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A Remedy for Taxpayer Giveaway to Unions

Time to Enforce Missouri Constitution's Bar on Gifts to Private Parties

By *Trey Kovacs**

Use of taxpayer funds should be reserved for purely public purposes, not the private benefit of an individual, corporation, or association. Yet, a number of Missouri public employee unions receive a direct subsidy from the state or local government in the form of release time, a practice that allows public employees to conduct union business during working hours without loss of pay.

Fortunately, several provisions in Missouri's constitution, known as "gift clauses," ban government subsidies that primarily benefit private entities. Missouri's constitution states: "The general assembly shall have no power to grant public money to any private person, association or corporation," with limited exceptions in instances of "public calamity" and old age assistance. It also bars local governments from granting "public money or thing of value to or in aid of any corporation, association or individual."¹

Paid release time place no obligation on government unions to provide anything in return to the public in exchange for the subsidy.² Missouri state agencies commonly grant release time to unions as part of collective bargaining agreements (CBA). In general, activity conducted on release time includes preparing and filing grievances, engaging in political activity, negotiating contracts, and attending union meetings and conferences. (Permitted activity or the amount of release time granted to government unions varies from CBA to CBA.)

Activities performed on release time by public employees often conflict with taxpayers' interests, and may even force taxpayers to fund political activity they oppose. For example, public employees on release time often lobby elected officials to support specific legislation. Public employee unions generally support more government spending, which leaves to more government hiring and more potential union members.

Release time works against the public interest in another way, as a recent Goldwater Institute report shows. When release time is used to negotiate contracts, "a public employee, being paid public wages, is negotiating for private benefits against another

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public body. When release time employees use release time to negotiate over wages and benefits, taxpayers are literally funding both sides of the negotiation with no seat at the table themselves.”³

Overall, activity performed on release time serves the interests of unions. Unions should incur those costs, not taxpayers. But despite the constitutional restriction on granting public aid to private entities, Missouri state agencies, city governments, and public schools continue to provide release time to public-employee unions.

Lack of Transparency. The amount of time, cost, and activities performed on union release time at Missouri public employers is not easily available. The only way to discover the cost of the union subsidy is to submit public records requests. The Competitive Enterprise Institute (CEI), submitted a number of public records requests to state agencies, city governments and public schools throughout Missouri.

A major finding of CEI’s public records requests is the lack of transparency and accurate recordkeeping surrounding the union subsidy. Overall, only a small minority of Missouri government employers could provide satisfactory responses to CEI’s public records requests.⁴

For example, a collective bargaining agreement that covers the Missouri Department of Corrections and other agencies grants 1,200 hours of paid release time annually to the local union of the American Federation of State, County and Municipal Employees Local. However, CEI could not obtain the department’s release time data because of a prohibitive fee—on which more later.

An overview of responses from Missouri government agencies follows.

Failure to Track or Disclose Release Time Records. Many Missouri government employers did not track release time records and could not provide the cost, amount or activity performed on release time. Another impediment is that some government officials determined that release time records are closed by law, even while others considered release time records open to the public.

The Grandview School District’s Custodian of Records response sums up this lack of proper record keeping. Not only did the Custodian of Records inform us that release time records are closed under the state’s Open Records Act, but that “the District does not maintain or possess any records responsive to this request. I am not aware of which agency, if any, that maintains records responsive to your request.”⁵

In Kansas City, the Office of the City Manager responded that its legal department came to the decision that records related to a specific employee activity are closed under the Open Records Act. Further, city officials said they do not keep records pertaining to CEI’s request and “would not be able to state how many overall hours of union leave has been granted to employees.”⁶

The City of Springfield records manager said the city could not fulfill CEI's release time records request because the majority of union activity during work time is governed by informal practices throughout the city and is not tracked separately.⁷

However, the Springfield Records Manager did send over the formal policy regarding release time. The City of Springfield Fire Department "Policies and Procedures" document provides release time for the International Association of Fire Fighters (IAFF) Local 152's President and Secretary-Treasurer to attend monthly union meetings and special business meetings. Other employees are allowed to attend union meetings providing other staff are available. Union officers may also use release time to attend grievance procedures, contract negotiations, and other special meetings.⁸

Alarming, the IAFF President and Treasurer are able ignore their public duty to attend their meetings even if "manpower is not available on the shift, the officer in charge shall either call back someone of equal rank off duty to fill in during the absence, take the vehicle out of service, or make what arrangements are best for the conditions at the time to maintain fire protection coverage and allow the Union Officers to attend their meeting."⁹

In effect, the City of Springfield Fire Department release time policy allows for the possibility of a vehicle being taken out of service, resulting in a reduction in public safety services, so that union officers can attend a union meeting on the city's dime.

Missouri Government Employers Stall and Reject Public Interest Fee Waiver. Another obstacle to obtaining release time records was Missouri public employers' denial of CEI's public interest fee waiver. Under Missouri's Sunshine Law, the "public governmental body determines that waiver or reduction of the fee is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the public governmental body."¹⁰

Making public both how tax dollars are spent and which activities public employees perform while on release time should fall within the above standard. CEI's fee waiver was rejected by the Missouri Department of Corrections, Saint Louis Public Schools, and the City of Independence. Charges from the Saint Louis Public Schools and Department of Corrections were prohibitive.

Other agencies tried other stalling tactics, including overestimating the time and money required to release records and claiming more records were closed than actually were.

Saint Louis Public Schools calculated that our request would take 40 hours and 200 paper copies. At 10 cents per page and the \$20 per hour to perform research, a pre-payment of \$820 was required to obtain release time records.¹¹

The Department of Corrections initially claimed its union release time records were closed.¹² Then upon informing the agency that other Missouri government employers found release time records were open under Missouri's Sunshine Law, the department conceded and agreed to make the requested records available. However, the Deputy General Counsel responded that the Department of Corrections only recorded release time on handwritten slips and that the estimated cost to fulfill CEI's request would be \$22,030 and require 1,941 man-hours to complete.¹³

Satisfactory and Partial Release Time Responses. Of the agencies that provided release time data, the majority could only partially fulfill CEI's request.

At the City of St. Charles Fire Department, the agency provided the amount of release time granted along with the employee names and salaries, but did not track the activity performed. In total, employees were released to conduct union business for 121.5 hours in FY 2012 and 191.5 hours FY 2013, at a cost of \$2,957.61 and \$4,870.45, respectively.¹⁴

Although the City of St. Charles tracked Fire Department release time, the Deputy City Clerk reported that the Police and Public Works Departments do not track release time separately and "have not been recording union business on daily schedules, therefore they have no record or names for union business."¹⁵

The Parkway School District also gave an incomplete response. It did not produce employees' names or track release time use or costs incurred by one of its unions, the Parkway Nurses Association.¹⁶ It did release the following:

- During the 2011-2012 school year, the Parkway School District issued the Communication Workers of America (CWA) 20 days of release time at a cost of \$2,489.76. Additionally, the school district paid \$25,602 of the Parkway National Education Association (PNEA) president's \$87,300.00 salary.¹⁷
- In 2012-2013, the Parkway School District granted 18 days of release time to CWA and PNEA, combined, at a cost of \$4,260.66. During this school year, the Parkway School District paid \$26,126 of the PNEA's union president's \$89,100.00 salary.¹⁸
- In 2013-2014, 23.5 days of release time were granted to CWA and PNEA at a total cost of \$6,115.50. In addition, the Parkway School District paid \$28,026 of the PNEA's union president's salary.¹⁹

CWA and PNEA members spent most of their release time conducting partisan political activity or attending union meetings and conferences. For example, CWA was allotted 39 days of release time. Of those days, CWA members spent 31 of them participating in "Lobby Day, Jefferson City," which is an event set up by the CWA and other public-employee unions to lobby legislators.²⁰ On Lobby Day 2013, the CWA sent 10 members on release time to the state Capitol, where they lobbied legislators to vote against right to work and paycheck protection laws.²¹

PNEA political activity on release time involved attending seven days of the National Education Association (NEA) Capitol Action Day, part of the union's lobbying strategy.²² PNEA members on release time also attended the Missouri National Education Association (MNEA) Spring Rep Assembly,²³ where union representatives from around the state discuss internal union business.²⁴

The Lindbergh School District provided all requested information. In 2012, employees spent 15 hours on release time at a cost of \$929.68. In 2013, the union was granted 31.34 hours of release time at a cost of \$1,942.21.²⁵

Lindbergh School District employees on release time also primarily engaged in political activity or attended union meetings including Capitol Action Days-Jefferson City, Missouri State Teachers Association (MSTA) Legislative Day, Regional Assembly for MNEA, Missouri State Teachers Association state convention, MSTA state convention, and MNEA Representative Assembly.²⁶

Another complete response came from the Northwest R-I School District. In 2013, the school district granted 57 hours of release time at a cost of \$2,326.61. Mainly, the activity performed was related to union politics, such as participating in Capitol Campaign Day, MNEA Legislative Day, and Capital Action Day-Jefferson City.²⁷

Overall Findings from Public Record Requests. In general, Missouri government employers do not sufficiently track or maintain release time records. Of the reported activity conducted on release time, Missouri public employees on primarily engaged in partisan political activity or attended union conferences—undertakings that are completely unrelated to what they were hired to do.

The hours and cost of release time in Missouri obtained by CEI's survey is just the tip of the iceberg. Many public employers do not track the cost of release time. Moreover, CEI's survey of release time provisions in Missouri was not comprehensive and it is likely that many other Missouri public employers grant public-employee unions release time.

Missouri's Gift Clause Prohibits Subsidies. Missouri's constitution contains several provisions known as gift clauses that prohibit the state and local governments from granting public money or a thing of value to associations and corporations.²⁸

The state constitution prohibits any public expenditure to private entities "without regard to the purpose of the grant or loan. A proviso has been judicially grafted onto this and similar sections, however, which permits grants of public money to private entities if the grant is for a public purpose."²⁹

The judicial rule created by Missouri courts to determine the validity of public expenditures is known as the "primary effect" test:

If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful. But if the primary object is not to subserve a public municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose.³⁰

Under the primary effect test, the primary object of the public expenditure must be to promote a public purpose and a private entity may benefit from it only incidentally.³¹

Release time is at conflict with the primary effect test. Government unions are the primary beneficiaries of release time and they use it to promote their own ends, not a public purpose. Only government unions benefit from lobbying legislators, attending union conferences, or any other activity performed on release time.

Release Time Successfully Challenged in Arizona. Release time has been successfully challenged and deemed an unconstitutional public expenditure under Arizona's gift clause, which reads:

Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.³²

In 2011, the Goldwater Institute filed a lawsuit on behalf of taxpayer plaintiffs against the release time provisions in the contract between the City of Phoenix and the Phoenix Law Enforcement Association (PLEA), which cost taxpayers approximately \$900,000 annually, according to the complaint.³³

Maricopa County Court Judge Katherine Cooper used a two-part analysis of public expenditures (used by the Arizona Supreme Court in *Turken v. Gordon*) to examine whether release time aided the private interests of government unions and is illegal public aid under the gift clause or serves a public purpose.³⁴ Similar to Missouri's primary effect test, in Arizona, (1) a public expenditure must promote a public purpose and (2) the public entity must receive proportionate, quantifiable and direct benefit for the aid given.³⁵

The court established the PLEA uses release time to advance the interests of its members only. Judge Cooper found that release time does not advance a public purpose and "diverts resources away from law enforcement."³⁶ She found that the benefits of release time accrue exclusively to police employees and that there is little to no accountability for how union release time is spent.³⁷

Because the labor contract between PLEA and the City of Phoenix does not require the union to perform any service in return for release time, the court held the

issuance of union release time does not meet either standard for a proper public expenditure under the state's gift clause and is unconstitutional.

The Goldwater Institute's lawsuit against release time provisions in the City of Phoenix contract is currently on appeal. Most recently, on January 24, 2014, Judge Cooper, ruling in favor of taxpayer plaintiffs, found release time unconstitutional. She enjoined the practice in the city's contract with the police union and urged for the injunction to be applied to all other public unions in Phoenix."³⁸

Conclusion. At a time when the demand for government services exceeds the resources available it is exactly when government should cut funding for activities that do not advance a public purpose. Under union release time, the government pays unions to lobby for higher compensation for their members, and thereby take as many resources from the taxpayers as possible. This is clearly unjust.

Under Missouri's gift clauses taxpayers are authorized to file suit challenging this unnecessary government expense. Another option is for the Missouri legislature to prohibit the practice.³⁹ Taxpayers have the tools to put an end to the government's practice of giving away the resources of the state to private entities for private benefit. It is now time to act.

Notes

¹ Gift Clauses contained in Missouri's constitution include: MO. CONST. art. III, Section 38(a), MO. CONST. art. III, Section 39, MO. CONST. VI, Section 23, MO. CONST. VI, Section 25.

² Testimony of James Sherk before the Committee on Oversight and Government Reform United States House of Representatives, *Official Time: Good Value for the Taxpayer?* 112th Congress, June 1, 2011, <http://www.heritage.org/research/testimony/2011/06/official-time-good-value-for-the-taxpayer>.

³ Jonathan Riches, et al., "Public Money for Private Gain: Legal Strategies to End Taxpayer-Funded Union.

Activism and Pension Spiking," Goldwater Institute, June 10, 2014, http://goldwaterinstitute.org/sites/default/files/Release%20Time_0.pdf.

⁴ Complete public employer response to CEI's public record request would include cost, time, employee name, salary and activity performed on union release time.

⁵ Grandview School District Custodian of Records, Public Record Request, email to report author. May 15, 2014.

⁶ City of Kansas City Office of the City Manager, Sunshine Record Request, email to report author. April 25, 2014.

⁷ City of Springfield Records Manager, Sunshine Law Request, email to report author, May 12, 2014.

⁸ Springfield Fire Department, MO, Policies and Procedures, "Union Officers—Meeting Attendance."

⁹ Ibid.

¹⁰ Missouri Revised Statutes Chapter 610, Governmental Bodies and Records, Section 610.026.1, <http://www.moga.mo.gov/mostatutes/stathtml/61000000261.html>.

¹¹ Saint Louis Public Schools Custodian of Records, Public Records Request, email to report author, May 27, 2014.

¹² Missouri Department of Corrections Deputy General Counsel, Public Information Request, email to report author, May 19, 2014.

¹³ Missouri Department of Corrections Deputy General Counsel, Public Information Request, email to report author, May 30, 2014.

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- ¹⁴ City of Saint Charles Deputy City Clerk, Union Business—Web Submissions Findings, email to report author, April 24, 2014.
- ¹⁵ Ibid.
- ¹⁶ Parkway School District Director of Communications, Public Information Request, email to report author, May 7, 2014.
- ¹⁷ Ibid.
- ¹⁸ Ibid.
- ¹⁹ Ibid.
- ²⁰ “Public Worker Lobby Day a Huge Success,” AFSCME Local 72, accessed August 18, 2014, <http://www.afscmecouncil72.org/node/155>.
- ²¹ Collin Reischman, “Union workers lobby lawmakers against paycheck bill,” *The Missouri Times*, March 27, 2013, <http://themissouritimes.com/1915/union-workers-lobby-lawmakers-against-paycheck-bill/>.
- ²² “Capitol Action Days,” Missouri National Education Association, Accessed on August 18, 2014, <http://www.mnea.org/Missouri/PoliticalAction/2.aspx>.
- ²³ Parkway School District Director of Communications, Public Information Request, email to report author, May 7, 2014.
- ²⁴ “MNEA Spring Representative Assembly,” Missouri National Education Association, accessed August 18, 2014, <http://www.mnea.org/Missouri/SpringRA.aspx>.
- ²⁵ Lindbergh Schools Communication Specialist, Public Records Request, email to report author, May 23, 2014.
- ²⁶ Ibid.
- ²⁷ Northwest R-I School District Coordinator for Human Resources, “Human Resources—Contact Us,” May 13, 2014.
- ²⁸ See note 1.
- ²⁹ *Menorah Medical Center v. Health & ED*. FAC. A. NO. 61031. 584 S.W. 2d 73 (1979). http://leagle.com/decision/1979657584SW2d73_1656/MENORAH%20MEDICAL%20CENTER%20v.%20HEALTH%20&%20ED.%20FAC.%20A.
- ³⁰ *Curchin v. Missouri Indus. Dev. Bd.*, 722 S.W.2d 930, 934 (Mo. banc 1987) citing *State ex rel., City of Jefferson v. Smith*, 348 Mo. 554, 558, 154 S.W.2d 101, 102 (1941), http://www.leagle.com/decision/19871652722SW2d930_11605.xml/CURCHIN%20v.%20MISSOURI%20INDUS.%20DEVELOPMENT%20BD.
- ³¹ Kevin F. O’Malley, “Missouri’s Changing Public Purpose Doctrine,” *Saint Louis University Law Journal*, Vol. 658, No. 16 (1971-1972).
- ³² Ariz. CONST. Art. 9, Section 7, <http://www.azleg.gov/FormatDocument.asp?inDoc=/const/9/7.htm>.
- ³³ “City, Police Union Sued by Taxpayers,” Goldwater Institute, December 8, 2011, <http://goldwaterinstitute.org/article/city-police-union-sued-taxpayers>.
- ³⁴ *Turken v. Gordon*, 223 Ariz. 342, 350, 224 P.3d 158, 165 (2010). The case involved a complex economic development agreement that would pay NPP CityNorth, a private entity, nearly \$100 million from the city of Phoenix to build a mall. From the case, a two-part analysis was created to examine the validity of government subsidies, <http://goldwaterinstitute.org/sites/default/files/CityNorth%20decision.pdf>.
- ³⁵ Rebecca Burnham, “Arizona Supreme Court Clarifies ‘Gift Clause’ Limits on Public Payments to Private Parties,” Greenburg Traurig Litigation Alert, February 2010, <http://www.gtlaw.com/News-Events/Publications/Alerts/133643/Arizona-Supreme-Court-Clarifies-Gift-Clause-Limits-on-Public-Payments-to-Private-Parties>.
- ³⁶ *Cheatham, et al. v. Gordon, et al.*, No. CV 2011-021634, Superior Court of Arizona Maricopa County, June 5, 2012, <http://goldwaterinstitute.org/sites/default/files/m5273505.pdf>.
- ³⁷ Ibid.
- ³⁸ See note 3.
- ³⁹ “Prohibition on Paid Union Activity (Release Time) by Public Employees Act,” American Legislative Exchange Council, <http://www.alec.org/model-legislation/prohibition-on-paid-union-activity-release-time-by-public-employees-act/>.