Teachers and the Agency Shop Agreement

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The advent of state collective bargaining statutes which permit bilateral decision-making between public employees and governmental units are of comparatively recent origin, with the first public employee statute enacted in 1964. Twenty-six states to date have enacted statutes which either include specific classes of employees, e.g., teachers, policemen, firemen, county employees, etc., or which make a blanket inclusion of employees divided only by the supervisory, non-supervisory rubric. In either case, the courts have consistently upheld the legality of such statutes dictating that each constitutes a grant of special privilege, or immunity, for employees, and therefore does not impinge upon the sovereign rights of the state.

Legal Status of the Agency Shop

With the passage of a bargaining statute in a given state, several issues collateral to the actual statute tend to arise. Among such issues is the question of the right of public employee negotiating units to bargain, or opt by statutory inclusion, for the right to have an agency shop agreement. An agency shop is defined as: one which conditions employment on the employees paying a fixed sum each month for the duration of the agreement to defray the union's expenses, whether or not he is a union member. Hence, under an agency shop, all employees pay dues to the union but need not join the union.[1]

The Hawaii Collective Bargaining Statute has included the agency shop provision as a portion of the act; consequently, teachers in Hawaii will be required to pay a fee for the services the negotiation unit renders for all the teachers in the state. Thus, even though a teacher does not choose to join a representative organization (Hawaii Education Association or Hawaii Federation of Teachers), he or she will automatically be assessed a service fee to "defray the cost of services rendered by the exclusive representative in negotiations and contract administration."[2] The Hawaii statute is clear in stating that an employee may choose not to join a union, and can refrain from participating in any union activities. However, the statute mandates that the teacher must make a payment of a service fee, which is equal to the cost of carrying out the negotiation function, to an exclusive representative.

When a public negotiation statute, either by statutory language, by presumption, or through the route of bargained contracts with school districts, allows an agency shop to become a reality in a state, teachers have raised questions about the validity of such action. Teachers in Hawaii as elsewhere are asking, "Must we pay fees to an organization if we choose not to join?" Section 3, of the Hawaii Public Employee Statute, states in part that, "An employee shall have the right to refrain from any or all such activities, except to the extent of making such payment of service fees

to an exclusive representative." Continuing in Section 4, "... the representative shall furnish a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement..."

There are two apparently conflicting concepts about the legality of the state forcing a teacher to pay a nongovernmental agency for personal services which he has not requested, even though he may receive certain collateral benefits from this service. From the point of view of the teacher who does not wish to pay the agency shop fee, his constitutional rights are being violated, particularly his First Amendment guarantee to right of association and protection of privacy, and the Fourteenth Amendment's due process guarantees. Both of these federal guarantees are buttressed in every state constitution as well. A related legal question involves the limitation of the policing power of the state, which refers to the limits that the state may employ to protect the public. If these personal rights are substantially breached, the courts will undoubtedly have to strike down agency shop provisions.

The second concept which the courts must consider when ascertaining the legality of agency shop centers around protection of a union's right to be the exclusive representative of the employees. If, by law, a union must bargain for all the teachers of an appropriate unit, whether or not they are members of the organization, then the union has a right to protection of its bargaining prerogative. If teachers are not compelled to contribute financially to the union, many would accept the gains won by bargaining but would not assist the organization financially. The result would be that the membership which paid the cost of negotiation by the union organization would soon decline, since all teachers would receive the same benefits, and the union would collapse financially.

The second concept of union protection has been upheld in the private sector by a series of rulings by the National Labor Relations Board which have been upheld by various court tests. Public Employee Relations Boards have tended to follow the NLRB rulings, and the logic behind them. When cases have gone to the courts, the rulings have tended to be split between the individual guarantees and the union solidarity concept.

The agency shop question has not yet been tested in Hawaii due to the relatively recent passage of the collective bargaining statute. However, there have been judicial tests of the validity of agency shop in public employment in various other states.

In September, 1969, a Michigan trial court upheld a union security agreement, or agency shop. The court held that the Grand Rapids Civil Service Board had no authority to require reinstatement of employees who were discharged when they refused to comply with a union security contract. Although this case did not directly apply to teachers, it did involve public employees who were required either to pay union dues, or pay by "check-off" an equivalent of the monthly dues. An interesting angle in this case was that the money was not to be given to the municipal union, but instead the equivalent amount was placed in a scholarship fund for children of the city employees for educational purposes. Even though this case was a modification of the traditional agency shop agreement, the court found it to be no different than the pure agency shop. The court found that the modified agency shop did not encourage or discourage membership in a labor union, as proscribed by the Public Employees Relation Act, any more than the straight agency shop, and that the policy of "check-off" was not illegal.[3]

The Michigan Court of Appeals, in its first ruling on the issue of agency shop, refused to disturb a circuit court decision upholding the agency shop. The circuit court refused to enjoin the discharge of four nurses who failed to comply with the agency shop provision of a contract between Wayne County and the American Federation of State, County, and Municipal Employees Council 23.[4]

Although the above two cases do not involve teachers, there have been several Michigan cases in which teachers have been discharged over agency shop provisions. A teacher with twenty-three years of service was dismissed because she failed to pay an agency shop fee which was a part of the contract between the Grand Blanc Teachers' Association and the Board of Education. The teacher, Miss Applegate, appealed to the Michigan Tenure Commission which upheld her discharge as reasonable. Their reasoning was that an agency shop is a benefit to employees in securing a sound, unified approach to employee representation.[5]

A suit dealing directly with teachers and the matter of payment of a service fee was filed by a group that called themselves the Teachers Opposed to Compul-

sory Unionism, who challenged the agency shop provision in the contract between the Detroit Federation of Teachers and the Board of Education. The suit, filed on November 7, 1969, charged that the agency shop provision denied the city's teachers their civil rights as well as rights guaranteed by the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution, and Article I of the Michigan Constitution.

The agency shop provision required that teachers begin within 60 days to pay each month a service fee in an amount equal to the regular monthly union membership dues uniformly required of employees of the Board of Education who were members as a condition of employment. In dismissing the case, the judge found that the agency shop provision was not "repugnant to any statute or constitutional provision. No where can this Court find any arbitrary or discriminatory provisions in the principle of the agency shop clause."[6]

With respect to the constitutional questions raised in this suit, the court concluded that a provision for an agency shop does not require plaintiffs to become members nor join the defendant union; thus it does not violate freedom of association or right of privacy. Further, the court found that since the contract provided that dismissal procedures of the Michigan Tenure Act be followed, there would be no discrimination against employees without the safeguard of due process. In conclusion, the court stated that:

> "The Public Employees Relation Act authorizes contracts between employees and their public employers to cover conditions of employment. The agency shop is apparently a condition of employment agreed upon by the contracting parties, and where not violative of any individual rights, will be sustained. As to the issue of whether this clause encourages or discourages membership in a union, this Court would conclude that the clause does not violate this provision of P.E.R.A. Nothing encompassed in the agency shop clause encourages anyone to do more than contribute to the organization selected by a majority of the group to represent it. This contribution merely spreads among all the beneficiaries the cost of representation."[7]

The Detroit Teachers Opposed to Compulsory Unionism attempted to appeal the decision, but the Michigan Court of Appeals refused to change the decision of the trial court.

It is clear that in Michigan, the courts and public employee agencies in the cases cited have supported the concept of union security. Both in the Detroit case and in Smigel v. Southgate Community Schools, which is reported in the next section of this article, the courts have commented that they could detect no breach of constitutional guarantees in an agency shop provision in public employment.

Cases involving the legality of an agency shop also have been litigated in other states with somewhat different results. In Akron, Ohio, the agency shop clause in an agreement between the Civil Service Personnel Association Local 1360, and the city of Akron, was declared invalid by the Court of Common Pleas as contrary to the state constitution and as a denial of equal protection of the law. The defendant in this case, the mayor of Akron, argued that the agreement in question was merely a private contract between himself and the local union, and thus it did not bind the city. The Association, however, asserted that in signing the contract, the Mayor was acting as the chief executive officer, thus binding the city and making the agreement enforcible.[8] The agency shop clause in question here provided that new employees who did not wish to join the union were subject to a mandatory check-off by the city equal to membership dues in the union.

In declaring the agency shop to be invalid, the presiding judge stated that policy statements made by city officials are legal up to the extent to which they purport to bind the city or control civil service employees; at such a point they become illegal. "A Mayor has no more right to privately agree to fire a civil service employee because he will not pay money to a particular union than he does to fire a civil service employee because he will not contribute to a particular political party. Therefore, to the extent the subject agreement purports to do so, it is invalid. The Constitution of Ohio provides for appointment and promotion in the area of Civil Service Employment by merit and fitness. There is no relationship between payment of union dues and merit and fitness for a job. If a city can fire a person because he will not pay union dues, then there can be no limit to the abuse that could follow."[9]

The issue of the right of a municipal corporation to enter into agency shop agreement has been argued from a different constitutional point in another Ohio case. In Faltz v. City of Dayton, the Common Pleas judge declared an agency shop agreement between the city of Dayton and Local 101, Dayton Public Service Union invalid because it exceeded the police power of

the city. A prior Ohio Supreme Court decision, Hagerman v. City of Dayton, said in part that an agency shop does not accomplish a governmental, public, or municipal purpose, but merely promotes the private interests of a non-public corporation. Therefore it is a violation of the police power of the municipality.[10] The Faltz decision subsequently was upheld by the Ohio Court of Appeals on the same grounds.

Obviously the courts in Ohio, which have not yet enacted a public employee negotiation statute, have chosen to base their decision on the constitutional rights of the individual and the proper exercise of police power rather than on the union security issue. Several of the right-to-work states have also successfully fought agency shops in states where no public employment statute exists.

The foregoing cases centering on the legality of an agency shop for employees, i.e., public school teachers, have all been conducted at the state level. Examination has failed to uncover a specific case with respect to agency shop provision for public employees which has been taken to the U.S. Supreme Court. However, a review of labor and labor relations in the law encyclopedias does not uncover specific rulings on labor relation cases which have bearing on public employees with respect to an agency shop.

Section 158 (a) (3) of 29 USC, permits union-security agreements requiring union membership as a condition of employment on or after the 30th day following the beginning of employment or the effective date of the agreement, whichever is later.[11] Initial hiring, however, cannot be conditioned on union membership. This section continues to state that an employee can refuse all union obligations except payment of dues and cannot be fired for not joining the union. A union does not violate the above noted section by invoking a valid union-security agreement which would cause an employer to fire an employee for "his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." With respect to a specific section on agency shop, Section 158 (a) (3) of 29 USC:

> does not outlaw an agency-shop provision under which continued employment is conditioned on the payment of a sum equal to the regular monthly dues payed by union members, with membership available at the employee's option and on non-discriminatory terms.[12]

What is the significance of the rulings on the legality of agency shop for teachers in Hawaii? Court cases and public employee relations boards tend to follow one of two tracks in their decision on this issue. In states where public employee bargaining statutes have been enacted, the union security rule seems predominant and the agency shop upheld. In other jurisdictions, the question turns on an exercise of personal freedom and police power. In those states, the right to discharge an employee for failure to support an agency contribution has not been sustained. Since the Hawaii Collective Bargaining Act is specific on the issue, it would seem that the courts would give the greater weight to arguments supporting union security, in absence of any obvious attack on constitutional guarantees. Thus it appears that agency shop is legal and employees must pay the service fee, regardless of their own personal attitudes.

The Amount of the Service Fee

A second legal issue which may become a question for litigation involves the amount of money which may be assessed as a service fee. It appears that courts have differed with respect to the amount of the service fee in relation to the union dues. An "informal" statement made to teachers in Hawaii by organizers from one of the organizations attempting to gain membership was that a teacher "might as well" join his organization, for if his organization won the representative election, the service fee would be as much as the present dues.

The problem reflects the other fact of the union security concept. Stated simply, if the agency fee is high enough, it will discourage membership in any other representative organization which might choose to challenge the exclusive representative in a later representation election. Thus, control of the amount of the agency fee may act as a bar to competition by another organization.

In decisions previously reviewed in this article, the courts upheld a service fee which was equal to the amount of the monthly union dues. This had been the circumstance with the public employees cases in Michigan going before the court until 1970. In the case of the Detroit Teachers Opposed to Compulsory Unionism, the presiding judge stated that such a manner of payment merely spread the cost of representation among all those that benefited from it.[13]

In a recent case which came before the Michigan Court of Appeals (August, 1970), the court upheld an

agency shop contract with proviso that the fee in lieu of a membership fee "must be equivalent to a non-member's proportionate share of the cost of negotiating and administering the contract involved." The ruling came on an appeal of a circuit court decision in a class action brought by Jean Smigel and other non-union members of the Southgate Education Association to challenge the agency shop provision in the 1968-1970 contract between the Southgate Education Association and the Southgate Community School District. Smigel and 96 other teachers were protesting the payment of an agency fee which was equal to the local, state and national dues of the exclusive negotiating agent. They held that the Association could only collect a fee which was equal to the local cost of negotiating the contract, and that a higher fee was discriminatory and therefore in violation of the Michigan Public Employment Act. The circuit court judge found in favor of the Association, but the Michigan Court of Appeals remanded the case back to the circuit court with instructions that it determine whether the agency payment required of each non-member of the Southgate Education Association was, in fact, proportionate to the costs of the contract administration. The presiding judge concluded that "if payment is greater than or less than that proportionate share, the agency shop provision violates the state's Public Employee Relations Act."[14]

State legislatures are beginning to recognize the problems connected with agency shop provisions in public employment. Massachusetts was the first state to amend its Public Employment Negotiation Act to specifically allow agency shop agreements. The act requires acceptance of any collective negotiation contract which stipulates that a fee shall be paid by all employees affected by the bargaining negotiations whether or not they are union members. Further, the act provides that the agency service fee must be proportionately commensurate with the cost of collective bargaining and contract administration and that it must be deducted only during the life of the collective bargaining agreement.[15]

The Hawaii Public Employee Bargaining Act is somewhat more specific than the Massachusetts statute, as it mandates that a service fee shall be assessed against all employees in a bargaining unit to defray the cost of services rendered by the exclusive representative in negotiations and contract administration. The statute also places the responsibility for determining the amount of the service fee in the hands of the Hawaii Public Employee Relations Board (HPERB).

Determination of the amount of the service fee for teachers will be a most vexing problem for HPERB to resolve. If the fee is too high, it will act as a bar to further competition between the organizations which are preparing for further representation elections. If it is too low, union solidarity is in jeopardy, as the Association may not be able to maintain itself financially because teachers will find it cheaper not to continue their membership in the organization.

The Hawaii State Teachers' Association has filed a petition requesting an agency fee which is equal to the state and national dues for its organization, and HPERB is presently reviewing the evidence to determine the amount to be assessed. In the opinion of this writer, if the service fee to be charged to teachers in the state is equal to the HSTA membership dues, the decision may well be challenged in the courts by the Hawaii Federation of Teachers.

The Hawaii Federation of Teachers has little choice but to do so, whether or not it avails them anything, since they will undoubtedly lose membership if the fee is identical to the membership dues. However, the Smigel case in Michigan, which held that the fee must be proportionately commensurate with the cost of collective bargaining and contract negotiations, makes it appear likely that other legal opinions will be presented on the matter of the dollar amount of the service fee which will be paid by public employees.

Summary

A statutory provision in the Hawaii Public Employee Bargaining Act establishes an agency shop relationship which will affect teachers. While no test of the legality of this provision has been made in Hawaii, public employees in other jurisdictions have raised legal questions about the right and power of a state to create agency shop agreements among its own personnel. The weight of case law appears to be that the state is within its legal powers to legislate agency shop agreements, and that the civil rights of public employees are not jeopardized by such actions.

The issue of the amount of money which may be withheld from the employees is not clear. The latest court decision in Michigan states that the amount shall be less than the amount paid by dues-paying members

of the organization. Other courts have allowed an amount equal to the monthly organizational dues. The Hawaii Public Employee Relations Board (HPERB) is empowered to make the decision about the reasonableness of the deduction for employees in Hawaii.

Teachers or school administrators should be aware of their rights and responsibilities under the Hawaii Public Employee Bargaining Act, and be prepared to act if there appears to be a violation of these rights. The vitality and responsiveness of teacher organizations is, in part, maintained by the readiness of the membership, and the non-members, to question the decisions of such organizations. The care with which an organization handles the agency shop provision will be a significant part of its stewardship in the years ahead.

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