***WILEY v. AUSTIN* – BACKGROUNDER**

Executive Summary

The Goldwater Institute has been on the cutting edge of using anti-subsidy provisions of state constitutions to eliminate an egregious taxpayer abuse called "release time." Release time is a practice where government employees are "released" from the jobs they were hired to perform to work exclusively for government unions – all while receiving taxpayer funded salaries and benefits. 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 activities. Release time exists at the federal, state, and local level.

The Institute's litigation successfully ended the practice of release time in Arizona. But the practice of release time is prevalent in many other states, including Texas. Release time exists throughout Texas, and is particularly pervasive in the City of Austin, among three separate union groups: police, fire, and EMS. This case is a taxpayer challenge to the collective bargaining agreement between the City of Austin ("City") and the Austin Firefighters' Association ("AFA"). Plaintiff taxpayers argue that release time constitutes an unlawful subsidy to a private entity under the Texas Constitution.

The primary goals in this litigation are to eliminate release time and build favorable anti-subsidy case law in Texas that can be used to address abuse of taxpayer funds and other forms of government cronyism.

Background

Imagine if your city council contacted a local Walmart and offered them full-time city employees to use however Walmart wished – as checkout clerks, greeters, stockers. Walmart makes the decision, and the employees wear Walmart uniforms, report to Walmart management, and work for Walmart's benefit. But the city claims that they're still city employees, and pays them salaries out of the government's treasury, including full taxpayer-funded salaries and benefits, and fringe benefits including guaranteed pensions.

Sound unlikely? Amazingly, this type of arrangement happens every day across the country. But instead of a large retail chain, it happens with unions. Under a practice called union "release time" (or "official time"), governments allow public employees on full-time government payroll to instead go work for a private union.

Release time is negotiated as part of the "collective bargaining" or "meet and confer" contracts between public employers and unions. Release time comes in many shapes and sizes, but it can generally be distilled down to three types.

The first is "full-time release," which lets public employees do nothing but union work. They report to union headquarters and their supervisors do not know where they are or what they are doing, yet these employees receive full pay and benefits from their government employer.

The second type is a "bank of hours," which gives unions a discretionary amount of hours that can be used for a wide range of union activities. While using these hours, public employees can decide not to show up for a shift, and do whatever the union wants instead.

The third type is activity-specific release time, where the government allows the union to use public employees for certain specified activities but not others. Activity-specific release time

can come with unlimited hours (such as unlimited hours for contract negotiations with the government) or a cap (such as 200 hours for union conferences).

Activities performed by government employees on release time are varied, and often bear no resemblance to the duties for which the government hired that employee. 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 candidates for public office, and to lobby legislative bodies on bills—in many cases taking positions on legislation that is contrary to the employer's position. Taxpayers are, therefore, funding the political activities of a private organization that may be advocating for legislation with which the taxpayers disagree.

Release time is commonly used to file grievances against public employers. This is tantamount to a company paying several full-time employees to urge other employees to file complaints against the company. It's also unnecessary, as other government agencies are often already charged with this task.

In addition, release time is regularly used to negotiate over wages, benefits, and other conditions of employment. This means public employees are negotiating for private benefits against another public body—all on the taxpayer's dime. When release time employees use release time to negotiate over wages and benefits, taxpayers are funding both sides of the negotiation—with no seat at the table themselves.

Release time is practiced at every level of government—city, state, and federal. The federal government permits release time ("official time"),[1] where, for example, the chronically understaffed Department of Veteran Affairs recently reported granting nearly *one million hours* of release time in *one year*, at a cost of over $42 million to taxpayers, for union activity, rather than the discharge of public duties.[2] And this practice is pervasive across the country.[3] Estimates are that the total cost of release time in the U.S. is $1 billion per year.[4]

In 2011, the Goldwater Institute challenged release time as practiced by the City of Phoenix. The trial court struck down the practice under the Arizona Constitution and enjoined

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[1] 5 U.S.C. § 7131.

[2] Diana Furchtgott-Roth, "Hundreds of VA Employees Working for Union on Taxpayers' Dime," Washington Examiner, Jun. 11, 2013, http://washingtonexaminer.com/diana-furchtgott-roth- hundreds-of-va-employees-working-for-union-on-taxpayers-dime/article/2531611.

[3] *See, e.g.,* Collective Bargaining Agreement, Las Vegas Metropolitan Police Department and Las Vegas Police Protective Association, 2011-2013, art. 5.1 (July 1, 2011); Labor Agreement, Portland Police Association, City of Portland, 2010-2013, art. 10 (July 1, 2010); Memorandum of Agreement, City of Jacksonville and Jacksonville Consolidated Lodge No. 5-30 of the Fraternal Order of Police, 2003- 2005, art. 3.3 (October 1, 2003); State Police Bargaining Unit Contract, State of Connecticut and Connecticut State Police, 2007-2010, art. 7, § 7 (July 1, 2007); Memorandum of Understanding, Salt Lake City and American Federation of State, County, and Municipal Employees, Local 1004, 2013- 2016, art. 6 (June 23, 2013); Memorandum of Understanding, Baltimore County Administration and Baltimore County Federation of Public Employees, 2010-2012, § 2.3 (July 1, 2010).

[4] Mallory Factor, "How Public Unions Exploit the Ruse of 'Official Time,'" Wall Street Journal, Oct. 1, 2012, http://online.wsj.com/news/articles/SB10000872396390443324404577591291764710 06. *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 offcial time alone costs taxpayers an estimated $155.6 million in fiscal year 2011).

the practice throughout the city.[5] The Arizona Court of Appeals agreed, finding the release time provisions at issue unconstitutional because they "do not obligate [the union] to perform any specific duty or give anything in return for the release time, meaning the City receives no consideration…for its expenditure."[6]

Now, the Goldwater Institute is representing taxpayers in a challenge to the collective bargaining agreement between the City of Austin and the Austin Firefighters' Association ("AFA"). In Austin alone, three separate union groups – police, fire, and EMS – have release time provisions in their collective bargaining agreements. In the AFA's agreement, "Association Business Leave" ("ABL") provisions, permit public employees to perform work exclusively for private unions while receiving government pay and benefits.

Those provisions allow the president of AFA to perform exclusively union business on a full-time basis, as well as other union members to perform union business on a part-time basis. All of this is funded by taxpayers through a pool of ABL hours that are contributed by the City every year. In other words, the City is paying for whole days of employee time to be spent benefitting the union—which amounts to several hundreds of thousands of dollars annually.

The Austin-AFA contract allows the president of the firefighters' union and other union members to use ABL for any activities that directly support the mission of the association. These activities include time spent in collective bargaining negotiations, state and national lobbying, and political activities relating to wages, hours, and work conditions for AFA members. ABL is also used for adjudicating grievances, attending dispute resolution proceedings, addressing cadet classes during cadet training, and attending union conferences and meetings. The City is therefore using taxpayer funds to subsidize union activities that *increase* the burden on taxpayers.

Legal Analysis

Public money should be spent only for public purposes. To the extent private interests benefit from government expenditures, the government should receive fair value for those expenditures in return. Government can buy things for the public with taxpayer money—but it can't give taxpayer money away to specially chosen beneficiaries.

Fortunately, the drafters of 47 state constitutions incorporated "gift clauses" in those documents. Gift clauses generally prohibit public gifts or subsidies to private individuals or associations.

The Texas Constitution forbids any city from lending its credit or granting public money to any individual, association or corporation.[7] It also makes plain that "[n]o appropriation for private or individual purposes shall be made, unless authorized by this Constitution."[8] These provisions promise Texans that their public money will be spent only for public purposes.

An expenditure of tax money is proper under the Texas Constitution only if the expenditure serves a public purpose and affords a clear public benefit in return. To prevent municipalities from granting unlawful gifts to private entities, three factors must be satisfied:

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[5] *Cheatham v. Diciccio*, CV 2011-021634, Maricopa County Superior Court, Order Granting Permanent Injunction, Jan. 24, 2014, https://goldwater-media.s3.amazonaws.com/cms_page_media/2014/11/5/09%20-%20Ruling%20Granting%20Permanent%20Injunction%201.24.14.pdf.

[6] *Cheatham v. Diciccio*, 238 Ariz. 69, 356 P.3d 814, 820 (App. 2015).

[7] Tex. Const, Art. III, §§ 50-52.

[8] Tex. Const. Art. XVI, § 6.

First, the expenditure must be made for activities that have *predominant public purpose*, rather than benefitting private parties. Second, *public control* must be retained over the expenditures to ensure the public purpose is accomplished. Third, the municipality must receive a *proportionate return benefit* constituting sufficient consideration.[9]

None of these requirements are met in the Austin contract. Instead, that contract is an outright gift of government money to a private association—in violation of the Texas Constitution.

Case Logistics

The plaintiffs in this case are Austin taxpayers Jay Wiley and Mark Pulliam. The Defendant is City of Austin, its officials, and the AFA. The case will be filed in the Travis County District Court.

Taxpayer plaintiffs are not seeking money damages, but only an order declaring the ABL "release time" provisions unconstitutional and enjoining their further enforcement.

The Goldwater Institute also hopes to vindicate the fundamental principle underpinning the Texas Constitution's gift clause that public dollars should be spent only for public purposes and create favorable precedent that prohibits taxpayer subsidies.

The Legal Team

Jon Riches is the Direct of National Litigation for the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation. He litigates 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.

Adi Dynar is a Staff Attorney at the Goldwater Institute. He litigates cases across the United States relating to fundamental civil rights, free enterprise, freedom of speech and association, and freedom of information, among others. Prior to joining the Goldwater Institute, Adi worked in areas of constitutional law and immigration law.

[9] *Texas Muni. League Intergovernmental Risk Pool v. Texas Workers' Compensation Com'n*, 74 S.W.3d 377, 383-84 (Tex. 2002).