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A Remedy for Fairfax County’s Taxpayer Giveaway to Unions “Release Time” Allows Government Employees to Do Union Work at Public Expense

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

Fortunately, a provision in Virginia’s constitution, known as the “Gift Clause,” bans government subsidies that primarily benefit private entities. Virginia’s constitution states:

Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation ...¹

In a procedural memo, Fairfax County Public Schools (FCPS) outlines approved release time activity.² According to the memo, permissible release time activity includes attending “employee group meetings, meetings with the Board of Supervisors ... participation on committees or task forces established to review employee-related issues.”³

This amounts to paying unionized government employees to lobby government officials, which often conflicts with taxpayer interests and may force taxpayers to fund political activity they oppose. Each union receives 240 hours per year to meet with the Board of Supervisors and attend various committee meetings (there are 10 unions that receive the taxpayer funded subsidy).⁴

FCPS employees are also permitted to attend union conventions or conferences on release time—each union is allotted another 240 hours per year for this purpose.⁵ These conferences may be purely political in purpose. There is no restriction on what kinds of conferences or conventions union employees may attend.

Preparing and assisting union members with a grievance is also a permissible release time activity. There is no limit on how much release time a union may use for this purpose.⁶

All the above release time activity is purportedly approved and supervised by FCPS so that there is no disruption to operations arising from the government employee’s absence. Audits of release time are required periodically. Unfortunately, a Center on National Labor Policy

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report notes that the information gleaned from public record request documents and confidential conversations with a Fairfax County supervisor show that release time record-keeping is “lackadaisical” and “non-existing auditing prevent accurate assessment of costs.”⁷ In addition, the union is responsible for tracking and recording release time, which raises further questions about the transparency of the practice.

Overall, activity performed on release time serves the interests of unions. Unions, not taxpayers, should incur those costs, which FCPS has been paying for since 1986, despite the constitutional restriction on granting public aid to private entities.⁸

Public Records Requests. The amount of time, cost, and activities performed on union release time at FCPS is not easily available. The only way to discover the cost of the union subsidy is to submit public records requests. Even with submitting public record requests, the tracking of release time is poor and does not illustrate its full hours and associated costs.

According to public records requests and calculations made by the National Center for Labor Policy, FCPS needed substitutes for 132,529 hours while public employees conducted union activity on release time over a three-year period. The cost of hiring substitutes for FCPS employees on release time is estimated at \$5.8 million over that three-year period.⁹

On average, FCPS spends approximately \$2 million per year to hire substitutes and allow for release time granted to labor unions to spend on conducting union business instead of public work.¹⁰

However, the lack of release time recordkeeping makes the actual cost unknown. Despite the policy that release time records should be audited, records requests for the total amount of release time from 2012 to the present could not be provided by FCPS because the County had transferred the responsibility of monitoring release time hours to government unions who receive the subsidy.¹¹

Virginia’s Gift Clause. Virginia’s constitution contains a provision known as the gift clause that prohibits the state and local governments from granting public money or extending credit to associations or corporations. A majority of states have adopted gift clauses in their constitutions to remedy past misdeeds by public officials and politically connected private parties.

In the 18th and 19th centuries, Virginia, like many other states, spent a significant amount of public funds for construction of railroads and other internal improvements.¹² Unfortunately, taxpayers received little in return and were left footing the bill.

An 1886 congressional report on the history of transportation in Virginia recounts the losses suffered by taxpayers, which amounted to over \$26 million.¹³

As the Virginia Supreme Court in noted in the 1956 case *Almond v. Day*:

Financial obligations in vast sums were incurred by the State, and its credit was freely but often unwisely extended to foster these enterprises by purchase of their bonds and stock, or through guarantee of their obligations and indebtedness. This was done with the hope and expectation that the enterprises would thrive and bring to the areas served business prosperity and to the State at large public benefit.¹⁴

While the text of the Gift Clause in Virginia is an outright ban on the state government and municipalities from granting any funds to a private entity, the courts have grafted on a public purpose test. As the Virginia Supreme Court stated in *Almond v. Day*, which approved the constitutionality of a statute that authorized the Board of Trustees of the Virginia Supplemental Retirement System to invest funds in private insurance companies:

Whether or not a transaction contravenes the “credit clause” [Gift Clause] of the Constitution prohibiting the lending of credit to or subscription to stock of corporations by the state depends upon its animating purpose and the object that it is desired to accomplish.¹⁵

This has led to numerous Virginia court cases that find government is allowed to give away public funds or guarantee private debt because the funds primarily support a public purpose or based on the legislative finding of public purpose.¹⁶ But in the case of release time, there is no law that demands state or local governments to grant release time—meaning there is no legislative finding of public purpose.

In addition, release time is at conflict with any kind of public purpose 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.¹⁷

Notice that its language is very similar to Virginia’s gift clause.

In 2011, the Phoenix-based 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.¹⁸

Maricopa County Court Judge Katherine Cooper used a two-part analysis of public expenditures to examine whether release time aided the private interests of government unions and is therefore illegal public aid under the gift clause.¹⁹ 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.²⁰

The court established that 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.”²¹ 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.²²

The court held that union release time does not meet either standard for a proper public expenditure under the state’s gift clause and is unconstitutional, 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 Goldwater Institute’s lawsuit against release time provisions in the City of Phoenix contract has concluded with a victory in the Arizona Court of Appeals.²³ Given that the language of Virginia’s gift clause is very similar to Arizona’s, reform efforts in Arizona can serve as an example for the Old Dominion.

Conclusion. At a time when the demand for government services exceeds the resources available to states and municipalities, 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 Virginia’s gift clause taxpayers are authorized to file suit challenging this unnecessary government expense. Another option is for the Virginia legislature to prohibit the practice.²⁴ Furthermore, Virginia governments could simply stop supplying government unions with release time. 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. Now is the time to act.

Notes

¹ Virginia. Constitution, Article 10, Section 10, <http://law.lis.virginia.gov/constitution/article10/section10>.

² County of Fairfax, Va., Procedural Memorandum No. 11-03—Employee Organization Rights and Responsibilities, November 23, 2010.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Center on National Labor Policy, “Fairfax County Public Schools Spend More than \$5.8 Million on Big Labor Grants,” October 20, 2015, http://nationallaborpolicy.org/wp-content/uploads/2015/10/CNLP-virginia_taxpayer_funded_union_action-published_final_approved.pdf.

⁸ Fairfax County School Board, Human Resources Employee Organization Privileges, Policy 4530.23 (2008), <https://nrtwc.org/fairfax/P4530.3EmployeeOrganizationPrivileges.pdf>.

⁹ See note 7.

¹⁰ Ibid.

¹¹ Katelyn Nuckoles, Center on National Labor Policy, “CNLP Exposes of Fairfax County Board’s Kickbacks to SEIU,” October 1, 2015, http://nationallaborpolicy.org/cnlp-exposes-of-fairfax-county-boards-kickbacks-to-seiu/#_edn1.

¹² *Almond v. Day*, Supreme Court of Virginia, March 5, 1956, <http://law.justia.com/cases/virginia/supreme-court/1956/4501-1.html>.

¹³ J. D. Imboden, “Early History of Transportation in Virginia,” House Executive Documents, 2nd Session, 49th Congress, Vol. 17, p. 5.

¹⁴ See note 12.

¹⁵ *Ibid.*

¹⁶ *Fairfax County v. County Executive*, 210 Va. 253, 169 S.E.2d 556 (1969). *Development Authority v. Coyner*, 207 Va. 351, 150 S.E.2d 87 (1966). *Harrison v. Day*, 202 Va. 967, 121 S.E.2d 615 (1961).

¹⁷ Arizona Constitution, Article 9, Section 7,

<http://www.azleg.gov/FormatDocument.asp?inDoc=/const/9/7.htm>.

¹⁸ “City, Police Union Sued by Taxpayers,” Goldwater Institute, December 8, 2011,

<http://goldwaterinstitute.org/en/work/topics/unions/release-time/city-police-union-sued-by-taxpayers/>.

¹⁹ This analysis was also used by the Arizona Supreme Court in *Turken v. Gordon*. The case involved a complex economic development agreement whereby the City of Phoenix would pay NPP CityNorth, a private entity, nearly \$100 million to build a mall. From the case, a two-part analysis was created to examine the validity of government subsidies. *Turken v. Gordon*, 223 Ariz. 342, 350, 224 P.3d 158, 165 (2010), <https://www.azcourts.gov/Portals/23/pdf2010/CV090042PR.pdf>.

²⁰ Rebecca Burnham, “Arizona Supreme Court Clarifies ‘Gift Clause’ Limits on Public Payments to Private Parties,” Greenburg Traurig Litigation Alert, February 8, 2010, <http://www.gtlaw.com/News-Events/Publications/Alerts?find=133643&printver=true>.

²¹ *Cheatham, et al. v. Gordon, et al.*, No. CV 2011-021634, Superior Court of Arizona Maricopa County, June 5, 2012.

²² *Ibid.*

²³ Goldwater Institute, “Goldwater Institute Lawsuit Ends Taxpayer-Funded Union Work,” news release, August 12, 2015, <http://goldwaterinstitute.org/en/work/topics/unions/related-reforms-unions/goldwater-institute-lawsuit-ends-taxpayer-funded-u/>.

²⁴ “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/>.