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NE. STATE OF NEBRASKA
OFFICIAL
MAY 13 1994
DEPT. OF JUSTICE

DATE: May 9, 1994

SUBJECT: Authorization for withholding of a state employee's union dues from the employee's paycheck when the employee wishes to stop the withholding process.

REQUESTED BY: John Breslow
Nebraska Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

In your opinion request letter, you indicated that a state employee was a member of the Nebraska Association of Public Employees (NAPE), and that the employee in question voluntarily made arrangements to have NAPE union dues withheld from her state payroll check. Subsequently, the employee attempted to resign from NAPE membership, and requested that the Department of Administrative Services, Personnel Division (the Department) cease withholding union dues from her state salary. However, the Department has refused to cease withholding for the employee's union dues until it receives proper authorization from NAPE, and the Department continues to withhold the union dues and forward them to the union. The Department's position is based upon its interpretation of its obligations under the collective bargaining agreement in place between the Department and NAPE. Specifically, the Department relies on Section 2.7 of the labor contract between NAPE and the state for 1993 through 1995 which provides:

> Upon receipt of a list of employees for whom dues deductions are to stop, certified to the Employer in writing by an authorized representative of the Union, the Employer will discontinue the automatic payroll dues deductions from such employees.

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Your only involvement in any of this apparently grows out of the fact that one of your audit tests is to determine whether or not the state has an appropriate employee authorization for all salary deductions. Nevertheless, you have requested our opinion as to whether or not a state employee can ask that the withholding of union dues from his or her payroll check be stopped at any time. As is discussed at length below, we believe that the answer to that question turns on the language of the withholding authorization signed by the employee in the first instance.

Neb. Rev. Stat. § 48-224 (1988) provides, in pertinent part:

> Any employee of the State of Nebraska . . . who desires to participate voluntarily in any employee organization . . . may execute an order authorizing the withholding from any wages or salary paid to such employee of a sum each month or pay period and the same to be paid to the designated recipient thereof.

This portion of the Nebraska statutes seems to make the withholding of union dues and other employee designated amounts purely a voluntary process, and presumably, if this were the only statute in the area, an employee could direct that the voluntary withholding of union dues should cease at any time regardless of other contractual provisions or other documents. However, Section 48-224 was passed before state government was given the power to bargain with labor organizations as the exclusive collective bargaining agents of state employees. ***State ex rel. Nebraska State Council #32, AFSCME v. City of Hastings***, 214 Neb. 20, 332 N.W.2d 661 (1983). Now, the State Employees Collective Bargaining Act, ***Neb. Rev. Stat. §§*** 81-1369 through 81-1390 (1987, Cum. Supp. 1992, Supp. 1993) and portions of the Industrial Relations Act, ***Neb. Rev. Stat. §§*** 48-801 through 48-838 (1988, Cum. Supp. 1992, Supp. 1993) allow the state to engage in extensive collective bargaining with unions representing state employees, and those same statutes regulate that entire collective bargaining process. In particular, Section 81-1371 (8) provides that, with respect to collective bargaining, "[m]andatory topic or topics of bargaining shall mean those subjects of negotiation on which employers must negotiate pursuant to the Industrial Relations Act, ***including terms and conditions of employment which may otherwise be provided by law for state employees***, except when specifically prohibited by law from being a subject of bargaining." (emphasis added). In addition, our Supreme Court has indicated that automatic dues checkoffs are the proper subject of collective bargaining. ***State ex rel. Nebraska State Council #32, AFSCME v. City of Hastings, supra***. As a result, it appears to us that the language of Section 48-224 must be read in conjunction with those provisions in the collective bargaining agreement between the Department and NAPE together with any associated documents which deal with union dues checkoffs such

as individual checkoff authorizations. More importantly, this whole situation involving unions and collective bargaining now must be analyzed in light of the requirements of the State Employees Collective Bargaining Act and the relevant portions of the Industrial Relations Act.

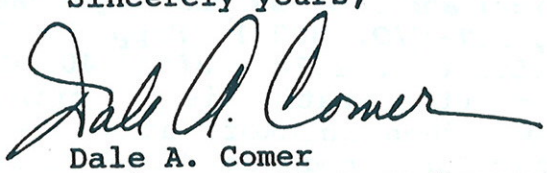
Our research discloses no Nebraska cases which discuss the voluntary nature of union dues checkoffs in the context of the State Employees Collective Bargaining Act and collective bargaining agreements. However, there are numerous federal cases dealing with the requirements of federal labor law in this area, and, since the Nebraska statute which sets out unfair labor practices under the State Employees Collective Bargaining Act, ***Neb. Rev. Stat. §*** 81-1386 (Reissue 1987), generally tracks the unfair labor practices prohibited in the National Labor Relations Act, 29 U.S.C. § 158, those cases offer some guidance as to what might constitute an unfair labor practice under state law with respect to dues checkoffs.

Section 302 (c) (4) of the federal Labor Management Relations Act, 29 U.S.C. § 186 (c) (4), allows a union to bargain for and receive a checkoff of union dues which may be irrevocable for as long as one year when there is a voluntary written authorization from the employee for the checkoff. ***SeaPak v. Industrial, Technical and Professional Employees, Division of National Maritime Union, AFL-CIO***, 300 F. Supp. 1197 (D. Ga. 1969), aff'd 423 F.2d 1229 (5th Cir. 1970), aff'd 400 U.S. 985 (1971). The employee's written authorization is the primary requisite to the validity of any such dues checkoff under Section 302 (c) (4). ***N.L.R.B. v. Shen-Mar Food Products***, 557 F.2d 396 (4th Cir. 1977). The checkoff authorization must be voluntary, and, therefore, any limits on its revocability as permitted by Section 302 (c) (4) must be expressed in the authorization itself. ***United Food and Commercial Workers District Union Local One, AFL-CIO v. N.L.R.B.***, 975 F.2d 40 (2nd Cir. 1992). An absence of a limit on revocability indicates that the checkoff authorization is revocable at will. ***United Food and Commercial Workers District Union Local One, AFL-CIO v. N.L.R.B., supra; Trico Products Corporation***, 238 N.L.R.B. 1306, 1309 (1978). It also appears that the terms of the employee's checkoff authorization under Section 302 (c) (4) control over provisions in the collective bargaining agreement between the union and the employer. ***Trico Products Corporation, supra***. A failure to cease a union dues checkoff after a valid revocation of the checkoff authorization can constitute an unfair labor practice under 29 U.S.C. § 158 by both the union and the employer. ***N.L.R.B. v. Atlanta Printing Specialties and Paper Products Union 527, AFL-CIO***, 523 F.2d 783 (5th Cir. 1975); ***Trico Products Corporation, supra; Cameron Iron Works***, 235 N.L.R.B. 287 (1978).

On the basis of this federal law concerning union dues checkoffs and unfair labor practices, we believe that the language of the individual employee's authorization for the union dues checkoff controls the revocability of the checkoff process under our state statutes. If that checkoff authorization contains no provisions detailing the circumstances under which the authorization is revocable and is simply an authorization to withhold union dues, it is revocable at will. On the other hand, it may well be permissible for the authorization (which we understand is prepared by the union) to make dues checkoff provisions irrevocable except at certain specified times of the year.

Based upon the materials which we have received in connection with your opinion request, we understand that the dues checkoff authorization from the particular employee which precipitated your opinion request does not contain any language dealing with revocability of the authorization. It simply authorizes the deduction of union dues. Consequently, it appears to us that the authorization in question is revocable notwithstanding Section 2.7 of the existing collective bargaining agreement. The Department, therefore, has no authority to continue to withhold the union dues amounts for the specific employee involved.

Sincerely yours,



Dale A. Comer
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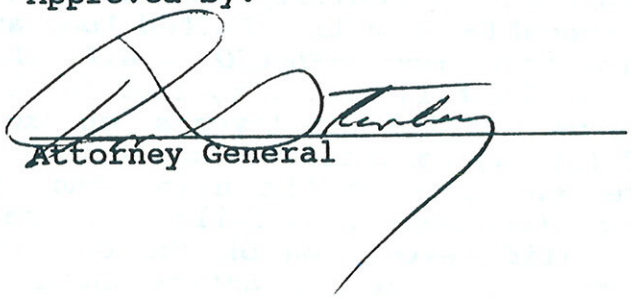

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