



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

EVALUATION REPORT

**State Employee Union
Fair Share Fee Calculations**

JULY 2013

PROGRAM EVALUATION DIVISION
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OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA • James Nobles, Legislative Auditor

July 2013

Members of the Legislative Audit Commission:

Minnesota law has established 17 state employee bargaining units, and employees in those units are permitted to select a labor union as their exclusive representative in contract negotiations and enforcement. An employee in one of the bargaining units may choose to join the union that represents the unit and pay member dues or not join the union and pay a “fair share” fee.

There are various legal requirements—federal and state—related to fair share fees. In response to your request, the Office of the Legislative Auditor evaluated how those requirements have been implemented for Minnesota state employees. Our findings and recommendations are presented in this report. We did not evaluate the merits of the state policy that allows unions to collect a fair share fee from an employee who chooses not to become a union member.

Our evaluation was conducted by Judy Randall (project manager) and Kate Yang. The Minnesota Bureau of Mediation Services, Minnesota Department of Management and Budget, and nine state employee unions cooperated with our evaluation, and we thank them for their assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jim Nobles'.

James Nobles
Legislative Auditor

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Summary

State employee unions generally complied with fair share fee requirements.

Major Facts and Findings:

- Minnesota statutes allow state employee unions to charge a “fair share” fee to an employee in a bargaining unit the union represents if the employee chooses not to join the union. (pp. 5-6)
- Federal court decisions and Minnesota law define union activities that are “chargeable” to nonmembers, but some ambiguity remains. (pp. 6-8)
- State employee unions must provide notices to employees they represent about (1) the amount and calculation method of the fair share fee and (2) procedures to challenge the notification process or the appropriateness of the fair share fee. (pp. 9-10)
- Six of the ten state employee unions in Minnesota spend at least 85 percent of their budget on chargeable activities; as a result, they charge the statutory maximum of fair share fees. (p. 12)
- Two unions we examined closely—the American Federation of State, County, and Municipal Employees Council 5 and Education Minnesota—have reasonable policies to identify chargeable and nonchargeable union activities. (p. 14)
- Recent fair share notices provided by state employee unions generally complied with state law, although some unions did not include all required information. (pp. 15-16)
- Since 2001, the Bureau of Mediation Services has received only four fair share challenges from state employees. (pp. 17-18)
- The Bureau of Mediation Services’ guidelines on chargeable union activities are outdated, and some sections are inaccurate. (pp. 18-19)
- The Minnesota Department of Management and Budget does not provide oversight of state employee unions’ fair share fee calculations or notices. (pp. 20-21)

Recommendation:

- The Bureau of Mediation Services should update its guidelines on chargeable union activities to reflect current Minnesota laws and recent court decisions regarding fair share fees. (p. 19)

Only certain union costs—referred to as “chargeable”—may be included in a fair share fee calculation.

The state employee unions we reviewed had reasonable methods to identify and track chargeable costs.

Report Summary

Minnesota law places most state employees in “bargaining units” and allows the employees in those units to be represented by a union in negotiations with the state regarding terms of employment. Currently, ten unions represent more than 43,000 state employees. State employee unions charge the employees they represent fees to carry out various activities. If an employee joins the union, he or she pays member dues; otherwise, the employee typically pays a “fair share” fee.¹

By law, the fair share fee may not exceed 85 percent of regular member dues and must exclude the costs of benefits available only to members. In the most recent year for which data are available, six of the ten state employee unions spent 85 percent or more of their total budget on activities that benefited all employees of the bargaining unit. As a result, their fair share fees equaled 85 percent of their regular member dues, the maximum allowed by law.

Federal court decisions have identified certain activities that are “chargeable” to nonmember employees. These activities typically relate to collective bargaining or benefits that affect all employees in the bargaining unit, regardless of union membership. “Nonchargeable” activities typically include political or member-only activities. Minnesota Rules established by the Bureau of Mediation Services (BMS) identify information that must be provided to employees regarding fair share fees.

We conducted an in-depth review of how the American Federation of State, County, and Municipal Employees Council 5 and Education Minnesota calculated their fair share fees. In both cases, we found that the unions had reasonable methods in place to identify and track chargeable and nonchargeable activities and related expenditures.

We also reviewed employee notifications from nine of the ten state employee unions. (The Minnesota Law Enforcement Association refused to cooperate with our request for information.) We found that the unions generally complied with Minnesota’s notification requirements, although in some cases information was missing.

An employee may challenge the fair share fee (on the basis of improper notification or calculation) before BMS. Since 2001, BMS has received only four such challenges from state employees. Three of the four challenges were dismissed; the fourth challenge, based on a religious objection, was settled.

BMS developed guidelines to help identify chargeable union expenses. However, the guidelines are more than 30 years old, inaccurate in places, and do not reflect current state statutes or U.S. Supreme Court decisions. We recommend that BMS update these guidelines.

The Minnesota Department of Management and Budget (MMB) processes deductions from employee paychecks for union dues and fair share fees. However, MMB does not verify fee calculations or ensure that unions provide adequate notice of fair share fees.

¹ Employees of the Office of the Legislative Auditor are not in a bargaining unit and are, therefore, excluded from union representation and the decision to pay union dues or fair share fees.

Introduction

State employees who choose not to be members of the union representing their bargaining unit typically pay a fair share fee.

Ten employee labor unions representing more than 43,000 Minnesota state employees negotiate on behalf of the employees to secure a variety of workplace benefits. When a state employee's position is part of a statutorily established "bargaining unit" represented by a union, the employee may choose to become a member of the union and pay regular dues or not become a member and pay a "fair share" fee. By law, the fair share fee may be no more than 85 percent of membership dues.¹

In April 2013, the Legislative Audit Commission directed the Office of the Legislative Auditor to evaluate state employee union fair share fee calculations. Our evaluation addressed the following questions:

- **How is the fair share fee calculated for the various state employee unions?**
- **To what extent do state employee unions comply with fair share fee calculation and notification requirements?**

To answer these questions, we reviewed Minnesota and federal laws, U.S. Supreme Court and lower-court decisions, and journal articles and analysis related to fair share fees. We also examined Minnesota state payroll data to identify the amount of member dues and fair share fees received by each state employee union.

We requested information from all ten state employee unions regarding how they calculate their fair share fees and how they notify employees of the fair share fee. All but one state employee union, the Minnesota Law Enforcement Association, cooperated with our request.² Additionally, we conducted an in-depth review of the fair share fee calculations and notification processes of three state employee unions: American Federation of State, County, and Municipal Employees (AFSCME) Council 5; Minnesota State College Faculty; and State Residential Schools Education Association. Finally, we interviewed staff from two state

¹ *Minnesota Statutes* 2012, 179A.06, subd. 3.

² Under *Minnesota Statutes* 2012, 3.971, subd. 7, the Office of the Legislative Auditor (OLA) has the authority to evaluate state employee union fair share fee calculations. It says: "At the direction of the commission the legislative auditor may conduct program evaluations of any state department, board, commission...; or any program or activity established or funded, in whole or in part, by the state." The Legislative Audit Commission directed OLA to conduct this evaluation at its April 17, 2013, meeting. State law establishes the ability of state employee unions to charge a fair share fee and outlines the associated calculation and notification requirements. Because we were able to obtain some information regarding the Minnesota Law Enforcement Association's membership, union dues, and fair share fees from the state payroll system, and because the other nine state employee unions cooperated with our request, OLA chose to not issue a subpoena for data from the Minnesota Law Enforcement Association (as is permitted by *Minnesota Statutes* 2012, 3.978). A letter from the association explaining its refusal to cooperate with our request is in the Appendix.

agencies, the Minnesota Department of Management and Budget and the Bureau of Mediation Services, regarding their roles related to state employee union fair share fees.

1

Background

Most state employees are placed in bargaining units established in law.

Members of a bargaining unit may select a union as the exclusive representative for collective bargaining purposes.

Minnesota law places most state employees in “bargaining units” and allows the employees in those units to be represented in negotiations with the state by a union.¹ An employee in a represented unit may either become a member of the union or pay a “fair share” of the dues a union member pays. In this chapter, we provide information about state employee labor unions in Minnesota, discuss fees unions may charge to nonmembers, and outline the legal requirements related to these fees.

STATE EMPLOYEE UNIONS

In Minnesota, the Public Employment Labor Relations Act (PELRA) regulates certain aspects of the relationship between state and local governments and their public employees.² Under PELRA, the union selected for the purpose of collective bargaining is the “exclusive representative” of all state employees in a given bargaining unit. That is, the union meets and negotiates with the employer on behalf of all employees in the bargaining unit, and the negotiated terms of employment apply to all employees, regardless of whether an employee is a member of the union. A state employee can choose whether to join the union selected by the majority of employees in the bargaining unit; unions may not coerce employees to join or remain members of the organization.³

Unless excluded by law, executive branch state employees and employees of the Minnesota State Colleges and Universities (MnSCU) belong to a state employee bargaining unit based on their job classification. State Court, Board of Public Defense, and University of Minnesota employees are subject to different bargaining unit arrangements and are not included in this report. PELRA does not include elected officials, election officers, and part-time or temporary employees as public employees for the purpose of public employment labor relations.⁴ Additionally, as shown in Exhibit 1.1, some state employees, including legislative staff and employees of the Office of the Legislative Auditor, are excluded from collective bargaining.

¹ *Minnesota Statutes* 2012, 179A.10, establishes 17 bargaining units and designates groups of employees that may—and may not—be part of a bargaining unit.

² *Minnesota Statutes* 2012, chapter 179A.

³ *Minnesota Statutes* 2012, 179A.13.

⁴ *Minnesota Statutes* 2012, chapter 179A.

Exhibit 1.1: State Job Classifications Excluded from Bargaining Units and Collective Bargaining

- Administrative law judge and compensation judge positions in the Office of Administrative Hearings
- All confidential employees^a
- Managerial positions defined by the Department of Management and Budget and covered under the state Managerial Plan
- Physicians compensated under special salary rates and plans
- Pilots or chief pilots
- Positions in the Bureau of Mediation Services
- Unclassified employees appointed by a constitutional officer^b
- Unclassified positions defined as managerial by the Minnesota State Colleges and Universities Board of Trustees

NOTES: State Court, Board of Public Defense, and University of Minnesota employees are subject to different bargaining unit arrangements and are excluded from our report. Legislative staff, including employees of the Office of the Legislative Auditor, are excluded from state employee collective bargaining and are not represented by a union.

^a Confidential employees are state employees who have access to labor relations information or actively participate in negotiating on behalf of the public employer.

^b *Minnesota Statutes* 2012, 43A.08, defines state employees in unclassified positions. Examples include elected officials, heads of agencies, and employees in the offices of the Governor and Lieutenant Governor.

SOURCE: *Minnesota Statutes* 2012, 179A.10, subd. 1.

Union representatives negotiate contracts with the Minnesota Department of Management and Budget (MMB) or the MnSCU Board of Trustees.⁵ The contracts contain provisions allowing unions to charge members regular dues and nonmembers fair share fees. MMB deducts dues and fair share fees from employees' paychecks.

Ten unions represent Minnesota state employees.

Currently ten unions represent state employees, as shown in Exhibit 1.2. The American Federation of State, County, and Municipal Employees (AFSCME) Council 5 represents the most employees; of the 17,274 state employees it represented as of April 2013, 3,647 were not union members and paid fair share fees. The State Residential Schools Education Association, which represents teachers and librarians in state residential facilities, was the smallest state employee union as of April 2013; all 171 employees it represented were union members. Of the 43,719 state employees represented by the ten unions as of April 2013, 11,060 employees (25 percent) paid fair share fees.

FAIR SHARE FEES

Unions charge members regular dues for providing collective bargaining services, holding professional and social events, and conducting other activities. Member dues are typically set at union conventions or by union board members, who are elected by members of the unions. Some, but not all, benefits provided to union members are also available to nonmember employees the unions

⁵ The Minnesota Department of Management and Budget may also be referred to as Minnesota Management and Budget (MMB); see *Minnesota Statutes* 2012, 16A.01, subd. 1.

Exhibit 1.2: Minnesota State Employee Unions, 2013

| Union | Employees Represented | Total Employees Represented | Fair Share Employees | Percentage of Fair Share Employees |
|--|---|-----------------------------|----------------------|------------------------------------|
| American Federation of State, County, and Municipal Employees (AFSCME) Council 5 | Employees performing craft, maintenance, and general labor; employees in service occupations; health care nonprofessionals; clerical and office employees; technical work employees; correctional officers; and public safety radio communication operators | 17,274 | 3,647 | 21% |
| Minnesota Association of Professional Employees (MAPE) | General professional employees | 12,934 | 4,572 | 35 |
| Minnesota State College Faculty (MSCF) | Community and technical college instructional faculty | 4,807 | 1,350 | 28 |
| Middle Management Association (MMA) | Supervisory employees | 2,887 | 694 | 24 |
| MnSCU Inter Faculty Organization (IFO) | State university instructional faculty (not including faculty at the University of Minnesota) | 2,367 | 386 | 16 |
| Minnesota Government Engineering Council (MGEC) | Registered engineers | 1,021 | 47 | 5 |
| Minnesota Law Enforcement Association (MLEA) | Licensed peace officers, conservation officer supervisors, and gambling control officers | 778 | 1 | <1 |
| Minnesota State University Association of Administrative and Service Faculty (MSUAASF) | Nonteaching faculty who serve in professional positions at the seven state universities | 759 | 169 | 22 |
| Minnesota Nurses Association (MNA) | Registered nurses | 721 | 194 | 27 |
| State Residential Schools Education Association (SRSEA) | Teachers and librarians in state residential facilities | 171 | 0 | 0 |
| Total | | 43,719 | 11,060 | 25% |

NOTE: We counted employees and fair share employees using Minnesota state payroll data for the pay period ending April 9, 2013.

SOURCES: Office of the Legislative Auditor, analysis of data from the Minnesota Department of Management and Budget, the state payroll system, state employee unions, and *Minnesota Statutes* 2012, 179A.10, subd. 2.

represent. For example, employee newsletters and professional training are often available to nonmembers. Nonmembers also benefit from the collective bargaining the union conducts on behalf of all employees in the bargaining unit. As a result:

- **Minnesota statutes allow state employee unions to charge a “fair share” fee to an employee in a bargaining unit the union represents if the employee chooses to not join the union.**

Minnesota Statutes 2012, 179A.06, subdivision 3, specifies that an exclusive representative of public employees may require employees who are not members of the union to pay a fair share fee. By law, the fee must be the lesser of:

Minnesota is one of three states that imposes a cap on the percentage of union dues that may be collected as a fair share fee.

(1) regular member dues less the cost of benefits financed through union dues and available only to union members; or (2) 85 percent of regular member dues.

The U.S. Supreme Court has upheld the legality of fair share fees for public employee unions. In *Abood v. Detroit Board of Education*, the court held that a fair share fee reduces the risk that nonmember employees become “free riders” who enjoy the benefits of collective bargaining without paying.⁶ While fair share arrangements for public employee unions are permitted by federal law, they are not required. States may pass laws to prohibit most unions from charging fair share fees to nonmember employees.⁷ These states are commonly known as “right-to-work” states. Currently, there are 24 right-to-work states nationwide, as shown in Exhibit 1.3.

Exhibit 1.3 also shows that, similar to Minnesota, many states allow state employee unions to establish fair share fees. Three states (Connecticut, Hawaii, and Rhode Island) *require* nonmember state employees to pay a fair share fee. Three other states, including Minnesota, impose a cap on the percentage of union dues that may be collected as a fair share fee: all three states require fair share fees to be no more than 85 percent of member dues. Five states have a rebate system in which a fee up to the amount of regular member dues may be deducted from nonmembers’ earnings, but a rebate returns to nonmembers the portion used for activities benefiting only union members.

LEGAL REQUIREMENTS

“Chargeable” Activities

While the U.S. Supreme Court upheld the legality of public employee union fair share fees, it also limited what union activities can be included when calculating fair share fees. The court held that a union cannot compel a nonmember to contribute to an ideological cause the employee may oppose.⁸ Therefore, unions can only include in their fair share fees those expenses associated with activities germane to collective bargaining. Unions may not include expenses incurred for “nonchargeable” activities, such as lobbying unrelated to collective bargaining agreements. We found that:

- **While the U.S. Supreme Court and Minnesota statutes have defined union activities that are chargeable to nonmembers, some ambiguity remains.**

The U.S. Supreme Court offered a three-part test for identifying “chargeable” union activities.⁹ It stated that chargeable union activities must: (1) be germane

⁶ *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

⁷ States may not prohibit fair share fees for employees working for the federal government or in railway or airline industries. See *45 U.S. Code*, sec. 152, Eleventh (2012), and *5 U.S. Code*, chapter 71 (2013).

⁸ *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

⁹ *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

to collective-bargaining activity, (2) be justified by the government's policy interest in labor peace and avoiding “free riders” who benefit from union efforts without paying for union services, and (3) not significantly impede free speech.

Notwithstanding the three-part test, the *Lehnert* court identified additional chargeable union activities that are not related to collective bargaining but that benefit all employees in the bargaining unit.¹⁰ Guided by these criteria, the court

Exhibit 1.3: State Fair Share Laws for State Employee Unions, 2013

States may allow, require, or prohibit fair share fees.

| | Fair Share | | |
|----------------------------|---------------------|----------------|-------------------------|
| | Allowed | Required | Prohibited ^a |
| Alaska | Connecticut | Alabama | |
| California | Hawaii ^b | Arizona | |
| Colorado | Rhode Island | Arkansas | |
| Delaware ^b | | Florida | |
| Illinois | | Georgia | |
| Maine | | Idaho | |
| Maryland | | Indiana | |
| Massachusetts ^b | | Iowa | |
| Minnesota ^c | | Kansas | |
| Missouri | | Louisiana | |
| Montana | | Michigan | |
| New Hampshire | | Mississippi | |
| New Jersey ^c | | Nebraska | |
| New Mexico | | Nevada | |
| New York ^b | | North Carolina | |
| Ohio ^b | | North Dakota | |
| Oregon | | Oklahoma | |
| Pennsylvania | | South Carolina | |
| Vermont ^c | | South Dakota | |
| Washington | | Tennessee | |
| Wisconsin | | Texas | |
| | | Utah | |
| | | Virginia | |
| | | Wyoming | |

NOTES: Two states are not included in the table. Kentucky and West Virginia have no laws directly addressing fair share fees and do not conduct collective bargaining with state employees. Georgia prohibits private-sector unions from charging nonmembers a fee, and the state government does not conduct collective bargaining.

^a States can pass laws to prohibit unions in public sectors from charging nonmembers a fee. These states are “right-to-work” states.

^b These states require the employer to establish a rebate system to return to nonmember employees a percentage of fees equivalent to the percentage of expenditures used for activities that benefit only union members.

^c These states establish a maximum fair share fee of 85 percent of regular member dues.

SOURCE: Office of the Legislative Auditor, analysis of states’ statutes on state employee labor relations and fair share fees.

¹⁰ *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

Exhibit 1.4: Examples of Chargeable and Nonchargeable Union Activities for Calculating Fair Share Fees

Chargeable Activities

- Collective-bargaining contract ratification or implementation
- Collective bargaining by the union's state and national affiliates that ultimately benefit members of the bargaining unit by virtue of their membership in the parent organization
- Publications that concern professional development, unemployment, job opportunities, and other matters that are for the benefit of all
- Participation by union delegates in events such as state and national conventions, where bargaining strategies and representational policies are developed for bargaining units
- Preparation for a strike that pertains to collective-bargaining negotiations and directly benefits employees of the bargaining unit

Nonchargeable Activities

- Lobbying, electoral, or other political activities outside the context of contract ratification or implementation
- Fundraising for causes that are supported by the union but not associated with the collective-bargaining agreement
- Public relations efforts to enhance the reputation of a specific occupation or to promote political positions

NOTES: This list shows union activities specified in *Lehnert v. Ferris Faculty Association*. It does not comprehensively cover all union activities.

SOURCE: *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).

identified some specific chargeable and nonchargeable activities, as shown in Exhibit 1.4. Minnesota statutes require that costs associated with activities that benefit only union members not be included in the fair share fee.¹¹

Notwithstanding the guidance outlined above, there is uncertainty about whether some activities are chargeable. The three-part test offered by the *Lehnert* court is relatively abstract and does not address specific activities a state employee union might conduct. Additionally, the Supreme Court's interpretation of chargeable union activities is evolving. For example, while the *Lehnert* court ruled that litigation not concerning the bargaining unit at issue is nonchargeable, in a later case, the Supreme Court held that litigation activities of a national affiliate may be chargeable, regardless of whether it directly concerns a given bargaining unit.¹²

Procedural Requirements

Besides restricting what activities are chargeable, the U.S. Supreme Court also held that unions must take three procedural measures related to fair share fees. Unions must: (1) provide nonmembers with adequate information about how the fair share fee was calculated, (2) provide for a reasonably prompt decision by an

¹¹ *Minnesota Statutes* 2012, 179A.06, subd. 3.

¹² *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), and *Locke v. Karass*, State Controller, 129 S. Ct. 798 (2009). In *Locke*, the court held that litigation of a national affiliate is chargeable if the litigation is related to collective bargaining and if the charge is "reciprocal in nature," meaning that other locals are expected to contribute similarly.

impartial decision maker if a nonmember challenges the fee, and (3) minimize the risk that nonmembers' contributions might be temporarily used for impermissible purposes.¹³

Minnesota codifies all three procedural measures in state law. In particular:

- **State employee unions must provide notices to employees they represent about (1) the amount and calculation method of the fair share fee and (2) procedures to challenge the notification process or the appropriateness of the fair share fee.**

Minnesota rules identify information unions must provide to state employees that are required to pay a fair share fee.

Minnesota statutes require public employee unions to provide advance written notice of their fair share fees to the employer and to employees who will be assessed the fee.¹⁴ Unions must provide the notice to newly hired employees. Unions must also provide a fair share notice to all nonmember employees upon initial implementation of the fee assessment and when changing the fair share fee amount. For the larger unions, the fee amount may change as often as annually.

Exhibit 1.5 outlines the information a fair share notice must contain. Among other things, a fair share notice must provide the amounts of the fair share fee and regular member dues. It also must provide information on how an employee can challenge the fair share fee.

Exhibit 1.5: Required Information in a Fair Share Notice

- Name, address, and telephone number of the union
- Amount of the union regular dues
- Amount of the fair share fee
- Sufficient information to identify expenditures for member-only benefits versus expenditures for collective bargaining and contract administration services provided to all employees
- Most recent documentation of the preceding year's actual expenditures and of the current year's projected expenditures
- The Bureau of Mediation Services' current mailing address
- A standard paragraph explaining employees' right to challenge the fair share fee^a

^a The paragraph should read, "An employee may challenge this assessment by filing a challenge with the Bureau of Mediation Services within 30 calendar days after receipt of this notice. The challenge must specify those portions of the assessment being contested and the reasons therefor, and copies of the challenge must be sent to your employer and this organization. The Public Employment Labor Relations Act requires a fee for filing challenges. Forms for challenges and a copy of the rules governing them are available from the bureau without charge."

SOURCE: *Minnesota Rules* 2012, 5510.1410, subp. 1.

¹³ *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

¹⁴ *Minnesota Statutes* 2012, 179A.06, subd. 3.

An employee who challenges a fair share fee must file a petition with the Minnesota Bureau of Mediation Services (BMS), the employer, and the union within 30 days after receiving the fair share notice.¹⁵ BMS is the state agency that serves as the impartial decision maker of any such challenge. The petition must identify the specific union activities that the employee alleges are not in compliance with state law. The challenge may be about the union's lack of proper notice or other procedural noncompliance, or about the validity of the fair share fee amount. The burden of proof regarding the propriety of the fair share fee rests on the union.

To ensure that nonmembers' contributions are not temporarily used for impermissible purposes, the state must not begin transferring an employee's fair share fees to a union until 30 days after the fair share notice was provided. If a challenge petition is filed, the state must place fair share fees collected from the petitioner into an escrow fund pending the decision of BMS.

¹⁵ The 30-day period starts whenever the employee receives a new notice, which occurs when he or she is hired, when a fair share fee is first assessed, and when the fee amount changes.

Compliance and Oversight

As outlined in Chapter 1, the fair share fees state employee unions charge nonmembers may include only expenses associated with activities that benefit all employees of the bargaining unit. The unions must also provide timely notice to new or nonmember employees, explaining how the fair share fee is calculated and employees' right to challenge the fee. In this chapter, we evaluate the extent to which state employee unions comply with these requirements. We also examine the extent to which two state agencies, the Minnesota Department of Management and Budget (MMB) and the Bureau of Mediation Services (BMS), oversee state employee unions' fair share fees and processes.

FAIR SHARE FEE CALCULATION

Unions set fair share fees as a percentage of regular member dues.

State employee unions set member dues and multiply the dues amount by a percentage to determine fair share fees.¹ The percentage applied equals the lesser of (1) the ratio of expenditures for chargeable activities to all union expenditures in a given year, or (2) 85 percent (the maximum percentage allowed by law).² Although unions do not establish dedicated accounts for fair share fee revenue, they must document expenditures associated with chargeable and nonchargeable activities and calculate the fair share fees accordingly.

Some unions have national and state affiliates that conduct collective bargaining and other activities on the national and state level to benefit employees represented by the union. Portions of member dues and fair share fees are paid directly to those national and state affiliates. Each affiliate identifies its own chargeable activities and calculates accordingly the amount of its fair share fees. The final fee assessed to each nonmember equals the sum of fair share fees charged by national and state affiliates, the state employee union, and in some cases, the local branch.³ For example, a full-time, nonmember employee represented by the Minnesota State College Faculty (MSCF) pays an annual fair share fee of \$657.42: \$134.46 is sent to the National Education Association and American Federation of Teachers (the national affiliates), \$318.96 is allocated to Education Minnesota (the state affiliate), and \$204.00 remains with MSCF.

¹ As noted in Chapter 1, member dues are established at union conventions or by union board members, who are elected by union members.

² Unions typically use the expenditure data from the most recent year for which an independent financial auditor's report is completed. *Minnesota Statutes* 2012, 179A.06, subd. 3, establishes the 85-percent maximum rate.

³ A state employee union may have multiple local branches to represent employees from particular geographic areas or state agencies.

The amount of fair share fees varies among and within state employee unions.

The amount of fair share fees varies among and within state employee unions. For example, in 2013, the Minnesota Nurses Association charged a fair share fee of \$23.93 per pay period, while the Minnesota Government Engineering Council charged \$10.20. The Minnesota State Colleges and Universities (MnSCU) Inter Faculty Organization has three levels of union dues and fair share fees, depending on teaching load; the Minnesota State University Association of Administrative and Service Faculty charges a fair share fee based on each employee's hourly wage. Based on our analysis of state payroll data and information provided to us by state employee unions, we found that:

- **Six of the ten state employee unions in Minnesota spend at least 85 percent of their budget on chargeable activities; as a result, they charge the statutory maximum of fair share fees.**

Exhibit 2.1 shows information on regular member dues and fair share fees for all ten state employee unions. Six unions have fair share fees equal to the statutory maximum of 85 percent of member dues. The Minnesota Nurses Association's expenses associated with chargeable activities equaled 85 percent of total expenses. For the remaining five state employee unions, however, the expenses associated with chargeable activities exceeded 85-percent.⁴ As a result, these unions all charged the maximum (85 percent of member dues) allowed by law. In contrast, American Federation of State, County, and Municipal Employees (AFSCME) Council 5 has varying fair share percentages for different local branches, ranging from 33 to 85 percent. The Minnesota State College Faculty has varying fair share percentages that are all below 85 percent.

Review of Chargeable Activities

We examined the fair share fee policies and practices for AFSCME Council 5 and Education Minnesota.

To further examine unions' fair share fee policies and practices, we selected three state employee unions for an in-depth review: AFSCME Council 5 (the union representing the largest number of state employees), State Residential Schools Education Association (SRSEA, the union representing the smallest number of state employees), and the Minnesota State College Faculty (MSCF). SRSEA is a local branch of Education Minnesota (a statewide union of educators in Minnesota) and MSCF is an affiliate of, and shares staff with, Education Minnesota. As a result, the processes SRSEA and MSCF use to identify chargeable activities are largely governed by Education Minnesota's practices and policies. We therefore focused our in-depth review on AFSCME Council 5 and Education Minnesota.

We reviewed how the two unions identified chargeable and nonchargeable activities and calculated their fair share fees.⁵ Based on our review of their policies and practices, we found that:

⁴ The Minnesota Association of Professional Employees (MAPE) had 85.45 percent of its total expenditures associated with chargeable activities, which we rounded to 85 percent in Exhibit 2.1.

⁵ AFSCME Council 5 and Education Minnesota provide training on fair share fees to their local branches. However, our review focused on the parent organizations and did not address the policies and practices of the local branches.

Exhibit 2.1: State Employee Annual Union Dues and Fees, 2013

| Union | Member Dues | Fair Share Fees | Fair Share Percentage | Percentage of Total Expenses Associated with Chargeable Activities ^a |
|--|-----------------------------------|-----------------------------------|-----------------------|---|
| American Federation of State, County, and Municipal Employees (AFSCME) Council 5 | Vary by local branch ^b | Vary by local branch ^b | 33% to 85% | Varies |
| Minnesota Association of Professional Employees (MAPE) | \$546 | \$464 | 85% | 85% |
| Minnesota State College Faculty (MSCF) ^c | Vary by teaching load | Vary by teaching load | 65% to 75% | Varies |
| Middle Management Association (MMA) | \$260 | \$221 | 85% | 99% |
| MnSCU Inter Faculty Organization (IFO) ^d | Vary by teaching load | Vary by teaching load | 85% | 92% |
| Minnesota Government Engineering Council (MGEC) | \$312 | \$265 | 85% | 97% |
| Minnesota Law Enforcement Association (MLEA) ^e | \$416 | \$280 | 67% | NA |
| Minnesota State University Association of Administrative and Service Faculty (MSUAASF) | 65 hours of pay | 55.25 hours of pay | 85% | 89% |
| Minnesota Nurses Association (MNA) | \$732 | \$622 | 85% | 85% |
| State Residential Schools Education Association (SRSEA) ^f | \$784 | \$581 | 74% | NA |

NOTES: All dues and fees are annual amounts rounded to the nearest dollar; percentages are rounded to the nearest percent. "NA" indicates the information was not available.

^a The Percentage of Total Expenses Associated with Chargeable Activities shows the unions' total expenses associated with chargeable activities divided by the unions' total expenses in the previous year. By law, the percentage state employee unions apply to member dues to calculate their fair share fees must be the lesser of (1) expenses associated with chargeable activities divided by total expenses, or (2) 85 percent. *Minnesota Statutes* 2012, 179A.06, subd. 3.

^b A state employee union may have multiple local branches to represent employees from different geographic areas or state agencies. AFSCME Council 5's local branches set their own dues and fair share fees based on local chargeable and nonchargeable activities. The council and its national affiliate also charge dues and fair share fees.

^c For employees who teach full time, three-quarter time, half time, or one-quarter time, the member dues and fair share fees are, respectively, \$872 and \$657, \$778 and \$578, \$494 and \$362, and \$229 and \$149.

^d For employees who teach 75-percent time or more, 45- to 74-percent time, or less than 45-percent time, the member dues and fair share fees are, respectively, \$753 and \$640, \$400 and \$340, and \$141 and \$120.

^e Because MLEA declined to cooperate with our data request, the amounts reported here are based solely on state payroll data and exclude the dues and fees paid by conservation officer supervisors and highway patrol supervisors. We were not able to determine MLEA's percentage of expenses associated with chargeable activities from state payroll data.

^f The amounts for SRSEA represent dues and fees paid by full-time employees. SRSEA did not identify its chargeable and nonchargeable activities in its fair share notice to employees.

SOURCES: Office of the Legislative Auditor, analysis of state payroll data and data from nine state employee organizations.

- **American Federation of State, County, and Municipal Employees Council 5 and Education Minnesota have reasonable policies to identify chargeable and nonchargeable union activities.**

Both AFSCME Council 5 and Education Minnesota were conservative in their allocation of chargeable activities.

Both AFSCME Council 5 and Education Minnesota used a limited interpretation of chargeable union activities, consistent with the U.S. Supreme Court decision in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991). Neither union identified political activities unrelated to collective bargaining, ideological activities, or member-only activities as chargeable activities. Exhibit 2.2 lists general categories of chargeable and nonchargeable activities identified in Supreme Court decisions and specific examples from our review of AFSCME Council 5 and Education Minnesota. For example, AFSCME Council 5's recent lobbying efforts to unionize child care providers were chargeable to the employees it represents because such efforts were directly related to collective bargaining. On the contrary, AFSCME Council 5 does not identify lobbying to increase the budget of a certain state agency as a chargeable activity, even if it were to benefit all employees of that agency.

Both AFSCME Council 5 and Education Minnesota use time reporting systems for staff to report chargeable and nonchargeable work hours based on the nature of their activities. Both organizations provide training and support to staff members regarding the chargeability of staff activities.

Ambiguities in the laws surrounding fair share calculations led to different practices between the two organizations for determining the chargeability of some operating expenses. Education Minnesota used the percentage of chargeable staff hours of a department or of the whole organization to allocate nonsalary operating expenditures. For example, Education Minnesota calculated the cost of chargeable office supplies by multiplying the cost of supplies used in a department by the percentage of chargeable staff hours of the department. AFSCME Council 5, on the other hand, directly tracked the purpose for which office supplies were used to determine their chargeability. As another example, AFSCME Council 5 assigned office space to each employee and determined the chargeability of office rent based on individual employees' chargeable hours, while Education Minnesota prorated office rent by the percentage of chargeable staff hours of the whole organization.

Staff from the Bureau of Mediation Services, the state agency that hears fair share fee challenges, told us that general operating and administrative activities can be chargeable; however, neither state law nor court decisions specify how operating expenses should be allocated.⁶ BMS staff suggested, and we agreed, that unions have the discretion to establish a method for allocating operating expenditures, as long as they keep a consistent policy and track the financial information accordingly.

⁶ The U.S. Supreme Court in *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), established a three-part chargeability test, as explained in Chapter 1. We interpreted the test to categorize general operating and administrative expenses as chargeable if the activities they support are chargeable.

Exhibit 2.2: Examples of Chargeable and Nonchargeable Activities from Select State Employee Unions, 2013

| Chargeable Activities | Examples |
|---|--|
| Union activities on collective-bargaining contract ratification or implementation | <ul style="list-style-type: none"> Negotiating collective-bargaining contracts Lobbying or public relations efforts for the negotiation of a contract Implementing impasse procedures specified in the contract, including mediation, arbitration, and strikes Efforts to promote membership Attending national conventions |
| Collective bargaining-related activities of the affiliated organizations | |
| Union activities open to all employees | <ul style="list-style-type: none"> Employee training and professional development Social events open to all employees |
| Publications on nonideological issues and available to all employees | <ul style="list-style-type: none"> Employee updates on collective-bargaining contract Publications on unemployment and job opportunities |
| Nonchargeable Activities | Examples |
| Lobbying, electoral, or other political activities outside the context of contract ratification or implementation | <ul style="list-style-type: none"> Lobbying on the state budget Endorsing a political candidate Political action committee fund-raising activities |
| Programs designed to secure funds for or support causes not oriented toward collective bargaining | <ul style="list-style-type: none"> Seeking support for local levies and referenda for education funding Charitable contributions Supporting and contributing to international affairs |
| Member-only benefits | <ul style="list-style-type: none"> Member gifts Social events open to members only Legal services to members only |
| Public relations efforts to enhance the reputation of a specific occupation or to promote an idea of a political nature | <ul style="list-style-type: none"> Minnesota Teacher of the Year Program Advertisement in support of a political candidate |
| Publications on nonchargeable union activities | <ul style="list-style-type: none"> Newsletters and flyers in support of a political candidate Sections of a union magazine on ideological issues |

NOTE: This list shows general categories of chargeable and nonchargeable union activities identified in the U.S. Supreme Court decision in *Lehnert v. Ferris Faculty Association*, and examples from two state employee unions we reviewed (American Federation of State, County, and Municipal Employees Council 5 and Education Minnesota).

SOURCES: Office of the Legislative Auditor, analysis of *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991), and documents and staff interviews of two state employee unions.

FAIR SHARE NOTICE

As discussed in Chapter 1, public employee unions must provide a notice to employees outlining their fair share fee obligation. To review state employee unions' compliance with these notice requirements, we examined recent fair share notices for nine of the ten state employee unions. The Minnesota Law Enforcement Association refused to cooperate with our evaluation. Based on our review, we found that:

- Recent fair share notices provided by state employee unions generally complied with state law, although some unions did not include all required information.**

Several state employee unions did not provide all of the required information in their fair share notices.

As outlined in Exhibit 1.5, Minnesota rules require public employee unions to include certain information in their fair share notices.⁷ Eight of the nine state employee unions we reviewed included the name, address, and telephone number of the union in their fair share notices, as required by law. Further, all nine of the notices listed the amount of union member dues and fair share fees, usually as a percentage of the member dues.

However, some fair share notices contained flaws. In our judgment, two unions did not provide “sufficient information to identify expenditures for benefits available only to members of the exclusive representative and ... expenditures for collective bargaining and contract administration services....”⁸ Minnesota rules do not specify what constitutes “sufficient information” to identify chargeable and nonchargeable activities. However, in *Chicago Teachers Union v. Hudson*, the U.S. Supreme Court held that adequate disclosure should enable the employee to judge the propriety of a fair share fee by separating expenses into major categories and including verification by an independent auditor.⁹ Two relatively small state employee unions provided no breakdown of major expenditure categories in their fair share notices; one of the two provided no information on expenditures for nonchargeable activities.

Additionally, notices from four unions did not include documentation of the current year’s projected expenditures as required by state rules. Although projected expenditures may not be used to calculate fair share fees, unions are required by state rules to provide this information.

Finally, the fair share notices of five state employee unions did not contain all information required by law regarding employees’ right to challenge the fair share fee. Two unions did not provide BMS’s current mailing address. Four unions’ explanations of the challenge process deviated from the standard paragraph required by state rules. None of the four stated that copies of the challenge must be sent to the employer and the union and that a fee is required to file a challenge.

State employee unions must comply with state rules regarding information provided in their fair share notices. Adequate disclosure of unions’ financial data and information on the process to challenge a fair share fee provides procedural safeguards to nonmembers’ rights. It is also required by state law. State employee unions, including those representing a small number of employees and having a relatively small budget, should provide information on major categories of union expenditures. Such documentation reflects good bookkeeping and provides a solid foundation for the fair share fee calculation. Unions should also include projected expenditures in their fair share notices as required by state law. Additionally, employees should be informed of their rights to challenge the fair share fee and the general process for filing a challenge.

⁷ *Minnesota Rules* 2012, 5510.1410, subp. 1.

⁸ *Ibid.*

⁹ *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). U.S. District Courts have disagreed on whether very small unions may be excused from the independent audit requirement.

BUREAU OF MEDIATION SERVICES

The Bureau of Mediation Services hears and investigates many types of petitions related to public employee labor relations, including fair share fee challenges. BMS has also developed guidelines regarding fair share fee calculations. We reviewed state laws and interviewed BMS staff to understand their role regarding state employee union fair share fees.

Fair Share Challenges

The Bureau of Mediation Services hears state employee challenges regarding fair share fees.

Upon receiving a fair share fee challenge, BMS must provide the petitioner with an acknowledgment and receipt, along with a copy of the rules governing such a challenge.¹⁰ All challenges must be filed within 30 calendar days from the employee's receipt of a fair share notice. Challenges may be based only on the appropriateness of a fair share fee amount or the propriety of a fair share notice. If an employee simply challenges the principle of union representation or fair share, BMS will dismiss the challenge without a hearing.

For a valid challenge, BMS holds hearings in which the petitioning employee and the union may present evidence and testimony. The union has the burden of proof to establish the appropriateness of the fair share fee amount.¹¹ BMS's determination regarding a fair share fee amount applies to all nonmembers in the bargaining unit; a determination regarding a fair share fee notice applies only to the employee who filed the challenge.¹² Either party can appeal the BMS decision to an appellate court.

BMS encourages employees and unions to reach agreements to settle the challenges, because such an agreement is "conducive to harmonious and stable labor and management relationships."¹³ If an agreement is reached before the close of the hearing, the petitioner must withdraw the challenge in writing or on the hearing record. The withdrawal letter typically does not contain the terms of the settlement, and BMS does not actively monitor how challenges are settled.

According to BMS staff:

- **Since 2001, the Bureau of Mediation Services has received only four fair share challenges from state employees.**

We reviewed BMS documents on each of the four state employee fair share challenges filed since 2001 and summarized the bases of the challenges and the outcomes in Exhibit 2.3. Three of the four challenges were ruled invalid and dismissed by BMS.

¹⁰ *Minnesota Rules* 2012, 5510.1510, subp. 4.

¹¹ *Minnesota Rules* 2012, 5510.1610.

¹² *Minnesota Rules* 2012, 5510.1710.

¹³ *Minnesota Rules* 2012, 5510.1910, subp. 1.

Since 2001, the Bureau has received only four fair share fee challenges from state employees.

Exhibit 2.3: State Employee Fair Share Fee Challenges Received by the Bureau of Mediation Services, 2001-2012

| Year | Employee's Reason for Challenge | BMS Decision |
|------|--|--|
| 2001 | The union included inappropriate expenditure items in its fair share fee calculation, making the fair share fee amount inaccurate. | Dismissed |
| 2002 | The petitioner refused to pay a fee to the union due to her religious convictions. | Resolved between the union and the petitioner ^a |
| 2005 | The employee did not receive a fair share notice. | Dismissed |
| 2011 | The union used fair share fees for activities with which the petitioner disagreed. | Dismissed |

NOTE: No additional challenges had been filed as of June 2013.

^a Instead of paying a fair share fee to the union, the employee donated an amount equal to the fee to a charity.

SOURCE: Office of the Legislative Auditor, analysis of Bureau of Mediation Services' documents regarding state employee fair share fee challenges.

The small number of challenges does not necessarily indicate that state employee unions comply with fair share laws. Fair share is a technical and legally complicated issue. For both the petitioning employee and the union, determining the appropriateness of fair share fee calculations often requires legal and accounting expertise. Employees who object to a fair share fee may need a certain level of expertise to present a valid challenge.

Chargeable Activities Guidelines

In 1977, BMS developed a set of guidelines to help unions determine which activities are chargeable. The document, called the "Residuum Theory," was based on state statutes in place at the time and decisions in fair share fee challenges prior to 1977. BMS staff told us that they have not made updates to the guidelines for about 30 years. Any union activity not listed in the document is nonchargeable and must be excluded from fair share fees; costs for providing the remaining—chargeable—activities (the "residuum") are used to calculate the fair share fees. We found that:

- **The Bureau of Mediation Services' guidelines on chargeable union activities are outdated, and some sections are inaccurate.**

We identified three concerns with the agency's guidelines. First, BMS developed the guidelines with a specific focus on teachers' unions because most fair share fee challenges at the time were from teachers; many of the chargeable items listed in the document may not be applicable to nonteacher unions. Second, since BMS developed the guidelines, the U.S. Supreme Court has decided on several fair share-related cases and provided additional clarification

on chargeable activities.¹⁴ For example, government relations efforts such as lobbying and electoral activities not directly related to collective bargaining are still listed as chargeable in BMS's guidelines, while these activities have been identified as nonchargeable by the U.S. Supreme Court. Finally, the state laws on which the guidelines are based have changed. As a result, the guidelines reference outdated statutes.

RECOMMENDATION

The Bureau of Mediation Services should update its guidelines on chargeable union activities to reflect current Minnesota laws and recent court decisions regarding fair share fees.

An updated document could offer useful guidance to petitioners, unions, and others. Currently, BMS provides the document to anyone who requests it. However, some of its outdated content could cause misunderstandings. As mentioned earlier, the issue of fair share fee calculation is technical and legally complicated. Accurate and updated guidelines regarding chargeable and nonchargeable union activities could be helpful in determining whether a fair share fee challenge is valid.

MINNESOTA DEPARTMENT OF MANAGEMENT AND BUDGET

The Minnesota Department of Management and Budget (MMB) processes deductions for union dues and fair share fees.

The Minnesota Department of Management and Budget has two distinct roles regarding state employee unions' fair share fee calculations. First, MMB processes the state's payroll. In this function, it is responsible for deducting the correct union dues or fair share fees from each state employee and transmitting those funds to the union representing that employee. Second, MMB staff negotiate state employee contracts with union representatives, which could include provisions regarding the administration of fair share fees. State statutes do not direct MMB to provide oversight of unions' fair share fee calculations or notification processes.

Payroll Processing and Labor Relations

We interviewed MMB staff, including the director of Payroll Operations, to better understand the agency's responsibilities regarding fair share fees. MMB staff told us that the state employee unions manage the process for identifying new employees and updating the correct deduction amounts for union dues or fair share fees in the state's payroll system. Most of the unions receive information about new employees through a biweekly report produced by MMB.¹⁵ Based on

¹⁴ See *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991); *Davenport v. Washington Education Association*, 551 U.S. 177 (2007); and *Locke v. Karass, State Controller*, 129 S. Ct. 798 (2009).

¹⁵ Some state employee unions, such as MnSCU's Inter Faculty Organization, receive information about new employees from MnSCU rather than MMB.

MMB also negotiates on behalf of the state with the labor unions.

this information, they contact new employees and invite them to join the union; they also provide information about their fair share fees. Once an employee chooses whether to join, state employee unions determine the deduction amounts to be entered in the state's employment management system. MMB staff ensure the information provided by the unions is formatted correctly; MMB staff do not verify the information provided by the unions, nor do they review fair share calculations to ensure their accuracy.

We examined state payroll information for the pay period ending April 9, 2013, to identify deductions for union dues and fair share fees. Of the more than 43,000 employees represented by state employee unions, 4 employees had double deductions—one for union dues and one for fair share fees—for the same union in the same paycheck. MMB staff told us they regularly check for such double deductions and communicate with the state employee unions to correct problems. They said, however, that the unions are responsible for ensuring the accuracy of the deductions and MMB does not have the authority to change the deduction amounts. We tracked the paychecks for the four employees with double deductions over several pay periods. Two of the double deductions were resolved by the next pay period, and two employees had double deductions for two paychecks before the issue appeared to be resolved.

MMB staff also serve as the primary labor negotiators for the state. We met with one of the state's key labor negotiators to learn the extent to which the administration of fair share fees is discussed during contract negotiations. She told us that fair share is "not a burning issue," and thus has not been specifically discussed during contract negotiations.

Oversight

Based on conversations with MMB staff, we found that:

- **The Minnesota Department of Management and Budget does not provide oversight of state employee unions' fair share fee calculations or notices.**

In particular, MMB does not verify the unions' fair share fee calculations to ensure that (1) expenditures for nonchargeable activities are properly identified and excluded from fair share fees, and (2) the fair share fee does not exceed 85 percent of the regular member dues. MMB's responsibility to provide this type of oversight is not clear.

Additionally, MMB does not review—or even receive copies of—unions' fair share notices, despite a requirement in law that unions submit these notices to the employer.¹⁶ MMB staff told us they may have received these notices in the past, when the process for entering employees' payroll deductions was more paper intensive. However, since 2003 when the unions started electronically providing

¹⁶ *Minnesota Statutes* 2012, 179A.06, subd. 3, states: "The exclusive representative shall provide advance written notice of the amount of the fair share fee to the employer and to unit employees who will be assessed the fee...."

There is no ongoing state oversight of how fair share fees are calculated.

updated deduction information, MMB has not received copies of the fair share notices. While state law does not require MMB to review fair share notices, court decisions in other states have indicated that the state—as the employer—may have a responsibility to ensure unions provide proper notices regarding fair share fees.¹⁷

The requirement that state employee unions submit copies of their fair share notices to the employer (typically MMB) indicates the Legislature has some interest in oversight of the fair share fee process.¹⁸ The Legislature could consider requiring a state agency to periodically verify the accuracy of the fair share fee calculations and review fair share notices. Such oversight would help to ensure that state employee unions comply with the law; it would also provide a level of assurance to employees who are otherwise responsible for monitoring fair share issues for themselves.

On the other hand, as noted throughout this report, we did not find significant concerns regarding unions' fair share fee calculations or notification processes. Some unions did not provide all required information in their fair share notices, but the issues were not prevalent and once remedied will not require continuous monitoring. For the most part, the information provided to us by the state employee unions indicated an understanding of, and general compliance with, the requirements associated with fair share fees. Additionally, fair share fees and union dues do not involve state funds. The fees and dues are deducted from state employees' paychecks and, presumably, the employees have some responsibility to review and verify these amounts themselves. Finally, state employees have the ability to challenge fair share fees before BMS, which provides a layer of oversight regarding state employee union fair share fees.

If the Legislature is interested in having more oversight of state employee unions' fair share fee calculations, there are three likely options; but there is not a perfect fit. The positives and negatives of each option are outlined below.

- **The Office of the Legislative Auditor (OLA)** is independent, has authority to audit fair share fee calculations, and could include fair share fees as part of its periodic payroll audits. Due to limited resources, however, such fair share fee audits would be infrequent.
- **The Bureau of Mediation Services** has expertise regarding fair share fee calculations, which would be helpful in an oversight role. However, providing periodic oversight of state employee union fair share fee calculations could jeopardize the agency's role as an impartial mediator in fair share fee challenges.
- **The Minnesota Department of Management and Budget's** current responsibility for processing payroll gives the department grounding in

¹⁷ See Christopher Dale, Minnesota State Colleges and Universities, Labor Relation Division, "Public Employees and Compelled 'Agency' or 'Fair Share' Fees" (The National Association of College and University Attorneys, June 29, 2010), 6-7, for a discussion of the employer's liability regarding fair share fee notification.

¹⁸ *Minnesota Statutes* 2012, 179A.06, subd. 3.

fair share fee issues. Additionally, MMB provides some limited review of fair share fee deductions—at least to the extent of identifying when an employee has double deductions taken from his or her paycheck. However, oversight by MMB would be complicated given the department's role negotiating contracts with state employee unions.

Recommendation

- The Bureau of Mediation Services should update its guidelines on chargeable union activities to reflect current Minnesota laws and recent court decisions regarding fair share fees. ([p. 19](#))



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June 3, 2013

James Nobles
Legislative Auditor
Room 140 – Centennial Building
658 Cedar Street
St. Paul, MN 55155

RE: Request for Information from the Minnesota Law Enforcement Association

Dear Mr. Nobles:

Thank you for your prompt response to my data request. As promised, the Minnesota Law Enforcement Association (MLEA) did call a special board meeting to reconsider its position regarding participation in the Program Evaluation of Fair Share Fee Calculations.

After careful evaluation of the request for information set out in your letter dated May 1, 2013, the background paper prepared by the OLA describing the project and applicable state statutes, the MLEA has determined that participation in the program evaluation is neither warranted nor appropriate.

As stated in prior correspondence, we do not believe that how unions representing State employees calculate fair share fees is either an “activity or program entered into or funded” by the State. Moreover, the calculation of union fair share fees is not a “[topic] that [is] likely, upon examination, to produce recommendations for cost savings, increased productivity, or the elimination of duplication among public agencies. *See Minn. Stat. §3.97, subd. 3a.* We note that in the OLA’s background paper describing the evaluation, the OLA even acknowledges that the evaluation is “atypical because it would examine the impact of union practices on individual members’ dues, rather than the broader impacts of a state law or program.” Therefore, MLEA asserts that the evaluation of union fair share fees and the data requested thereunder clearly fails to fall within the scope of a “program evaluation” as established by Minn. Stat. §§3.97, subd. 3a, and 3.971, subd. 7.

In fact, not only does the MLEA assert that the purported program evaluation is not within the scope of the above-cited statutes, but also the MLEA asserts that the request for specific and proprietary financial information from the union by the State of Minnesota, the employer of MLEA members, constitutes interference with the existence and/or administration of the MLEA which is an unfair labor practice under Minn. Stat. §179A.13, subd. 2.

June 3, 2013

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Please understand that the MLEA acknowledges that the OLA is merely carrying out the directives of the Legislative Audit Commission. We attribute no improper intent or purpose to the OLA. To the contrary, the MLEA has the utmost confidence in and respect for the OLA as a strictly unbiased and non-partisan agency that conducts its business with integrity.

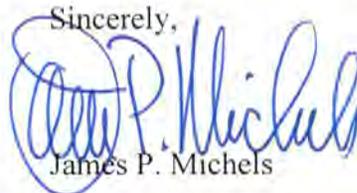
That said, we do not share the same confidence in the intent or purpose of the legislator who requested the program evaluation. His history of anti-employee and anti-union rhetoric and proposed legislation is well-documented and creates grave concerns among the members of the MLEA as to the motivation for the proposed program evaluation. The ability of a union to assess fair share fees is at the very heart of the "right to work" issue in that such legislation prohibits the collection of fair share fees and, thus, creates a situation in which certain employees are allowed to "freeload" by reaping the benefits of the union's work in representing their interests without sharing in the cost of providing those services. Given the recent attempts in this and other states to pass "right to work" legislation, we view the requested topic to be nothing more than an attempt to gain information about the internal financial operations of state employee unions which the MLEA fears would be distorted to pursue a clearly partisan and anti-union agenda.

If the issue of fair share fees were a legitimate topic for a program evaluation, a request could have been made for an evaluation of the Bureau of Mediation Services role in reviewing and evaluating fair share fee challenges pursuant to Minn. Stat. §179A.04, subd. 1. This challenge process clearly is a program maintained and funded by the State. However, it is clear from the statute that challenges are to be asserted only by union members and not by the employer as appears to be the case with regard to the program evaluation that actually was requested.

The member Associations that comprise the MLEA have fewer than five fair share fee payers, and neither the MLEA or any of its member Associations has ever faced a challenge to their fair share fees. Thus, although we have nothing to hide with regard to the OLA's data request, for the reasons outlined above, we respectfully decline to participate.

Your prior correspondence suggests that MLEA's lack of participation will be noted in the OLA's report. If the OLA deems it necessary to note the MLEA's decision to not participate, we request that you attach a copy of this letter as an appendix to the report so that the basis for the MLEA's position is clear.

Sincerely,



James P. Michels

cc: Mike Gruhlke

BMS

BUREAU OF MEDIATION SERVICES
State of Minnesota

July 18, 2013

James R. Nobles
Legislative Auditor
Room 140 Centennial Building
658 Cedar Street
St. Paul, MN 55155-1603

Mr. Nobles,

BMS has reviewed the report of your office titled *State Employee Union Fair Share Fee Calculations* (Report). Generally, BMS believes the Report is accurate and agrees with its findings. In particular we are aware that the document titled "residuum theory" which the BMS has used to explain how chargeable vs non-chargeable expenses are determined is outdated and does not reflect current case law nor changes in statutory coding. This agency has begun the process to prepare a replacement document which will be completed by the end of December 2013.

With respect to the Report's suggestions about options if the legislature decides further oversight of the fair share fees is warranted, BMS believes that this office is the proper place to house such a function. This agency currently performs a number of regulatory and quasi-judicial functions with respect to public employers and unions. These include: determining appropriate units, conducting unit clarification proceedings, determining issues appropriate for arbitration, establishing and regulating the state roster of labor arbitration, resolving data practice issues over access to employee's personnel data, and hearing fair share fee challenges. BMS presently employs a qualified staff of experts in labor relations who serve as investigators and when needed hearing officers in such matters. For these reasons, BMS is the natural place within state government for any additional oversight of the fair share fee process, if such is needed.

Respectfully,



Josh Tilsen, Commissioner,
Bureau of Mediation Services

July 17, 2013

James R. Nobles, Legislative Auditor
Office of the Legislative Auditor
140 Centennial Office Building
658 Cedar Street
St. Paul, Minnesota 55155

RE: State Employee Union Fair Share Fee Calculations Program Evaluation

Dear Mr. Nobles:

Thank you for the opportunity to review and comment on your program evaluation report on "State Employee Union Fair Share Fee Calculations."

We have reviewed the report and the related findings. As there are no recommendations related to MMB in the report, we have no specific implementation response. The finding related to MMB is accurate. As you note in your report, MMB has two roles related to state employee unions' fair share fee calculations. MMB processes the statewide payroll including deductions for both state employee union dues and fair share fees. We do not verify the information provided by the unions for deductions nor do we review the calculations. We also serve as the primary labor negotiators for the state; however, fair share fees have not been specifically discussed in recent negotiations.

Thank you for your and your team's work and the opportunity to comment. We value your contributions to better government.

Sincerely,



Jim Schowalter
Commissioner

c: Judy Randall

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Miscellaneous

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Minnesota State Lottery, February 2004

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