See also Hough v. SEIU Local 521, 2019 U.S. Dist. LEXIS 46356 (N.D. Cal 03/20/2019).

5/ See Belgau v. Inslee, 359 F. Supp. 3d 1000 (W.D. Wash 2019) (post-Janus reaffirmation not required for continued deduction of union dues); Fisk v. Inslee, 2017 U.S. Dist. LEXIS 170910, (W.D. Wash. Oct. 16, 2017), aff'd 2019 U.S. App. LEXIS 761 (9th Cir. Jan. 9, 2019).

maintainable against the PERC defendants there is no basis to award plaintiffs attorneys fees and costs and such relief is barred by Eleventh Amendment and sovereign immunity.