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## **A Remedy for the Lone Star State's Taxpayer Giveaway to Unions** **Time to Enforce Texas Constitution's Bar on Taxpayer Subsidies 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, Texas 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, several provisions in the Texas constitution, known as “gift clauses,” ban government subsidies that primarily benefit private entities. Texas’ constitution states:

[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever.<sup>1</sup>

It also stipulates: “The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation.”<sup>2</sup>

Paid release time places no obligation on government employee unions to provide anything in return to the public in exchange for the subsidy.<sup>3</sup> A number of Texas municipal agencies 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.<sup>4</sup> (Permitted activities, activities for which release time is actually used, and the amount of release time 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 leads 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, taxpayers are funding both sides of the contract negotiations without any real voice in matters that determine government employee pay and benefits, which greatly impact taxpayers and government services.<sup>5</sup>

Overall, activity performed on release time serves the interests of unions. Unions, not taxpayers, should incur those costs. But despite the constitutional restriction on granting public aid to private entities, Texas municipal governments continue to provide release time to public employee unions.

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\* *Trey Kovacs is a Fellow at the Competitive Enterprise Institute.*

**Public Records Requests.** The amount of time, cost, and type of activities performed on union release time at Texas 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 several public records requests to municipal agencies in Texas for union release time records. An overview of responses from Texas government agencies follows.

The San Antonio Fire Department (SAFD) granted 4,238 release time hours in fiscal year 2012, at a cost to taxpayers \$135,786.<sup>6</sup> In FY 2013, release time amounted to 4,620 hours and cost \$151,585.<sup>7</sup> Although CEI requested the activity performed on release time, the SAFD records shed little to no light on the activity performed on release time. Mostly, the SAFD records did not indicate what activity took place during release time.<sup>8</sup> When indicated, only brief descriptions were given and the most common activity listed was “union leave,” with no information on what that employee was actually doing. Other activities included “MDA summer camp,” “conference,” “cadets,” and “pension.”<sup>9</sup> Even with the union release time descriptions that were provided it is still difficult to paint a picture of what activity is performed.

The San Antonio Police Department (SAPD) granted even more hours than the SAFD. In FY 2012, SAPD released union employees for 7,941 hours, at a cost of \$252,581.<sup>10</sup> In FY 2013, release time hours amounted to 8,301, at a cost of \$272,244.<sup>11</sup> Similar to the SAFD, SAPD records did not significantly reveal what activities were performed on release time. Again, the SAPD either did not identify the release time activity or simply called it “association leave.”<sup>12</sup> Activity on release time that was detailed consisted of the “San Antonio Police Officer Association (SAPOA) picnic,” “SAPOA auction,” “pension board and benevolent fund meeting,” “association basketball tournament” and “pre-retirement meeting.”<sup>13</sup>

City of Austin records showed the Police Department (APD), Fire Department (AFD) and Emergency Medical Services (AEMS) were granted 10,857 hours of release time in FY 2012 and 16,963 in FY 2013, a cumulative total of 27,821.<sup>14</sup> A total cost figure cannot be calculated because salaries were not provided for all APD, AFD, and AEMS employees. However, for the salaries made available, the cost of union release time to Austin taxpayers was \$227,530 and \$593,783 in FY 2012 and FY 2013.<sup>15</sup>

In addition, the APD and AEMS did not provide the activity performed on release time, while the AFD did record the activity. In general, the reason given, in FY 2012 and 2013, fell into a couple of categories including, “Union Conference Meeting,” “Grievance Committee,” “Bargaining,” “President” and “other association business.” Union conference meetings and bargaining were the most cited uses of release time.<sup>16</sup>

Although the other association business required comment there are many instances where the comment section was left blank. Activities listed under “other association business” included: “election committee,” “membership meeting,” “general meeting,” “union meeting,” “Benevolent fund meeting,” “National convention,” “PAC Meeting,” Retirement BBQ, “Union Audit,” “by laws meeting,” “fishing tournament,” “Retirement Party,” “Wellness report,” “Representation meeting,” among other activity.<sup>17</sup>

**Texas’ Gift Clause Prohibits Subsidies.** The issue of the legality of release time was presented to the Texas Attorney General Mark White in 1979. He was asked to determine whether the Fort Worth Independent School District’s union release time policy, begun in 1975, violated the state constitution’s gift clause. The policy gave several teachers unions nine days of union release time for every 100 members and allowed the unions to determine what activity could be conducted on

release time. During 1978-1979, one union, the Classroom Teachers Association, used 301 release time days at a cost of \$23,000.<sup>18</sup>

White determined:

A policy of the Fort Worth Independent School District, which permits teachers to work for professional organizations while being paid salaries by the school district, constitutes an unconditional grant of public funds to a private organization and therefore unconstitutional.<sup>19</sup>

He noted that Texas's gift clause bans the grant of public funds to private entity "unless the transfer serves a public purpose and adequate contractual or other controls ensure its realization,"<sup>20</sup> and that release time constituted a "benefit financed from public funds. The policy permits teachers to pursue the business of the professional organization while being paid by the school district."<sup>21</sup>

Given that release time is a benefit of public funds that is granted to a private entity, it must serve a public purpose and have controls in place to ensure that it does so. White found that the school district failed to articulate how release time served a public purpose and the release time program failed to place "adequate controls on the use of released time to insure that a public purpose will be served."<sup>22</sup>

While attorney general opinions do not create law or undo deleterious impact of current law, they carry great weight with courts when they determine the constitutionality of a given public policy.<sup>23</sup>

Government unions are the primary beneficiaries of release time and they use it to promote their own ends, not a public purpose.

**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.<sup>24</sup>

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.<sup>25</sup>

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.<sup>26</sup> 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.<sup>27</sup>

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."<sup>28</sup> 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.<sup>29</sup>

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 still on appeal. The most recent action was on January 24, 2014, when 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."<sup>30</sup>

**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 Texas's gift clauses taxpayers are authorized to file suit challenging this unnecessary government expense. Another option is for the Texas legislature to prohibit the practice.<sup>31</sup> In addition, Texas municipal governments could stop negotiating release time into collective bargaining agreements. 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

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<sup>1</sup> TX. Const. art. III, sec. 52

<sup>2</sup> TX. Const. art. III, sec. 51

<sup>3</sup> 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>.

<sup>4</sup> Trey Kovacs, "A Remedy for Taxpayer Giveaway to Unions: Time to Enforce Missouri Constitution's Bar on Gifts to Private Parties," CEI.org, March 25, 2015, <https://cei.org/sites/default/files/Trey%20Kovacs%20-%20A%20Remedy%20for%20Taxpayer%20Giveaway%20to%20Unions.pdf>.

<sup>5</sup> 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](http://goldwaterinstitute.org/sites/default/files/Release%20Time_0.pdf).

<sup>6</sup> City of San Antonio Management Analyst, Public Information Request, email to report author, November 18, 2014. Dollar amounts are rounded to the nearest dollar and the nearest hour.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> City of Austin Human Resource Department, Public Information Request, email to report author, September 3, 2014.

<sup>15</sup> Ibid.

<sup>16</sup> Austin Fire Department, Public Information Request, email to report author, September 18, 2014.

<sup>17</sup> Ibid.

<sup>18</sup> 89 Op. Att'y Gen. p. 270-272 (1979)

<https://www.texasattorneygeneral.gov/opinions/opinions/46white/op/1979/htm/mw0089.htm>.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup> U.S. The Attorney General of Texas. Web. 1 July 2015

<https://www.texasattorneygeneral.gov/opinion/about-attorney-general-opinions>.

<sup>24</sup> 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>.

<sup>25</sup> “City, Police Union Sued by Taxpayers,” Goldwater Institute, December 8, 2011,

<http://goldwaterinstitute.org/article/city-police-union-sued-taxpayers>.

<sup>26</sup> This analysis was also used by the Arizona Supreme Court in *Turken v. Gordon*. 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, *Turken v. Gordon*, 223 Ariz. 342, 350, 224 P.3d 158, 165 (2010),

<https://www.azcourts.gov/Portals/23/pdf2010/CV090042PR.pdf>.

<sup>27</sup> 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/NewsEvents/Publications/Alerts/133643/Arizona-Supreme-Court-Clarifies-Gift-Clause-Limits-on-PublicPayments-to-Private-Parties>.

<sup>28</sup> *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>.

<sup>29</sup> Ibid.

<sup>30</sup> See note 5.

<sup>31</sup> “Prohibition on Paid Union Activity (Release Time) by Public Employees Act,” American Legislative Exchange Council, <http://www.alec.org/model-legislation/prohibition-on-paid-unionactivity-release-time-by-public-employees-act/>.