STATE OF INDIANA

COUNTY OF LAKE

IN THE LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE
HAMMOND, INDIANA

JAMES M. SWEENEY, et al,
Plaintiffs,

CAUSE NO. 45D01-1305-PL-52

v.

GREGORY ZOELLER, ATTORNEY GENERAL OF THE STATE OF INDIANA, et al,
Defendants.

ORDER

The Court, having taken this matter under advisement, now finds as follows:

1. On February 11, 2013, the plaintiffs James M. Sweeney, David A. Fagan, Charles Severs, James C. Oliver, Bryan Scofield, Earl Click, Jr., and International Union of Operating Engineers, Local 150, AFL-CIO, filed a five-count Complaint challenging IC 22-6-6 as being in violation of the Constitution of the State of Indiana as follows:

Article I, Section 1: The statute deprives the equal protection rights of Local 150 members who are compelled to bear the entire cost of representation for non-paying individual employees and interferes with the contract rights of Local 150 and members.

Article I, Section 9: The statute infringes on the free speech rights of Local 150 and its members by diverting resources to represent non-paying individual employees which would otherwise be used for protected speech.

Article I, Section 24: The statute is an *ex post facto* law.

Article I, Section 21: The statute compels Local 150 to provide a particular service to individual employees it represents without them having to pay for that service.

2. On April 29, 2013, the defendants Gregory Zoeller, Attorney General of the State of Indiana and Sean M. Keefer, Commissioner of the Indiana Department of Labor, filed a Motion to Dismiss pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure for failure by the plaintiffs to state a claim upon which relief may be granted.

3. Dismissal based on failure to state a claim involves a pure question of law; that is to say, a Rule 12(B)(6) determination does not require reference to extrinsic evidence, the drawing of

inferences therefrom, or the weighing of credibility for its disposition, *Randolph v. Methodist Hosps., Inc.*, 793 N.E.2d 231, 234 (Ind. Ct. App. 2003). The grant or denial of a motion to dismiss turns only on the legal sufficiency of the claim and does not require determinations of fact, *Id.* If a proposed complaint states a set of facts that even if true would not support the relief requested, the dismissal will be affirmed, *Elliot v. Rush Memorial Hospital,* 928 N.E.2d 634; (Ind. Ct. App. 2010).

4. The standard of review for alleged violations of the Indiana Constitution is well established:

> Every statute stands clothed with the presumption of constitutionality until clearly overcome by a contrary showing, The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion, *State Bd. Of Tax Comm'rs v. Town of St. John,* 702 N.E.2d 1034, 1037 (Ind. 1998), *citations omitted.*

5. The issues in this case involve pure questions of law and require no determinations of fact, so the Rule 12(B) (6) motion filed by the defendants is a proper means to decide the constitutionally of the statute under the well-established standards set forth in *State Bd. Of Tax Comm'rs, id.* In addition, the use of the Uniform Declaratory Judgment Act, found at IC 34-14-1, by its own terms, is appropriate to "...settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations...." IC 34-14-1-12 and is a proper remedy to determine the constitutionality of a statute, *Neswick v. Board of Com'rs of Newton County,* 426 N.E. 2d 53 (Ind.Ct.App. 1981); *City of Anderson v. Associated Furniture & Appliances, Inc.,* 423 N.E.2d 293 (Ind. 1981).

The Court will rule upon each of the plaintiffs' constitutional challenges as follows:

A. Article I, Section 1: The plaintiffs allege that statute deprives the equal protection rights of Local 150 members who are compelled to bear the entire cost of representation for non-paying individual employees and interferes with the contract rights of Local 150 and members.

In order to prevail on a claim that the statute violates equal protection rights under Article I, Section 1, the plaintiffs must demonstrate that Article I, Section 1 is capable of independent judicial enforcement, *Morrison v. Sadler,* 821 N.E.2d 15 (Ind. Ct. App. 2005). There is an ongoing inquiry, namely, whether Article I, Section 1 creates judicially enforceable rights or merely expresses aspirational principles that are incapable of judicial enforcement. The Court of Appeals held, by language contained in *Doe v. O'Connor,* 790 N.E.2d 985 (Ind. 2003), that the

Indiana Supreme Court was "...inclined to hold that particular constitutional provision not to be judically enforceable," 821 N.E.2d at 31. However, as evidenced by Justice Boehm's dissent in *Clinic for Women, Inc. v. Brizzi,* 837 N.E.2d 973, 978 (Ind. 2005), the debate rages on:

> I conclude that Article I, Section 1 [,] does indeed have substance and is designed to assure all persons in this state 'certain inalienable rights' which are enforceable by the courts. As Chief Justice Shepard put it: [T]here is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate.

In *Doe v. Town of Plainfield,* 893 N.E.2d 1124 (Ind. Ct. App. 2008), the Court of Appeals acknowledged that the Supreme Court has not directly addressed the issue of whether or not Article I, Section 1 creates judicially enforceable rights, but did say that, unless the right which forms the basis of a constitutional challenge is a fundamental or core right, the question of judicial enforceability is not reached, because it is only such a fundamental or core right that is susceptible to being enforced judicially under Article I, Section 1. The question then becomes: Does the right of Local 150 to receive revenue and do the rights of the individual plaintiff union members not to have non-union members receive services from the union to which they pay dues amount to fundamental or core rights susceptible to judicial enforcement under Article I, Section 1? The *Morrison* case provides an unequivocal answer of "no":

> ...no statute has been invalidated under Article I, § 1 for over fifty years, and that prior cases that did invalidate statutes under Article I, § 1 did so using a now-discredited view [*Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905) and its progeny] of the scope of the government's police power to regulate businesses, *Morrison, id.,* at 32.

B. Article I, Section 9: The plaintiffs allege that the statute infringes on the free speech rights of Local 150 and its members by diverting resources to represent non-paying individual employees which would otherwise be used for protected speech.

When reviewing whether the State has violated Article I, Section 9, a two-step analysis must be employed: First, it must be determined whether state action has restricted a claimant's expressive activity; then, second, if it has, we must decide whether the restricted activity constituted an "abuse" of the right to speak, *Whittington v. State*, 669 N.E.2d 1363, 1367 (Ind. 1996), *Blackman v. State,* 868 N.E.2d 579 (Ind. Ct. App. 2007).

The Indiana Supreme Court has found that a terminated employee had no private right of action under Article I, Section 9, *Cantrell v. Morris,* 849 N.E.2d 488 (Ind. 2006); that I.C. 35-45-1-3; the statute that proscribed disorderly conduct, was constitutional under Article I, Section 9, even though its improper application can unconstitutionally restrain protected political speech, *J.D. v. State,* 859 N.E.2d 341 (Ind. 2007), *Price v. State,* 622 N.E.2d 954 (Ind. 1993); and that I.C. 35-45-9-3, the statute that proscribed Criminal Gang Activity, was constitutional under Article I, Section 9, *Klein v. State,* 698 N.E.2d 296 (Ind. 1998).

More to the point, the United States Supreme Court in *Knox v. Serv. Employees Int'l Union Local 1000,* ----U.S.----, 132 S.Ct. 2227 (2012), held that the fact that nonmembers of the union paid less than their proportionate share, no constitutional right of the union is violated because the union has no constitutional right to receive any payment from these employees.

C. Article I, Section 24: The plaintiffs allege that the statute is an *ex post facto* law.

IC 22-6-6-13 provides as follows:

Sections 8 through 12 [IC 22-6-6-8 through IC 22-6-6-12] of this chapter:

(1) apply to a written or oral contract or agreement entered into, modified, renewed, or extended after March 14, 2012; and
(2) do not apply to or abrogate a written or oral contract or agreement in effect on March 14, 2012.

However, IC 22-6-6-3 provides as follows:

Nothing in this chapter is intended, or should be construed, to change or affect any law concerning collective bargaining or collective bargaining agreements in the building and construction industry other than:

(1) a law that permits agreements that would require membership in a labor organization;
(2) a law that permits agreements that would require the payment of dues, fees, assessments, or other charges of any kind or amount to a labor organization; or
(3) a law that permits agreements that would require the payment to a charity or a third party of an amount that is equivalent to or a pro rata part of dues, fees, assessment, or other charges required of members of a labor organization;

as a condition of employment.

There is no question that from a plain reading of IC 22-6-6-13 that the statute is intended to have only prospective, and not retroactive, effect. What, then of IC 22-6-6-3? The Court believes that it simply explains limitations on the applicability of the statute as a whole. The wording of IC 22-6-6-3 sets forth that it is a disclaimer about the applicability of the statute to other existing laws that impact collective bargaining. It does not abrogate the language of IC 22-6-6-13 that plainly states that the statute as a whole has only prospective effect.

If a statute does not apply retroactively, it cannot violate Article I, Section 24, *Simmons v. State,* 962 N.E.2d 89 (Ind. Ct. App. 2011).

C. Article I, Section 21: The plaintiffs allege that the statute compels Local 150 to provide a particular service to individual employees it represents without them having to pay for that service.

Article I, Section 21 of the Indiana Constitution provides that: "No person's particular services shall be demanded, without just compensation." Does the statute amount to a demand that union members provide particular services without just compensation? In *Bayh v. Sonnenburg,* 573 N.E.2d 398 (Ind. 1991), the Indiana Supreme Court wrestled with the question of what, exactly, constituted a "demand":

> We have never before considered how coercive the State's request for services must be to become a "demand," but the U.S. Supreme Court's analysis of the type of coercion required to render servitude "involuntary" under the thirteenth amendment is instructive. We think a request becomes a "demand" when it is backed up with the use or threatened use of physical force or legal process which creates in the citizen a reasonable belief that he is not free to refuse the request, *Bayh, id.,* at 417.

IC 22-6-6-8 provides as follows:

A person may not require an individual to:

(1) become or remain a member of a labor organization;
(2) pay dues, fees, assessments, or other charges of any kind or amount to a labor organization; or
(3) pay to a charity or third party an amount that is equivalent to or a pro rata part of dues, fees, assessments, or other charges required of members of a labor organization;

as a condition of employment or continuation of employment.

IC 22-6-6-10 provides as follows:

A person that knowingly or intentionally, directly or indirectly, violates section 8 of this chapter, commits a Class A misdemeanor.

There is no doubt that the statute is backed up by the use or threatened use of legal process: If any person requires the payment of dues as a condition of employment, that person is criminally liable.

The question then becomes: Is "...a person's particular services..." being "...demanded without just compensation?"

In order to answer this question it must be determined whether or not the services being provided to an employee by the plaintiffs are "...particular services..." as defined by Article I, Section 21. To be considered particular, services must be (1) historically compensated, and (2) something

required of a party as an individual, as opposed to something required generally of all citizens, *Cheatham v. Poole,* 789 N.E.2d 467 (Ind. 2003). Particular services have been held to include attorney services and expert witnesses, *Bayh,* 573 N.E.2d at 414. The services provided by a union in representing employees include negotiating and enforcing collective bargaining agreements, *Communication Workers of Am. v. Beck,* 487 U.S. 735 (1988). These services have been historically compensated, by the payment of dues, and are not something required generally of all citizens. In fact, federal law ensures that nonmembers who obtain the benefits of union representation can be made to pay for them, 29 USCA 158(a)(3), *Beck,* at 762. And so begins the final step of the determination of the constitutionality of I.C. 22-6-6 under Article I, Section 21 of the Indiana Constitution.

29 USCA 158(a)(3) provides, in relevant part, as follows:

...nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein ...

As the defendants concede, under the above statute and subsequent United States Supreme Court decisions, unions are required under federal law "...to process grievances for non-members, negotiate contracts on behalf of members and non-members alike, and otherwise provide services to non-members, regardless of non-members' failure to make any payments to the union for the services that the union provides," defendants' Memorandum, page 10. This is where the problem lies: In the absence of the federal law, a union could, without incurring any criminal liability under IC 22-6-6-10, refuse to provide services for those employees who chose not to join the union; in the absence of IC 22-6-6, the union could insure that it received compensation in the form of dues for the services the federal law required it to perform from those employees who chose not to join the union though a collective bargaining agreement with the employer that made the payment of dues to the union a condition of employment.

Put simply, with the enactment of IC 22-6-6-8 and IC 22-6-6-10, it becomes a criminal offense for a union to receive just compensation for particular services federal law demands it provide to employees.

6. There is no Court which is more loathe to declare any state statute unconstitutional than this one. IC 22-6-6-8 and IC 22-6-6-10 stand clothed with the presumption of constitutionality. Debate regarding the wisdom or folly of this statute (about which the Court has purposely avoided using its title) lies in the political arena, not with the courts. This Court is in complete agreement with Judge Simon in *Sweeney et al v. Daniels, et al,* 2013 WL 209047 (N.D. Ind. Jan. 17, 2013) that IC 22-6-6-8 and IC 22-6-6-10 do not "...run afoul of preemptive federal labor law or the U.S. Constitution," *Sweeney, id* at 23. The Court also finds that these statutes are constitutional under Article I, Section 1, Article I, Section 9 and Article I, Section 24 of the Indiana Constitution.

7. However, the effect of IC 22-6-6-8 and IC 22-6-6-10 under the current, long-standing federal labor law, is to demand particular services without just compensation. The Court therefore has no choice but to find that IC 22-6-6-8 and IC 22-6-6-10 violate Article I, Section 21 of the Indiana Constitution.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The defendants' Motion to Dismiss is granted with prejudice as to Counts II, III, IV, and V of the plaintiffs' Complaint.

2. The defendants' Motion to Dismiss is denied as to Count I of the plaintiff's Complaint.

3. The Court enters a declaratory judgment that IC 22-6-6-8 and IC 22-6-6-10 are unconstitutional in violation of Article I, Section 21 of the Indiana Constitution.

4. The grant of any relief under the terms of this Order is stayed pending the perfection of an appeal by any party, and, if an appeal is so perfected, during the pendency of that appeal.

Dated: September 5, 2013

JOHN M. SEDIA, Judge
LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE

Distribution: Attorneys Wrage, Pierson, LaRose, Poulos, Principe, Joel

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