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## Union Security and the Nonunion Public Employee: Harmony or Conflict?

In 1975 there will be over eleven million public sector employees outside the federal service<sup>1</sup> who may be covered by collective bargaining agreements.<sup>2</sup> In 1969, of approximately 700 contracts negotiated by the nation's largest public employee union, 43 percent included some form of union security.<sup>3</sup> Dues checkoff authorizations in 1968 provided 23 million dollars for federal employee unions.<sup>4</sup>

From these statistics it is not difficult to imagine the myriad interests that influence public collective bargaining agreements. This article investigates the problem of protecting the rights of the nonunion public sector employee while maintaining a stable labor-management relationship. The rights and duties that attach to union security conditions will be evaluated to show how and why they

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1. This paper will concern itself solely with the development of union security in the public sector at the state and local government levels. Thus, any reference to federal employees, protected under Exec. Order No. 11,491, will be purely by inference or comparison on the part of the reader.

2. NATIONAL GOVERNORS' CONFERENCE, EXEC. COMM. REPORT OF TASK FORCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS 29 (1967) [hereinafter cited as REPORT].

3. Gromfine, *Union Security Clauses in Public Employment*, 304 GOVERNMENT EMPLOYEE RELATIONS REPORTER E-1, E-9 (1969), [hereinafter cited as GERR]. The term "union security" represents, for the purposes of this paper, those conditions of employment which a union seeks to have embodied in the collective bargaining agreement and which have the effect of buttressing the union's majority status. The more prevalent types of union security provisions in the public sector are exclusive recognition, dues checkoff, union shop, maintenance of membership, and agency shop. All of these will be examined in detail.

It should be noted, however, that other types of union security provisions do exist. The strongest provision that could be included in a collective agreement is one providing for a closed shop. This is "[a] form of union security wherein the employer agrees to hire only those who are already union members. Membership in the union is a condition of continued employment." H. ROBERTS, *LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE* (1970). Such provisions are outlawed in the private sector under section 8(a)(3) of that Taft-Hartley Act. 29 U.S.C. § 158(a)(3) (1964). The leading case in the public sector is *Petrucci v. Hogan*, 5 N.Y. Misc. 480, 27 N.Y.S.2d 718 (1941). There the closed shop was also ruled illegal as violative of state civil service law. Under a closed shop arrangement, the court reasoned, employment would of necessity depend upon union membership and not merit or fitness. Further, an invalid delegation of state power was found to result. In light of these precedents, the incidence of the closed shop in the public sector has been virtually nil. See also *Mugford v. City of Baltimore*, 185 Md. 266, 44 A.2d 745 (1946).

Preferential hiring is an arrangement whereunder the employer agrees to give first preference in hiring to union-supplied workers as long as the union is able to supply the needed employees. Non-union members are hired only after the supply of qualified union members has been depleted. This form of union security also conflicts with the merit system and has seen little success in the public sector.

4. 279 GERR D-1 (1969).

frequently come into conflict. Finally, alternatives to these conflicts will be explored.

A union is not unlike a politician. It campaigns for election, and, if it wins, immediately begins to worry about reelection. The primary concern of a union, like that of a politician, is security in office. Once elected, the union seeks to become the undisputed employee representative through the integration of union security clauses into the collective bargaining agreements.

Initially, the union is concerned with recognition as the sole employee representative.<sup>5</sup> Exclusivity has two main advantages: (1) In terms of employer-supplied terms of agreement, all employees are treated equally; and (2) The cost of bargaining is lower for the employer because the problem of multiplicity of representatives is eliminated. The proposition that public sector labor legislation should embrace the principle of exclusive recognition has been generally accepted.<sup>6</sup>

In *Lullo v. Fire Fighters Local 1066*,<sup>7</sup> for example, the New Jersey Supreme Court concluded that a multiplicity of organizations possessing representation rights for the same group of employees is undesirable.<sup>8</sup> The court noted that such multiplicity encourages rivalry among employee groups and handicaps employers in the development of stable relationships and effective negotiations. One court has even gone so far as to find exclusivity to be a compelling state interest.<sup>9</sup>

The two alternatives to exclusive representation have not been favored. "Members-only" representation, wherein each organization represents only its own members, and proportional representation, wherein the bargaining team is composed of representatives from the different employee organizations on a percentage of membership basis, have aroused little employee interest. The possible advantage of being able to choose among organizations is considered to be outweighed by the relative weakness of rival organizations when com-

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5. For cases concerning the validity of exclusive recognition see, e.g., *Kleinman v. McCoy*, 19 N.Y.2d 292, 279 N.Y.S.2d 345, 226 N.E.2d 174 (1967); *Civil Service Forum v. New York City Transit Authority*, 4 App. Div.2d 117, 163 N.Y.S.2d 476 (Sup. Ct. 1957), *aff'd*, 4 N.Y.2d 866, 174 N.Y.S.2d 235, 150 N.E.2d 705 (Ct. App. 1958).

6. See, e.g., the advisory reports on labor relations in the public sector in Connecticut (February 1965), Minnesota (March 1965), Rhode Island (February 1966), New York (March 1966), Michigan (February 1967), Illinois (March 1967), New Jersey (January 1968), and Pennsylvania (June 1968), all discussed in Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1969).

7. 55 N.J. 409, 262 A.2d 681 (1970).

8. The court followed the reasoning of the FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE OF THE PUBLIC AND SCHOOL EMPLOYEES' GRIEVANCE PROCEDURE STUDY COMM'N., 55 N.J. at 414, 262 A.2d at 685 (1970).

9. *Local 858, A.F.T. v. Denver School Dist. No. 1*, 314 F. Supp. 1969 (D. Colo. 1970).

pared to the strength of an exclusive representative. Employers fear that these alternatives will complicate the bargaining process. They are well aware that rivalry could lead to conflict and instability.<sup>10</sup>

The principle of exclusive recognition has long been a fact of life in the private sector.<sup>11</sup> Only one state specifically prohibits by statute exclusivity in the public sector, and that statute applies only to teachers.<sup>12</sup> However, one state court ruled there can be no exclusive representation until all employees in the unit have agreed. The prevailing statute was construed to prevent any labor organization from representing any non-consenting public employee.<sup>13</sup>

The exclusive status of a union, however, cannot prevent an individual employee or a minority union from petitioning the public employer about grievances arising out of the employment relationship.<sup>14</sup> The first amendment of the Constitution and its counterparts in the state constitutions uphold this right to freedom of expression.<sup>15</sup> This caveat notwithstanding, exclusive recognition has not been found to be inconsistent<sup>16</sup> with constitutional provisions.<sup>17</sup>

There is no denial of equal protection because an employee who refuses to join an exclusively recognized union is still constitutionally entitled to representation by that union without discrimination and without regard to his refusal to join.<sup>18</sup>

The constitutional claims against exclusive recognition are repeated just as vocally when the issue is checkoff of union dues.<sup>19</sup> The two generally go hand

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10. REPORT 21. *But see* State Bd. of Regents v. Local 1258 Packing House Workers, 339 GERR F-1 (Iowa 1970), wherein the Iowa Supreme Court held that the board had no authority to recognize one bargaining agent as exclusive but said that it could "see no reason why the Regents, if they so desire, could not enter into one written contract with the union finding all members of the union agreeing to such representation as long as the terms of the contract are within the statutory authority of the board and contains no terms of employment which could not be included in a standardized contract for individual employees."

11. *See, e.g.,* NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, *rehearing denied*, 389 U.S. 892 (1967).

12. MINN. STAT. ANN. § 125.22(3) (Supp. 1970).

13. Dade County Classroom Teachers' Ass'n v. Ryan, 225 So.2d 903 (Fla. 1969).

14. Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004-05 (1970).

15. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

16. *See Lullo v. Local 1066, Fire Fighters*, 55 N.J. 409, 262 A.2d 681 (1970).

17. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44 (1937).

18. *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944). For the requirements, generally, to satisfy the equal protection clause, *see Baxstrom v. Herold*, 383 U.S. 107, 111 (1966); *Morey v. Doud*, 354 U.S. 457, 465 (1957).

19. "The deduction by the employer of union or association dues and fees from the pay of members, based on written authorization of the employees." ADVISORY COMM'N. ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 3 (1969) [hereinafter cited as L-M POLICIES].

in hand.<sup>20</sup> The rationale for dues checkoff also has to do with security. If the employer deducts dues directly, there is no need for the union to worry about delinquency. Further, other non-exclusive unions are not as financially secure as the exclusively recognized union and thus cannot compete as effectively.

There are reasons aside from financial security for advocating exclusive dues checkoff. The Advisory Commission on Intergovernmental Relations recommended checkoff be permitted, on voluntary written authorization of employees, but only to those organizations representing a majority of the employees in the unit (which is generally a prerequisite to exclusive recognition). It disfavored minority checkoffs because

deduction of dues for members of these groups probably would generate conflict and instability in employer-employee relationships. In addition it might overburden the administrative system, since in the absence of objective criteria for distinguishing among minority organizations, all such groups would probably have to be included in the checkoff.<sup>21</sup>

Nevertheless, the constitutional arguments still arise. In *Local 858, AFT v. Denver School District No. 1*,<sup>22</sup> a minority union sued a public employer on the ground that denial of dues checkoff, *inter alia*, constituted an infringement upon its first and fourteenth amendment rights. In upholding the exclusive checkoff, the court extended the obligation to treat the elected representative exclusively and the "negative duty to treat with no other," (first pronounced in *NLRB v. Jones, Laughlin Steel Corp.*<sup>23</sup>) from private employers to public employers. It could not find any alleged distinction between the teachers in the unit because all were represented by the winner and none were represented by the loser. However, the court then assumed there might be some distinction in order that it could fully discuss the constitutional claims. In light of the Supreme Court's decision in *Shapiro v. Thompson*,<sup>24</sup> the court here found the grant of exclusive privilege to promote a compelling governmental interest:

The interests of the state . . . are compelling, for labor peace and stability in an area as vital as public education and indisputably a necessity to the attainment of that goal. Interunion strife within the

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20. Checkoff arrangements have been found to be most common in the West and least common in the South. Metropolitan central cities and suburbs are likely to have them; sixty-five percent of cities with populations over 100,000 have them. All cities with over one million in population and seventeen of twenty-two cities between 500,000 and one million have checkoff arrangements. M. MOSKOW, J. LOEWENBERG & E. KOZIARA, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 106 (1970) [hereinafter cited as MOSKOW].

21. L-M POLICIES 108.

22. 314 F. Supp. 1069 (D. Colo. 1970).

23. 301 U.S. 1 (1937).

24. 394 U.S. 618, 634 (1969).

schools must be minimized. Unnecessary work stoppages and the consequent impairment of the educational process cannot be tolerated without significant injury to public education.<sup>25</sup>

The fact that this dicta is directed toward public education should be of little consequence since the damage to public welfare can be equally significant as a result of strife in governmental relations.

The New York courts also have found checkoff to be a valid way to promote the financial security and stability of the exclusive representative. In *Bauch v. City of New York*,<sup>26</sup> the privilege of checkoff for minority unions was to be discontinued by an Executive Order of the Mayor. The Order was to implement the terms of a collective bargaining agreement entered into with citywide majority representatives. Further, in the absence of citywide majority representation for a bargaining unit, the departmental majority representative received the dues checkoff privilege, but only until a citywide majority representative was chosen. In the absence of both citywide and departmental majority representatives, every employee organization having members in the unit would get checkoff privileges but only until one of the afore-mentioned representatives was chosen.

The petitioners argued that (1) the Order was beyond the Mayor's executive authority; (2) it was inconsistent with statutory provisions; (3) it was contrary to civil service provisions of the state constitution; and (4) it was violative of state and federal constitutional guarantees of due process and equal protection. The lower court found no merit in any of these arguments. It refused to intrude on the policy making powers of the Mayor "in a very sensitive area of employer-employee relations between the city and its thousands of employees."<sup>27</sup> The court further applied the rationale behind private sector decisions allowing union shops to the more moderate union security measures:

[U]nder which the special advantage given to the majority union consists not as under the union shop, of the right to demand and receive dues from employees who would prefer to be non-union or to belong to a different union, but merely of facilitating the collection of dues from those who have freely joined the union of their own choice. Whether such measures are wise or provident or best calculated to achieve the objective of stable and equitable employer-

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25. 314 F. Supp. 1069, 1077 (D. Colo. 1970).

26. 54 Misc.2d 343, 282 N.Y.S.2d 816 (Sup. Ct. N.Y. Cty. 1967), *aff'd*, 289 N.Y.S.2d 951, 21 N.Y.2d 599, 954-56, 237 N.E.2d 211, 213-14, *cert. denied*, 393 U.S. 834 (1968).

27. *Id.* at 824, citing with approval *Patrolmen's Benevolent Ass'n v. Wagner*, 8 App. Div.2d 369, 187 N.Y.S.2d 809 (Sup. Ct. 1959), *aff'd*, 7 N.Y.2d 813, 196 N.Y.S.2d 694, 164 N.E.2d 715 (Ct. App. 1959), *cert. denied*, 363 U.S. 810 (1960).

employee relations, is not the concern of the courts. . . .<sup>28</sup>

The court of appeals affirmed the lower court's ruling and directed itself to the constitutional arguments. It resolved the due process argument (that the challenged Order was not reasonably related to the attainment of a permissible objective) and the equal protection argument (that the distinction had no reasonable basis) as each was resolved in the discussion of exclusivity.<sup>29</sup> The court also found the claim that withdrawal of dues checkoff would weaken a minority union to the point of threatening its very existence lacking in substance.

Nothing in the city's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues checkoff. Neither the First Amendment nor any other constitutional provision entitles them to the special aid of the city's collection and disbursing facilities.<sup>30</sup>

The appellate court found the petitioners' reliance on *Bates v. City of Little Rock*,<sup>31</sup> *NAACP v. State of Alabama*,<sup>32</sup> and *Thomas v. Collins*<sup>33</sup> misplaced since those cases involved "attempts by states to hinder organizations by some affirmative prohibition upon, or intrusion into, their activities. There is not the slightest suggestion that a state or other body must provide services to an organization to help it maintain its competitive position with its rivals."<sup>34</sup>

The *Bauch* case has become strong precedent in New York.<sup>35</sup> The state supreme court in *Kraemer v. PERB* found that a public employer was under no obligation to grant dues and insurance checkoffs to a "nonrecognized, noncertified employees association."<sup>36</sup> The grant of exclusive checkoff to a majority union, the court continued, "in no way interferes with an employee's right to associate with a minority union which is still free to collect dues or premiums by other means."<sup>37</sup>

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28. 54 Misc.2d 343, 282 N.Y.S.2d at 826 (Sup. Ct. N.Y. Cty. 1967). The court also followed the Railway Labor Act, 45 U.S.C. § 152, Eleventh, (b)-(c); 5 C.F.R. 550.34(a)(5); Exec. Order No. 10,988, § 5, 27 Fed. Reg. 551 (1962); and New York City Housing Authority practice as precedent for exclusive checkoff.

29. 289 N.Y.S.2d at 955-56, 21 N.Y.2d at 606-07, 237 N.E.2d at 213-14.

30. 289 N.Y.S.2d at 956, 21 N.Y.2d 599, 237 N.E.2d at 214.

31. 361 U.S. 516 (1960).

32. 357 U.S. 449 (1958).

33. 323 U.S. 516 (1945).

34. 289 N.Y.S.2d at 956 n.5, 237 N.E.2d at 214.

35. See, e.g., *Kugler v. City of New York*, 73 L.R.R.M. 2478 (Sup. Ct., N.Y. Cty. 1970).

36. 316 N.Y.S.2d 88, 35 App. Div.2d 297, (Sup. Ct. 1970), *aff'd*, \_\_\_\_ N.Y.S.2d \_\_\_\_, 77 L.R.R.M. 2736 (Ct. App. 1971).

37. 316 N.Y.S.2d at 90, 76 LRRM at 2317 (1970). It should be mentioned, however, that many jurisdictions do not permit exclusive checkoff due to the fact that there is a general payroll

Virtually all jurisdictions that permit checkoff arrangements agree that they must be voluntary on the part of the individual employee. Such voluntary arrangements open to all employees have been analogized to subscriptions, pensions, charitable funds<sup>38</sup> and other withholdings by the employer.<sup>39</sup> Mandatory checkoffs have frequently been invalidated by the courts.<sup>40</sup> The major objection to a public employer undertaking checkoff at the insistence or demand of a union, even though terminable by any employee at any time, is that it would act as a delegation of governmental power and would violate the principle that an employer cannot grant to a union and its members any preferential advantage of any character over other employees of the unit.<sup>41</sup> Similarly, in *Dade County Classroom Teachers Association v. Ryan*,<sup>42</sup> the Florida Supreme Court ruled that a union demand for dues checkoff for everyone in the unit was invalid. Checkoff could only be allowed where the employee agreed to it on his own volition.<sup>43</sup>

Two cases that have challenged the principle of exclusive checkoff should be noted. First, another constitutional challenge to an exclusive checkoff provision was filed in Baltimore in late 1969.<sup>44</sup> Its result is yet unreported. Second, the Wisconsin Supreme Court upheld a circuit court reversal of the state Employment Relations Commission on checkoff, finding the Commission's decision to be invalid.<sup>45</sup> In finding the only purpose of exclusive checkoff to be self-perpetuation and entrenchment, the court set forth some unusual reasoning. "While a majority representative may negotiate for check-off, he is negotiating for all the employees, and, if check-off is granted for any, it must be granted for all."<sup>46</sup> The decision still represents the law in Wisconsin.

The union shop is an arrangement whereby the employer may hire whomever he pleases, but all new employees are required to become union members within

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deductions law that permits a number of different organizations such rights. In such jurisdictions, where the collective bargaining law does not address itself to this problem, the argument can be made that the bargaining law should be construed to modify or complement the payroll deductions law. Then the exclusivity aspect would be easier to swallow.

38. *Mugford v. City of Baltimore*, 185 Md. 266, 44 A.2d 745 (1946).

39. GOVERNOR OF MICHIGAN'S COMM. ON PUBLIC EMPLOYEE LABOR RELATIONS REPORT 12 (1967).

40. See, e.g., *Sheehy v. Ensign*, 395 GERR B-3 (C.P. Lucas Cty, Ohio 1970), where mandatory checkoff for Toledo was found to be contrary to state constitutional, statutory, and case law.

41. *Mugford v. City of Baltimore*, 185 Md. 266, 44 A.2d 745 (1946).

42. 225 So.2d 903 (Fla. 1969).

43. See text p. *supra*. For a typical checkoff statute, see R.I. GEN. LAWS § 36-6-17. For a sample authorization, see L-M POLICIES 341.

44. 319 GERR B-17 (1969).

45. *Milwaukee Bd. of School Directors*, 42 Wisc.2d 637, 168 N.W.2d 92 (1969). See *Wisc. State Foresters Ass'n v. Wisc. Dep't of Natural Resources*, 402 GERR B-7, B-8 (1971).

46. *Id.* at 642, 168 N.W.2d at 98. However, Wisconsin has recently amended its law to permit the agency shop, an action which could affect the precedent in this area. See 428 GERR B-6 (1971).



a specified time period, usually thirty days.

In private industry it is quite common to provide a union shop. . . . Existing laws regarding public employee relations have universally protected the right of a public employee to refrain from participation in an employee organization if he so desires. Such provisions have generally resulted from recognition by study commissions that public employment, particularly under a merit system, should be available to all citizens. A requirement for union shop is considered incompatible with this right.<sup>47</sup>

The classic argument in behalf of the union shop is the elimination of the "free rider." In the words of Samuel Gompers, "Nonunionists who reap the rewards of union effort, without contributing a dollar or risking the loss of a day, are parasites. They are reaping the benefit from the union spirit, while they themselves are debasing genuine manhood."<sup>48</sup> This argument was originally adopted for the private sector with the passage of the Wagner Act.<sup>49</sup> It expressly permitted the union shop and sanctioned the resulting contracts which provided for dismissal of any employee who either refused to join the union or was denied membership by it. The Wagner Act was qualified by the passage of the Taft-Hartley Act<sup>50</sup> in 1947. "[U]nder the [Taft-Hartley] Act, unions cannot bar an employee from membership and then compel the employer to dismiss him; the individual is fully protected in his job except when he refuses to pay the regular dues and initiation fees."<sup>51</sup>

It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.<sup>52</sup>

The strict union shop has fallen into disfavor in the public sector. Although in *Railway Employees' Department v. Hanson*,<sup>53</sup> the fifth amendment unconstitutional deprivation of property argument was turned down,<sup>54</sup> the Supreme

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47. NATIONAL GOVERNORS' CONFERENCE COMM. ON MANPOWER AND LABOR RELATIONS (Supp. to REPORT 1968).

48. 12 AMER. FEDERATIONIST 221 (1905), cited in *Municipal Employment Relations in Wisconsin: The Extension of Private Labor Relations Devices into Public Employment*, 1965 WISC. L. REV. 671, 682.

49. 29 U.S.C. §§ 151-58, 159-66 (1970).

50. *Id.* §§ 141-44, 151-58, 159-67, 171-82, 185-87.

51. D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 98 (1970).

52. NLRB v. General Motors, 373 U.S. 734, 742 (1963).

53. 351 U.S. 225, 238 (1956).

54. The decision went only to the financial support aspect of the union shop.

Court in *International Association of Machinists v. Street*<sup>55</sup> said the strict union shop violated the rights of those employees who disapproved. The union shop arrangement, the Court ruled, would constitute an improper delegation of governmental authority, conferring upon a private organization control over the government's employ.<sup>56</sup>

A strong union shop contract requiring membership in the union and maintenance of union membership was held void and illegal in *Benson v. School District No. 1 of Silver Bow County*.<sup>57</sup> The security provision was to be a condition of all teacher contracts with the added proviso that any teacher who failed to sign a contract embodying such provision could be discharged upon union request. Tenured teachers who refused would remain employed without a contract from year to year under the same terms and conditions as such teacher was employed in the year the collective bargaining agreement was signed. Eight teachers signed their contracts but deleted the union security clause; they were told they would suffer the salary consequences. But the court held that just as an employer could not refuse to hire employees for joining a union or for belonging to one, it could not "impose a penalty for not becoming members by seeking to withhold the increase in salary to those who do not belong to the union."<sup>58</sup> The provision was invalidated.

As a result of *Benson*, in part, state legislatures have incorporated provisions similar to Section 8(a)(3) of the Taft-Hartley Act<sup>59</sup> into their statutes, thereby

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55. 367 U.S. 740, 765-70 (1961).

56. Note, *Labor Relations in the Public Service*, 75 HARV. L. REV. 391, 404 (1961).

57. 344 P.2d 117 (Mont. 1959).

58. *Id.* at 122-23.

59. Sec. 8(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against any employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees

prohibiting the public employer from firing an employee for reasons other than his failure to tender dues and fees.<sup>60</sup> Where such provisions are not statutory, they are generally written into the individual contracts.<sup>61</sup>

The landmark decision in this area is *Tremblay v. Berlin Police Union*.<sup>62</sup> There the New Hampshire Supreme Court upheld a municipal decision to allow such a "modified" union shop clause because (1) the legislature had authorized such a decision; (2) the ultimate control over hiring and firing and managing the police department remained in the municipality; and (3) the overriding provisions of the contract declared the union's delegated powers subordinate to and consistent with the powers of the municipality. The clause in question required all new hires and re-employs to become union members within sixty days and authorize checkoff. The court found the clause valid since the only obligation it imposed was of a financial nature. "There is no requirement in this clause, or any other," the court said, "for maintenance of membership in good standing. . . . The union cannot cause the discharge of an employee who has resigned from or has been expelled by the union for any reason other than his withdrawal of the checkoff authorization."<sup>63</sup>

*Tremblay* notwithstanding, nineteen states<sup>64</sup> have general "right-to-work" provisions in their labor relations statutes.<sup>65</sup> Such provisions outlaw agreements

uniformly required as a condition of acquiring or retaining membership . . . .

29 U.S.C. § 158(a)(3) (1970).

60. See, e.g., PA. STAT. ANN. tit. 43, § 211.6(c) (1970); HAWAII REV. STAT. § 88-13 (Supp. 1970); MICH. STAT. ANN. § 17.455(10) (1970).

61. See, e.g., contracts reported at 225 GERR Contracts-State and Local 1 (1968) (between New Castle County, Delaware, and AFSCME Locals Nos. 459 and 1607 and 313 GERR B-3 (1969) (covering state hospital employees in Rhode Island).

62. 108 N.H. 416, 237 A.2d 668 (1968). See also OP. ATT'Y GEN. OF WASHINGTON, AGO 57-8 No. 228 (19 ).

63. *Id.* at 420, 237 A.2d at 672. Note however that though the reasoning is similar here, the court could not base its decision on an 8(a)(3)-type proviso. The statutory basis of the decision, partially was a law prohibiting efforts to compel any person *not* to join a labor organization as a condition of continued employment. "Litigation may therefore arise over the effects of such a union shop provision upon a dissenting public employee who is—unlike the situation in *Tremblay*—a voluntary member of a rival union that did not negotiate the contract. In this variation of *Tremblay*, the court could declare the union shop invalid since it may coerce the public employee, paying dues to and actively participating in the minority union, to forego his membership in the minority union." Comment, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547, 561 (1970) [hereinafter cited as Comment, CORNELL].

64. Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming. See Comment, CORNELL.

65. Such legislation is validated by Sec. 14(b), the local-option clause, of the National Labor Relations Act, 29 U.S.C. 164(b) (1964): "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

requiring membership in a labor organization as a condition of employment. Of these nineteen states, twelve prohibit agreements that establish either union membership or the payment of fees or charges by nonmembers (agency shops) as conditions of employment.<sup>66</sup> The remaining seven statutes are directed only at union membership, but the agency shop, to be discussed below, even in these states<sup>67</sup> has been prohibited either judicially or administratively. Of the original nineteen only Georgia (by statute) and Tennessee (by case law) specifically exclude public employment from the coverage of the right-to-work laws. Thus the issue of union shop and the various other types of union security to be included in the remainder of the discussion is moot as to those seventeen states.<sup>68</sup>

Most union shop arrangements carry with them a maintenance of membership provision.<sup>69</sup> Where "membership" is determined only by the payment of dues and fees, such provisions are generally accepted as non-violative of employees' rights.<sup>70</sup> Where "membership" is interpreted more stringently, such clauses are usually not adopted because the idea that ability (the merit system) and not union membership should be the key to employment cannot be overcome.<sup>71</sup>

A different argument against some maintenance of membership provisions is set forth in a concurring and dissenting opinion to a Michigan agency shop case.<sup>72</sup> Board member Leo Walsh writes:

Under some maintenance of membership union security provisions, employees are divided into two classes. Members of the bargaining representative are required to maintain their membership as a condition of employment. Those who are not members are not required to become members as a condition of employment, nor are they required to pay to the collective bargaining representative the equivalent of initiation fees and dues. Maintenance of membership of this kind involves a patent discrimination against bargaining representa-

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66. Alabama, Arkansas, Georgia, Iowa, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Utah, Virginia, Wyoming.

67. Arizona, Florida, Kansas, Nevada, North Dakota, South Dakota, Texas.

68. An example of the mooted effect can be found in the *OP. ATT'Y GEN. OF NORTH DAKOTA* (1945). Right-to-work legislation does not violate the due process requirements of the Constitution, the Supreme Court ruled in *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949) and *AFL v. American Sash Co.*, 335 U.S. 538 (1949) since prohibition of certain union security provisions is within the police power of a state.

69. "An arrangement providing that those who are members of the employee organization at the time the agreement is negotiated, or who voluntarily join it subsequently, must maintain their membership for the duration of the agreement as a condition of employment." *L-M POLICIES* 3.

70. *Cf. Algoma Plywood Co. v. Wisconsin Bd.* 336 U.S. 301 (1949).

71. Moskow 105.

72. *Oakland County Sheriff's Dep't and Local 23, AFSCME*, 227 GERR F-1, (Mich. Lab. Med. Bd. 1968).

tive members which inevitably discharges [*sic*] union membership.<sup>73</sup>

Walsh would find that such provisions constitute unlawful interference under the Michigan statute.<sup>74</sup>

Union shop and maintenance of membership provisions which impose only a financial obligation on the employees of the unit are in reality only agency shops by another name. The agency shop is "an arrangement which requires all employees who do not join the union to pay a fixed monthly sum, usually the equivalent of union dues and fees, as a condition of employment, to help defray the union's expenses in acting as bargaining agent for the group."<sup>75</sup> This is frequently the only permissible kind of union security provision allowable in states with collective bargaining statutes.<sup>76</sup> Statutory basis is given the agency shop as a result of a balancing process, weighing the employee's right to refrain against union "free rider" arguments.<sup>77</sup> Although a negative implication may arise that a collective bargaining statute embodying the principles of Sections 7 and 8(a)(3) of the Labor Management Relations Act,<sup>78</sup> but not containing a union security proviso, was intended neither to validate an agency shop nor to carve out an exception to the public employee rights created therein, that implication is reversed by case law.<sup>79</sup>

In the private sector, the agency shop was given legitimacy by the Supreme Court in *NLRB v. General Motors Corp.*<sup>80</sup> There the payment by nonunion employees to the union of sums equal to initiation fees and periodic dues was found not to violate Section 8(a)(3) of the Labor Management Relations Act.<sup>81</sup> Although the spirit of this case has been followed by some courts on public sector questions, the reasoning has not always been the same. Litigation on the issue has been significant only in four states.<sup>82</sup> For a complete understanding

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73. *Id.* at F-17.

74. MICH. STAT. ANN. § 423.210 (1970). *But see* Penn. Lab. Rel. Bd. v. Teamster's Local No. 8,436 GERR E-1 (1971).

75. L-M POLICIES 2.

76. *See, e.g.*, GOVERNOR OF MICHIGAN'S COMM. ON PUBLIC EMPLOYEE LABOR RELATIONS REPORT 12 (1967); D. KRUGER & C. SCHMIDT, JR., COLLECTIVE BARGAINING IN THE PUBLIC SERVICE (1969).

77. AFL-CIO MARITIME TRADES DEP'T EXECUTIVE BOARD, COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: AN INTERIM REPORT 52-61 (1969).

78. 29 U.S.C. §§ 157, 158(a)(3) (1970).

79. Comment, CORNELL 559-60.

80. 373 U.S. 734 (1963).

81. *Id.* at 735-45. *See* Public Service Co. of Colorado, 89 N.L.R.B. 418 (1950); Algoma Plywood Co. v. Wisconsin Bd., 336 U.S. 301 (1949).

82. New York, Ohio, Missouri, and Michigan. Note however that agency shop clauses are operative in other jurisdictions, *i.e.*, Boston, in some on a de facto basis. 384 GERR B-17 (1971). *See also* 432 GERR B-9, F-1 (1971), wherein a decision of the Hawaii P.E.R.B. setting an agency shop fee is fully examined.

of the problems involved, precedent must be closely examined.

In New York, the *General Motors* case has been found inapplicable to public employees. The court in *Ritto v. Fink*<sup>83</sup> ruled that agency shop agreements were not applicable to civil service employees who did not voluntarily subscribe to such agreements. To make such agreements mandatory, the court continued, would violate both the spirit and the letter of the state constitution and the civil service law of the state.

Similarly, a New York fact-finder rejected an American Federation of State, County, and Municipal Employees (AFSCME) proposal for a contract provision stipulating: (1) maintenance of membership for all employees belonging to the union when the contract was to take effect; (2) an agency shop for nonmembers at that time; (3) a union shop for new hires; and (4) a dues checkoff irrevocable for one year. He found the legality of such a provision doubtful under the state's Taylor Act.<sup>84</sup>

Missouri, too, has decided that payment of a union service fee cannot be made a condition of employment.<sup>85</sup> State Attorney General Danforth based his decision on that section of the Missouri labor organization statute prohibiting "intimidation or coercion" compelling employees "to join or refrain from joining a union."<sup>86</sup> In essence, the agency shop in Missouri is an unfair labor practice.

An agency shop for Akron, Ohio, was found to be contrary to the state constitution and a denial of equal protection in *Civil Service Personnel Association v. Ballard*.<sup>87</sup> "A mayor has no more right to . . . 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."<sup>88</sup> Through this somewhat specious argument, the analogy perhaps being carried too far, the court found that an agency shop could lead to abuse of the merit system. (The equal protection argument went to the fact that the agency shop only applied to new hires).

The city of Dayton, Ohio had an agency shop agreement with the Public

83. 58 Misc.2d 1032, 297 N.Y.S.2d 407 (Monroe Cty. City Ct. 1968).

84. 250 GERR B-2 (1968). The Taylor Act is Sec. 108, Civil Service Law, art. 14, ch. 392 L. 1967. There is growing sentiment however that the agency shop be made legal under the Taylor Law. See Sabghir, *The Taylor Act: A Brief Look After Three Years*, NATIONAL GOVERNORS' CONFERENCE, COMMITTEE ON EXECUTIVE MANAGEMENT AND AFFAIRS 39 (Supp. to REPORT 1970).

85. 370 GERR B-8 (1970). Arizona has also found the agency shop to be illegal. Op. Att'y GEN. No. 6858, 426 GERR B-6 (Ariz. 1971), but see Note 40 *supra*.

86. Sec. 105, 510.

87. 344 GERR B-1 (Summit Cty. Ct. of C.P. 1970), *aff'd*, 405 GERR B-9, 10 (Ohio 1971).

88. *Id.*

Service Union which established as a penalty for not paying dues directly to the union or authorizing a checkoff by the city the suspension of the employee for a minimum of one day for each month the dues or service fee was not paid. The plaintiff in *Foltz v. Dayton*<sup>89</sup> refused to authorize the checkoff or pay the service charge provided for in the agreement. The Court of Common Pleas upheld his action, finding the agreement to be *ultra vires* and invalid. The court determined that the provision did not accomplish any governmental, public, or municipal, as distinguished from private, purpose. It based its decision on *Hagerman v. Dayton*,<sup>90</sup> where a checkoff of payroll dues provision was found to be a police regulation in conflict with state law because it constituted an unlawful delegation of municipal authority. The court of appeals found itself similarly bound by *Hagerman*. A concurring opinion made a concession to changing times. Justice Crawford expressed the hope that the state supreme court would change the law and reverse, in the belief that such arrangements no longer support only a "private, personal and selfish purpose" but now relate to satisfactory relations between a government and its employees, a matter of utmost political concern, directly related to the general welfare.<sup>91</sup> However, to date, *Hagerman* is still the law in Ohio.

The standard that other courts have been reluctant to advocate has been subject to the greatest volume of litigation in Michigan. The initial determination came in *Oakland County Sheriff's Department v. Local 23, AFSCME*.<sup>92</sup> There a majority of the Michigan Labor Mediation Board ruled that the agency shop neither discourages nor encourages union membership since, regardless of affiliation, each employee pays his pro rata share of the cost of negotiating and administering the collective bargaining agreement. The Board found that permitting nonmembers to benefit from the union's toils without compensation would violate the statutory prohibition against encouragement and discouragement of union membership.

A union is required to represent *all* employees in the bargaining unit in good faith and without discrimination. Thus, union membership is discouraged if employees enjoy the fruits of the vine without sharing the cultivation of the vineyard. Grapes may not be harvested until the ground has been prepared; the vines planted, trimmed and sprayed; the soil weeded and fertilized.<sup>93</sup>

The petitioner contended that requiring payment by a nonmember of an amount equal to a union's dues, where such dues may include insurance benefits

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89. 75 L.R.R.M. 2321 (Ct. App. 2d Dist. Ohio 1970).

90. 147 Ohio St. 313, 71 N.E.2d 246 (1947).

91. 75 L.R.R.M. at 2325.

92. 227 GERR F-1 (Mich. Labor Med. Bd. 1968).

93. *Id.* at F-14.

or support for the fraternal and social aspects of union membership, may encourage membership.<sup>94</sup> The Board replied:

[t]he fraternal and social aspects of unions and insurance contracts for members have lessened in recent years, as unions have become primarily *representatives* of employees in bargaining units. Whatever difference there may be between the costs of the representative function and other union activities is minimal, and not a basis for distinguishing between a contract provision requiring payment of a dues equivalent and some lesser amount.<sup>95</sup>

The question next arose as a result of a collective bargaining agreement between the city of Warren and the International Association of Fire Fighters.<sup>96</sup> There, twenty-five firemen refused to either join the union or pay the equivalent of dues. To discharge them would have violated the state civil service<sup>97</sup> and Public Employment Relations Acts;<sup>98</sup> to permit them to continue employment would have violated a lawful labor contract. The court employed a form of judicial gymnastics, and found the former act to be of a general nature and the latter to be of a special nature, and that the "special" act prevailed. The Public Employment Relations Act, it concluded, was "principally directed to interference, restraint, or coercion by an employer with the rights of the employees, and was not intended to be extended to nondiscriminatory contractual clauses. . . ."<sup>99</sup> The court, therefore, ruled that the discharge of the firemen for not joining or paying was only a lawful action in the fulfillment of the collective bargaining agreement.

Many of the succeeding Michigan cases involved the state Teacher's Tenure Act,<sup>100</sup> with the validity of the agency shop being continually upheld.<sup>101</sup> In one case<sup>102</sup> a factfinder found the objective of the Tenure Act, "elimination of political and arbitrary infringements upon the employment rights of teachers," to be not inconsistent with the concept of union security. The court in *Smigel v. Southgate Community School District*<sup>103</sup> laid the issue more or less to rest

94. *NLRB v. Local 138, Operating Eng'rs*, 385 F.2d 874 (2d Cir. 1967), *cert. denied*, 391 U.S. 904 (1968).

95. 227 GERR at F-15.

96. *City of Warren v. Int'l Ass'n of Fire Fighters*, 68 L.R.R.M. 2977 (Mich. Cir. Ct. Macomb Cty. 1968).

97. MICH. STAT. ANN. §§ 5.3363(13), 5.3364 (14) (1949).

98. *Id.* at § 17.455(9) (1965).

99. 68 L.R.R.M. at 2978 (1968).

100. MICH. STAT. ANN. § 71-191 (1937).

101. See *Clampitt v. Bd. of Educ.*, 68 L.R.R.M. 2996 (Mich. Cir. Ct. Macomb Cty. 1968); *Inkster Bd. of Educ.*, 263 GERR F-1—F-4 (1968) (fact finding report); *Pullen v. Wayne County and AFSCME Dist. Council 23*, 327 GERR B-1 (Mich. Ct. App. 1st Dist. 1969).

102. *Swartz Creek Bd. of Educ.*, 267 GERR B-3 (1968) (fact finding report).

103. 70 L.R.R.M. 2042 (Mich. Cir. Ct. Wayne Cty. 1968), *aff'd*, 363 GERR G-1, 22 Mich. App. 115 (1970), *appeal docketed*, No. 53008, Sept. 15, 1971.



when it saw a "common unified goal precluding an interpretation of the Tenure Act urging a conflict with P.E.R.A."'<sup>104</sup>

Any action which would weaken the bargaining power of the Association and tend to reduce its strength is very well a proper subject for the parties to consider as reasonable grounds for discharge. Such activity disturbs the delicately balanced relationships between the bargaining parties, thus creating hardships greater in magnitude than provisions such as those setting forth hours of attendance and responsibilities in the classroom. Violation of these provisions certainly could be interpreted by the parties and Tenure Commission to constitute reasonable grounds for discharge under Article IV, Section I of the Tenure Act.<sup>105</sup>

Most of the Michigan decisions adopt the "free rider" argument in upholding agency shop agreements. One factfinder, however, denied the argument but found that the real justification "despite whatever the expediency of the claim or denial is the seeking after equalization of bargaining integrity by equalizing the degree of organizational unity."<sup>106</sup> Attempts at denial of such equalization, he found, can lead to in-fighting among employees (teachers), with the victims being those served (students). He further set out an interesting, common-sense rebuttal to the argument that the agency shop infringes on personal rights and freedom of decision-making on the part of each individual employee.

However, it must be pointed out that NO EMPLOYEE ever gets a job ANYWHERE without first meeting arbitrarily imposed standards of acceptability which have no relationship whatever to the proficient discharge of the projected duties. For example, employers, generally, have upgraded hiring standards to require, at least, a high school education. Is this a logical, job related requirement for the applicant for the janitor's opening; or for a dock-man who simply loads and unloads trucks or to be a common laborer, digging ditches?<sup>107</sup>

A later decision adopts a similar common sense approach,<sup>108</sup> by setting out the in-fighting rationale and recognizing the benefits of financial security to an employee organization already having to maintain its staff and carry out its

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104. *Id.* at 2044.

105. *Id. Accord*, Applegate v. Grand Blanc Community Schools, 339 GERR B-8 (Mich. Teacher Tenure Comm. 1969) (discharge of a teacher for failure to pay the agency service fee upheld).

106. Waterford Township School Dist. v. Bd. of Educ., 275 GERR B-2, (Mich. Lab. Med. Bd. 1968).

107. *Id.* at B-3.

108. Grand Rapids Bd. of Educ. v. Teachers' Ass'n, 289 GERR B-1 (Mich. Lab. Med. Bd. 1969).

legitimate functions on the employees' behalf.<sup>109</sup> Further, the argument of the board of education that only classroom competency is considered in hiring and firing was refuted.<sup>110</sup>

The court in *Warczak v. Board of Education*<sup>111</sup> disposed of the constitutional claims against the agency shop. It found no merit in constitutional claims of violation of freedom of association and right of privacy or due process and equal protection claims based on the federal and Michigan constitutions.

Finally, contentions that inclusion of assessments in the service fee and failure to include a grace period in the provision render an agency shop invalid were set aside in *Southgate Community School District v. Linda Morrison*.<sup>112</sup> As to the latter contention, the Commission ruled no express language was necessary—that where there was no such grace period, a reasonable time would be implied within which an employee could make a decision. As to assessments, the panel concluded that they “generally are for the purpose of deferring extraordinary costs on the part of the collective bargaining representative in administering the agreements and are, therefore, properly included in the payments required of nonunion members of the collective bargaining unit to be paid in lieu of fees, dues, and assessments required of members.”<sup>113</sup>

It has been stated that three considerations are inherent in public employment labor relations: “(1) security of and financial support for the bargaining representative; (2) freedom of dissenting or objecting employees; and (3) encroachment on the sovereign powers and operations of government.”<sup>114</sup> The agency shop, unlike the closed and full union shops, is in harmony with all of these considerations. It promotes stability in the bargaining unit while requiring no more of dissenting employees than that they pay their way in bargaining.<sup>115</sup> Although there are those that believe that even this requirement is a

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109. *Accord*, *Nagy v. Detroit*, 71 L.R.R.M. 2362, 2364 (Mich. Cir. Ct. Wayne Cty. 1969).

110. 289 GERR at B-2.

111. 73 L.R.R.M. 2237 (Mich. Cir. Ct. Wayne Cty. 1970).

112. 341 GERR B-9—B-11 (Mich. Emp. Rel. Comm. 1970).

113. *Id.* at B-10. Note however that on appeal the case was sent back to the Wayne County Circuit Court for further testimony on the argument that the fee was “disproportionate” and that it encouraged union membership. 352 GERR B-14 (1970). The reporting publication speculates that this remand casts doubt on the legality of agency shop agreements in Michigan. This writer would not lend such significance to the remand. At this writing, no adverse decision has yet been handed down. Furthermore, the greatest effect an adverse decision might have in this case would be to no longer permit inclusion of assessments in the fee, an unlikely outcome due to the extreme difficulty of showing a non-existent relationship between them and the cost of negotiating and administering the contract involved. Also note that the remand in the *Smigel* case, *supra*, to determine the validity of a specific monetary checkoff under an agency provision, resulted in no such speculation.

114. Comment, CORNELL 548.

115. For an examination of the problem of agency shops for supervisory employees, see L-M POLICIES 496-503.

coercion of support for the union,<sup>116</sup> the general trend is that the agency shop is the "high road to union security."<sup>117</sup> But, there are rules to that "road" and they too require close scrutiny.

### *The Limits of the Agency Shop*

Union security devices produce order, simplicity of administration, and stability in the private sector. So, from a governmental point of view, a legislature that has decided to model its public sector collective bargaining after that in the private sector will tend to adopt provisions for exclusive representation, dues checkoff, and some form of union or agency shop. If a legislature sees the role of the public employee as more limited and seeks to contain his influence, a pattern clearly consistent with the view that the process is more political than economic, it will not allow such provisions.<sup>118</sup> The state whose legislature chooses the former alternative must provide safeguards within its union security provisions, so that the rights of the non-joiner and the dissenter are fully protected

In the private sector, the majority union must represent all the employees fairly, impartially, and in good faith.<sup>119</sup> Since dissenting nonmembers cannot do their own negotiation,<sup>120</sup> the majority union cannot "betray the trust of nonunion members, by bargaining for special benefits to union members only, thus leaving the nonunion members with no means of equalizing the situation."<sup>121</sup> These policies have been unanimously adopted in the public sector.<sup>122</sup>

Once the nonunion employee is obligated to support the bargaining representative through a service fee, he should be protected to the extent that the fee becomes unreasonable. A question may arise as to the propriety of the use of the funds—whether the money collected from nonmembers is going to a use other than defraying the collective bargaining costs. In a questionable decision in the private sector,<sup>123</sup> the Supreme Court found the matter not to be of real

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116. See, e.g., concurring and dissenting opinion of Philip Weiss in *Oakland County Sheriff's Dep't and Local 23, AFSCME*, 227 GERR F-1 (Mich. Lab. Med. Bd. 1968).

117. Address by Jerry Wurf, President of AFSCME, *National Convention of AFSCME*, June 3, 1968, in 247 GERR AA-1 (1968).

118. Note, *Pennsylvania's Proposed Public Employees Relations Act: A Landmark of Sound Progress or An Invitation to a Quagmire?*, 30 U. PITT. L. REV. 693, 703 (1969).

119. *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Hughes Tool v. NLRB*, 147 F.2d 69 (5th Cir. 1945); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

120. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

121. *NLRB v. Gaynor News Co.*, 197 F.2d 719, 722 (2d Cir. 1952), *aff'd*, 347 U.S. 17 (1954).

122. See, e.g., *Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 681 (1970); *Oakland County Sheriff's Dep't and Local 23, AFSCME*, 227 GERR F-1 (Mich. Lab. Med. Bd. 1968), see text p. 630 *supra*; *Smigel v. Southgate Community School Dist.*, 70 L.R.R.M. 2042 (Mich. Cir. Ct. Wayne Cty. 1968), *aff'd*, 363 GERR G-1, 22 Mich. App. 115 (1970), see text p. 631 *supra*.

123. *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963).

substance but rather of "bookkeeping significance only."<sup>124</sup> Where the service fee is equal to the initiation fee and monthly dues, the Court reasoned, if nonmember payments go entirely to collective bargaining costs, the nonmember will pay more of these expenses than his pro rata share. "The member will pay less and to that extent a portion of his fees and dues is available to pay institutional expenses. The union's budget is balanced. By paying a larger share of collective bargaining costs the nonmember subsidizes the union's institutional activities."<sup>125</sup>

But, the question remains whether the nonmember should have to pay any more than his pro rata share of the collective bargaining expenses (including maintenance expenses). Most commentators believe he should not.<sup>126</sup> One such commentator, Walter Oberer, supports an agency shop unlike that in the private sector:

[W]here the nonunion member pays the full shot for his conscientious objection to swearing allegiance to the union, that is, paying the same dues and initiation fee as are paid by the union patriots in the bargaining unit—but a more rational scheme, where the member of the bargaining unit who eschews the union pays only his per capita share of the expense of negotiating and administering the collective bargaining agreement, the benefits of which he shares with all other employees in the unit. The "CO" would thus be freed of the onus of free-riding, of nonpayment of his "head tax" for benefits received, but would, at the same time, be free of the hateful necessity of contributing to the political and fraternal causes of an organization with which he chooses not to be identified.<sup>127</sup>

The problem of unions using moneys collected from service fees imposed upon non-members by agency shop provisions is a volatile one. One Senator accuses agency shop agreements of effecting "the flow of millions of dollars into . . . political war chests."<sup>128</sup> Another proposed an unsuccessful bill to prohibit the use of any union dues for political purposes with the penalty being loss of tax-exempt status.<sup>129</sup> Agency shop provisions, another commentator writes, provide "a thinly disguised pipeline diverting enforced salary deductions in the form of union dues to provide campaign funds for union-controlled politicians—politicians who as public officials are the government employees'

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124. *Id.* at 753.

125. *Id.* at 754. *See* Detroit Mailers Union No. 40, 192 N.L.R.B. No. 107 (1971).

126. *See, e.g.,* Comment, CORNELL; MOSKOW; Smigel v. Southgate Community School Dist., 70 L.R.R.M. 2042 (Mich. Cir. Ct. Wayne Cty. 1968), *aff'd*, 363 GERR G-1, 22 Mich. App. 115 (1970). *See* text p. 631 *supra*.

127. Oberer, *The Future of Collective Bargaining in Public Employment*, 20 LAB. L.J. 777, 781 (1969).

128. 330 GERR B-8, B-11 (1970) (Sen. Gurney R.-Fla.).

129. *Id.* (Sen. Fannin R.-Ariz.).

bosses, and who are the very persons who forced him to pay the union in the first place."<sup>130</sup>

Whether such charges are accurate or exaggerated is not important for purposes of this discussion. What is important is to acknowledge the possibility of truth and reconcile it with the rights of the nonunion member.

Wrongful use of union funds for political purposes was the issue in *International Association of Machinists v. Street*.<sup>131</sup> The Supreme Court over a strong dissent by Justice Frankfurter,<sup>132</sup> held that Section 2 (Eleventh) of the Railway Labor Act<sup>133</sup> "is to be construed to deny unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."<sup>134</sup> But when it came to selecting a remedy, the Court made just two suggestions, each admirable but impractical. First, an injunction against expenditure for political causes opposed by each complaining employee of a sum, from all the moneys to be spent by the union for political purposes, proportionately equal to that fraction of the total union budget used for such political activities. Second, restitution of that portion of the money which the union used, despite notification, for political causes to which the employee told the union he was opposed.<sup>135</sup> The desirability of such remedies is great, but their implementation is unlikely, due to the incredible record keeping required.

Perhaps a more practical solution would be to attack the problem at the time dues checkoff authorizations are signed. Under what have been dubbed "fair share" agreements, the usual agency shop procedure is followed except that the employee has the option to require any portion of his payment to the union, which the latter might otherwise use for political activities, to be paid by it to a recognized charity.<sup>136</sup>

In the only public sector case involving the use of compulsory dues money for political purposes, *Warczak v. Board of Education*,<sup>137</sup> the trial court dismissed the suit, denying that the employees' rights under the first, third, fourth, fifth, ninth, and fourteenth amendments to the Constitution had been abridged. An appeal was announced<sup>138</sup> but no further decision has been handed down.

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130. Larson, *Public Employees and Their "Right to Work,"* in R. WALSH, SORRY . . . NO GOVERNMENT TODAY—UNIONS V. CITY HALL 266 (1970).

131. 367 U.S. 740, 765-70 (1961). See also *Reid v. McDonnell Douglas Corp.*, 77 L.R.R.M. 2609 (10th Cir. 1971).

132. *Id.* at 797.

133. 45 U.S.C. § 152 (1970).

134. 367 U.S. at 768-69.

135. *Id.* at 771-75.

136. In Michigan, such a provision is a mandatory topic of bargaining. It has been considered in Wisconsin and agreed to in New York City in a contract with 12,000 hospital workers. Moskow.

137. 73 L.R.R.M. 2237 (Mich. Civ. Ct., Wayne Cty. 1970).

138. 333 GERR B-3 (1970).

A similar problem has arisen as to the channeling of agency fees to parent organizations of local collective bargaining representatives. An issue in *Swartz Creek Community Schools*<sup>139</sup> was whether a nonunion member should only have to pay a prorated amount of the fee equivalent to the percentage of the dues that went to support the bargaining activities of the local teacher association as opposed to that which went to the parent organization. The court answered in the negative, finding that "where the so-called outside organizations are no more than parents of the local chapter, the distinction becomes blurry, fuzzy, and hardly discernible enough to make an issue."<sup>140</sup>

To allow a deduction from the service fee of any money that goes to state or local associations, writes one factfinder,<sup>141</sup> would assess a lighter weight against nonmembers. This would actively discourage membership and encourage nonmembership.

A variant of the agency shop which might appeal to those who think that any service fee is personally obnoxious is an arrangement whereby the equivalent of the service fee is paid to a charity. Such an arrangement was put at issue in *City of Grand Rapids v. Local 1061, AFSCME*.<sup>142</sup> There the moneys were paid to a scholarship fund. The provision was upheld although its purpose mystified the court somewhat:

It is somewhat difficult to see how the policy of the agency shop is supported by this type of checkoff which is founded on a vague unjust enrichment theory; under this type of requirement, in effect, those who receive the benefits of union negotiations but do not wish to pay union dues as members are compelled, at least, to hurt financially as much as those who do.<sup>143</sup>

Such a provision, however, will probably be infrequently utilized, and even then, probably only as a concession to a particularly vocal anti-union minority. Practically speaking, the cost per objector would be higher because for each objector who chose this course and whose money did not go to defray the bargaining expenses, the union would have to assess the other members of the unit a higher amount in order to make up for the lost revenue; and since the objector is paying the equivalent of the service fee, his cost too will be higher under this arrangement.

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139. 344 GERR B-1—B-3 (Mich. Emp. Rel. Comm. 1970).

140. *Id.* at B-3. See also *Jackson v. Schwartz Creek Community Schools*, 414 GERR E-1 (Mich. Emp. Rel. Comm. 1971) (\$62 of \$80 dues going to parent associations found valid under statute).

141. 275 GERR B-2, 3 (1968).

142. 72 L.R.R.M. 2257 (Mich. Cir. Ct. Kent Cty. 1969).

143. *Id.* at 2260.

### *The Agency Shop*

An insecure employee organization has been described as "paranoiac" and of necessity "pseudo-militant."<sup>144</sup> Although such descriptions may be exaggerated, it is difficult to deny the proposition that where a collective bargaining representative suffers from fears of financial instability, the members of the unit it represents also suffer. Such insecurity is no doubt detrimental to the labor-management relationship. It sends the employee representative to the bargaining table with one eye over its shoulder, fearing the loss of dues-paying members who disagree with its decisions. A case can be made that this might make a union more sensitive to the desires of its constituency, but this sensitivity is one the union cannot help but feel regardless of its stability—for a union that serves its membership well reaps the benefits in increased enrollment.

If security is advantageous to the labor relations process, then a form of security must be achieved which maximizes the freedom of the dissenting non-member while financially subsidizing the bargaining representative to allow it to perform more responsibly *and* responsively. A straight agency shop, incorporating the safeguards of a "little Labor-Management Reporting and Disclosure Act"<sup>145</sup> (LMRDA)," satisfies these aims.

Some may argue that individual rights undermine the foundation for this desired stability and since stability is in the public interest, those rights must necessarily give way in the attainment of that goal. The logic of this argument is not convincing when one realizes that the entire union concept developed around a first amendment belief that every employee should have the freedom of association and speech in conducting his affairs with management. To now subjugate that freedom, those same rights, to the desire for stability is to create an aggressor from the very source it was meant to defend. The stability intended should be the equalization of bargaining power vis-a-vis the employer, and not the elimination of dissent.

The two can be harmonized in a straight agency shop arrangement, based on each employee contributing his pro rata share to the collective bargaining expenses. If this figure is less than the dues and fees paid by union members, then the service charge to nonmembers should not be equal to dues and fees. In such cases the union might have to explain to its membership where the excess over the pro rata share has gone, but this is a responsibility it shares with every dues-collecting organization. It is more equitable that the employee who has affiliated himself with the union by choice frame the question of impropriety, and become the potential "stuckee," rather than the employee

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144. *Supra* note 127.

145. 29 U.S.C. §§ 401, 531 (1970).

who pays the fees only as a result of an agency shop which he has no power to change.

However, there are problems with this arrangement. Determining just what should be included in the collective bargaining expenses is no easy task. Payments to parent organizations are clearly related to collective bargaining. It is naive to believe that every local could survive without its parent. The local's resources would be greatly strained. But use of unit funds to bail out other union locals is another story. Similarly, nonmember's service fees should not go to strike assistance funds. Such funds are too remote from the negotiation and maintenance of the collective bargaining agreement.

Campaign contributions to candidates pledged to change government labor policies, *i.e.*, removal of the statutory strike prohibitions, although arguably connected to the collective bargaining cause, are not directly related to the collective bargaining expense. As Justice Douglas, concurring in *I.A.M. v. Street*, stated "[I]t may be said that the election of a Franklin D. Roosevelt rather than a Calvin Coolidge might be the best possible way to serve the cause of collective bargaining. But even such a selective use of union funds for political purposes subordinates the individual's First Amendment rights to the views of the majority."<sup>146</sup> This argument has no less weight in those jurisdictions which prohibit the right to strike and instead expect labor organizations to present their cause to the legislative body. Lobbying on civil service laws and the like is not so closely related to the interests of an individual unit that it should be subsidized by nonunion members in the unit.

The incorporation of some LMRDA-type provision could further protect the nonmember from forced contribution to political or social causes he might never espouse. If provisions were made for strict enforcement of the rule that moneys received from nonmembers via service charges could not be used for other than collective bargaining purposes, then improper use of such funds might crop up even less frequently than it does under presently effective arrangements.

The excess over the pro rata share should be credited toward the next period's service fee. Fair share arrangements which give such moneys to recognized charities are of questionable constitutionality. No choice of charity, in fact no choice of whether or not to make a donation, is even given the nonmember. A fifth amendment "unconstitutional taking" argument can be easily imagined.

Finally, the basis for the so-called "modified agency shop", as noted by the court in *Grand Rapids v. Local 1061, AFSCME*,<sup>147</sup> is difficult to understand.

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146. 367 U.S. at 778.

147. See text p. 635 *supra*.



The provision does not accomplish any of the stated aims of union security. It merely penalizes those who don't join the union while still obligating the majority representative to fairly represent all members of the unit.

An extreme method of protecting the nonmember's rights would be to let him vote on collective bargaining policies while maintaining his independent status. But, the concept of a voting agency shop breaks down when viewed in the harsh light of reality. The nonmembers do not need the vote on collective bargaining matters. Union members will veto any agreement or terms of agreement that are not favorable to them. And since the union is required to represent all members of the unit fairly and equally in bargaining, what is favorable to union members is generally favorable to nonmembers as well. Discriminatory treatment is forbidden by statute. Nonmembers' interests are therefore protected without nonmembers having the franchise. Further, the possible confusion and discord that would arise from letting nonmembers vote on other matters of union concern, and from attempting to distinguish those matters from collective bargaining matters, would lead to undesired instability in the unit labor relations.

### *Conclusion*

Thus, the straight agency shop seems to be the solution. True, it *may* encourage union membership but at the same time it effectively prevents discouragement of membership. The rights of the dissenter are protected, the security of the bargaining representative is achieved, and the powers of the government are not improperly delegated. The agency shop is a key to stability for labor relations in the public sector.

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