



BACKGROUNDER

PRESERVING WORKERS' FREE SPEECH RIGHTS

Gilmore v. Gallego

Executive Summary

Government workers should not have to choose between keeping their job or being forced to finance union activities. Yet in a practice called “release time,” that is precisely what is happening in the City of Phoenix (“City”) and throughout the country. Under release time, government employees are “released” from the jobs they were hired to perform to work exclusively for government unions—all while receiving funding from other government employees, including those who don’t belong to the union. While on release time, government workers are paid to increase union membership, engage in political activities, lobby the government, file grievances against their employer, and negotiate for higher wages and benefits, among other things.

The practice of release time is prevalent throughout Arizona and the rest of the country.

In this case, the City entered into a Memorandum of Understanding (“MOU”) with the American Federation of State, County, and Municipal Employees, Local 2384, Field Unit II (“AFSCME”). Under the MOU, the City is obligated to provide AFSCME with multiple release time benefits, including four full-time release positions, guaranteed compensatory time for high-ranking union officials using release time, a bank of release time hours per year to be used by other Union representatives, and additional hours and direct payments for AFSCME members to attend Union seminars, lectures, conventions, and workshops.

Release time is funded in this MOU and others between the City and labor unions by charging the cost of release time employees’ salaries as part of “total compensation” to all employees who are bound by the MOU, whether those employees are members of the labor union or not. In other words, release time is funded by all government employees of a specific bargaining unit, and as a result, non-union members are being forced to fund the salaries of release time employees.

Forcing non-union members to fund the speech of a government union violates the First Amendment to the U.S. Constitution. It also violates several state constitutional provisions and Arizona’s Right to Work laws.

On October 8, 2019, representing two City of Phoenix employees who object to having part of their salaries directed toward union activities, the Goldwater Institute filed suit against the City to block the practice of release time and to end this form of unlawful cronyism.

Background

The practice of union “release time” (sometimes called “official time”) allows full-time public employees on the government payroll to go work for a private union instead of working for the public. Release time is negotiated as part of collective bargaining agreements between government employers and labor unions.

Release time comes in many shapes and sizes, but there are three basic types. The first is “full-time release,” which lets public employees do nothing but union work. They report to union headquarters and their city supervisors do not know where they are or what they are doing, yet they receive full pay and benefits from their government employer. The second type is a “bank of hours,” which gives unions a certain number of hours per employee that can be used however the union directs. The third type is activity-specific release time, where the government gives the union power to use public employees for certain specified activities but not others. Activity-specific release time might be capped (such as 200 hours for union conferences) or can be unlimited, such as allowing for unlimited hours for contract negotiations with the government.

Activities performed by government employees on release time are varied and often bear no resemblance to the duties for which the employees were hired. In many instances, release time employees engage in activities that are directly at odds with the interests of their public employers. For example, release time is used to campaign for political candidates or to lobby legislative bodies on bills (in many cases, taking positions on legislation that is contrary to the employer’s position). This means that some workers are forced to fund the political activities of a private organization that may be advocating for legislation with which they disagree. Additionally, release time is commonly used to file costly grievances against public employers. This is tantamount to a company paying several full-time employees to encourage their co-workers to file complaints against the company that the company must then resolve. Release time is also regularly used to negotiate over wages, benefits, and other conditions of employment.

Release time is pervasive across the country and is practiced at every level of government—city, state, and federal. Some estimates put the total cost of release time in the U.S. at \$1 billion per year,¹ but because state and local governments often do not carefully track its use, the amount is likely much higher.

¹ Mallory Factor, “How Public Unions Exploit the Ruse of ‘Official Time,’” *Wall Street Journal*, Oct. 1, 2012, <http://online.wsj.com/news/articles/SB1000087239639044332440457759129176471006>. See also Mark Flatten, “Federal Employee Unions Use Tax-Funded Official Time, Money to Building Political Muscle,” *Washington Examiner*, Feb. 5, 2013, <http://washingtonexaminer.com/federal-employee-unions-use-tax-funded-official-time-money-to-build-political-muscle/article/2543269> (noting that federal official time alone costs taxpayers an estimated \$155.6 million in fiscal year 2011).

On May 22, 2019, the City of Phoenix entered into an MOU with AFSCME Field Unit II. Because AFSCME is the exclusive bargaining unit for City of Phoenix employees in jobs ranging from electricians, mechanics, security guards, building and maintenance workers, and others, the agreement applies to all such City of Phoenix employees, whether they belong to the union or not.

The MOU lays out very generous release time provisions. Specifically, the MOU provides the Union with: (1) four full-time release positions; that is, four City workers who are released *entirely* from their City job to work exclusively for the union; (2) a bank of 3,183 release time hours per year to be used by other union representatives; (3) 150 additional hours per year for union members to attend union seminars, lectures, and conventions; and (4) \$14,000 per year in reimbursement for union members to attend schools, conferences, and workshops.

Under the terms of the MOU, “[t]he cost to the City for these release time positions and release hours, including all benefits, has been charged as part of total compensation detailed in this agreement.” In other words, every City employee who is part of Field Unit II, whether he or she belongs to the Union or not, is required to direct part of his or her compensation to finance release time under the MOU. As outlined below, that is unlawful.

Legal Analysis

As Thomas Jefferson famously said, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” The release time provisions under the MOU do precisely that, and in so doing, violate the First Amendment rights of non-union members who do wish to fund union activities. Release time also violates the Arizona Constitution and Arizona’s Right to Work laws.

Last year, the U.S. Supreme Court decided *Janus v. AFSCME*, a landmark First Amendment case.² In that case, the Court found that the First Amendment is violated when a government employer takes money from nonconsenting employees to support a public-sector labor union. The Court held that “[n]either an agency fee *nor any other payment* may be deducted from a nonmember’s wages, nor may *any other attempt* be made to collect such a payment, unless the employee affirmative consents to pay.”³ In other words, the Court held that the First Amendment is violated if any portion of a non-consenting worker’s compensation is used to subsidize the private speech of a labor organization, including a labor organization’s political advocacy, collective bargaining, handling of grievances, and other private activities.

And just as the First Amendment prohibits the compulsory payment of wages from a non-consenting employee to a private labor organization under *Janus*, the Arizona Constitution’s guarantees of free speech and association likewise prohibit compelling public-sector workers to support a union. Likewise, Article XXV of the Arizona Constitution and Arizona’s Right to Work laws⁴ prohibit forced union membership, as well as forcing non-union employees to pay

² 138 S.Ct. 2448 (2018).

³ *Id.* at 2486 (emphasis added).

⁴ A.R.S. §§ 23-1301-1307; 23-352

any financial compensation to unions.⁵ Under the Arizona Constitution, Arizonans “may not be forced to speak a message he or she does not wish to say.”⁶ What’s more, when the government compels an individual to associate with others, and that compulsion leads to the monetary endorsement of political views, the message expressed must be “viewpoint neutral.”⁷ In this case, because the Plaintiffs are forced to provide part of their compensation to fund union activities that are political, including electioneering, lobbying, grievances, and collective bargaining, the release time provisions also violate the Arizona Constitution’s free speech and association provisions.

In addition to the free speech, association, and Right to Work violations, the release time expenditures in the MOU may also violate the Arizona Constitution’s Gift Clause⁸, which forbids government from giving or lending public money to private organizations unless the expenditures are for public purposes and taxpayers receive adequate value in return.⁹ The basic principle here is simple: Public money should be spent for public purposes. Whenever private interests are paid with public money, the public should get some fair value in return for those expenditures. The release time provisions in the MOU benefit AFSCME, which uses release time to promote the union’s purposes only. They do not serve a public purpose because they do not benefit the public welfare or the community as a whole. Moreover, because release time cannot lawfully be part of “total compensation” under *Janus*, Article XXV of the Arizona Constitution, and Arizona’s Right to Work laws, the release time expenditures must be viewed independently, which means that the City could does not receive sufficient return value for them.

The release time provisions are paid by nonconsenting employees and constitute a gift to the union. The First Amendment to the U.S. Constitution, the Arizona Constitution, and Arizona state law prohibit this arrangement.

Case Logistics

The Goldwater Institute represents two City of Phoenix employees, Mark Gilmore and Mark Harder, who are subject to the MOU between the City and the AFSCME. Neither Mr. Gilmore nor Mr. Harder are members of AFSCME and object to having any portion of their compensation directed toward union activities, including release time.

The case was filed in the Maricopa County Superior Court.

Plaintiffs seek an order declaring the release time provisions in the City and union contract are unconstitutional and barring their further enforcement.

⁵ See *American Fed’n of State, Cnty. & Mun. Emps., AFL-CIO, Local 2384 v. City of Phoenix*, 213 Ariz. 358, 367, 142 P.3d 234, 243 (App. 2006) (“It is clear that the populace, through constitutional amendment and legislation, intended to forbid both management and labor from imposing, as a condition of employment, the requirement that any person participate in any form or design of union membership.”).

⁶ *Brush & Nib Studio, LC v. City of Phoenix*, No. CV-18-0176-PR, 2019 WL 4400328, at *10 (Ariz. Sept. 16, 2019).

⁷ See *May v. McNally*, 203 Ariz. 425, 429-30, 55 P.3d 768, 772-73 (2002).

⁸ Ariz. Const. art. IX, § 7.

⁹ See *Turken v. Gordon*, 223 Ariz. 342 (2010).

The Legal Team

Jon Riches is the Director of National Litigation for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. He litigates in both trial and appellate courts at the state and federal level in the areas of taxpayer rights and fiscal policy, public union and pension reform, government transparency, economic liberty, and school choice, among others. Prior to joining the Goldwater Institute, Jon served on active duty in the U.S. Navy Judge Advocate General's (JAG) Corps, where he represented hundreds of clients, litigated dozens of Court-Martial cases, and advised commanders on a vast array of legal issues.

Jacob Huebert is a Senior Attorney at the Goldwater Institute. Before joining Goldwater, he served as Director of Litigation for the Liberty Justice Center in Chicago. There, he successfully litigated cases to protect economic liberty, free speech, and other constitutional rights, including the landmark *Janus v. AFSCME* case, in which the U.S. Supreme Court upheld government workers' First Amendment right to choose for themselves whether to pay money to a union. Huebert is a former clerk to a judge of the U.S. Court of Appeals for the Sixth Circuit and a graduate of Grove City College and the University of Chicago Law School.