# STATE CONSTITUTIONAL GIFT CLAUSE CHALLENGES TO RELEASE TIME PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS

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*Now more than ever public workers face the threat or reality of having their collective bargaining rights unilaterally stripped by radically anti-union state governments. Rights of public workers are under attack not only in state legislatures, but in state courts, as well. One such creative litigation tactic in the ongoing special-interest-funded crusade against public unions is the challenging of release time provisions of collective bargaining agreements under the gift clauses of state constitutions. These plaintiffs argue that because release time provisions allow public workers to be paid for time spent representing other workers, they amount to unconstitutional "gifts" for which the public receives no consideration. While this innovative argument has not yet resulted in widespread successes, its legal bases are worth examining. This commentary analyzes the validity of release time provisions under state constitutional gift clauses, with a particular eye to the possible outcome of such a challenge under the Illinois Constitution.*

## I. INTRODUCTION

One recent litigation tactic in the ongoing special-interest-funded crusade against public sector unions is to challenge, state by state, the constitutionality of release time provisions of collective bargaining agreements under state constitutional law theories. A "release time" provision of a collective bargaining agreement ("CBA") allows employees to be paid for work performed on behalf of their co-workers in their official union representative capacity.[1] A release time provision allots a

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1. *See* Lori Higgins, *Bill Targets District-Paid Union Release Time*, DET. FREE PRESS (June 16, 2015, 12:10 AM), http://www.freep.com/story/news/local/michigan/2015/06/16/teachers-union-legislation-release-time/71272470/.

specified number of paid hours per month for a designated employee to dedicate to duties incumbent upon him in his role as a union officer (for example, conducting union meetings, etc.).

Special interest groups have recently begun challenging these CBA provisions in various state courts, arguing such provisions amount to unconstitutional "gifts," the payments of which serve no "public purpose." The argument is an innovative one and is the subject of constitutional scrutiny on a state-by-state basis. This commentary analyzes some of the ongoing litigation in this area and discusses the possible outcome of a challenge to release time provisions under the gift clause of the Illinois Constitution. Given the broad language of the Illinois gift clause and the broad discretion given by Illinois courts to legislatures in determining what constitutes a "public purpose," release time provisions are likely to be held constitutional in Illinois.

## II. BACKGROUND ON GIFT CLAUSE LITIGATION

### *A. Gift Clause Litigation in Arizona*

In *Cheatham v. DiCiccio,* the Arizona Supreme Court held that release time provisions of a CBA between the City of Phoenix and the police union were not unconstitutional under the state gift clause.[2] In so doing, it reversed the decision of the appellate court, which had invalidated the release pay provision under the state gift clause for want of adequate consideration.[3] The CBA at issue allocated up to 960 release-time hours to six police officers, 1,583 to 1,859 additional hours for "legitimate association business," and an "unspecified" bank of paid leave for officers to attend representative meetings, costing the City a projected $1.7 million over two years.[4]

The Arizona Constitution's gift clause states, in part, that "[n]either the [S]tate, 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."[5] The Arizona Supreme Court has a two-part test for determining if the gift clause is violated: (1) whether "the expenditure is used for a public purpose," and (2) whether "the consideration received by the government is not grossly disproportionate to the amount paid to the private entity."[6]

2. 379 P.3d 211, 221 (Ariz. 2016).
3. Cheatham v. DiCiccio 356 P.3d 814, 821 (Ariz. App. Ct. 2015), *rev'd* 379 P.3d 211 (Ariz. 2016).
4. *Id.* at 816 (internal quotations omitted).
5. *Id.* at 818 (citing Ariz. Const. art. IX, § 7).
6. *Id.* at 819 (citing Turken v. Gordon, 224 P.3d 158, 161, 167 (Ariz. 2010)).

In *Cheatham*, the Arizona Supreme Court found that release time provisions do serve public purposes.[7] First, the court noted that negotiating release pay is a standard practice in collective bargaining, as is evidenced by the City's inclusion of release time provisions in preceding CBAs for decades.[8] Second, in the private employer setting, federal courts have held release time clauses to be mandatory subjects of bargaining, requiring the employer to negotiate release pay, if the union so desires.[9] Third, the City benefits from the efficient negotiation process that results from its agreement to provide release pay.[10] Fourth, the City benefits from efficient employee grievance resolutions secured by officers working in a representational capacity.[11] Fifth, release pay serves a public purpose by improving labor relations and employment conditions for the officers charged with safeguarding the public safety.[12]

On the second prong of the gift clause analysis, the *Cheatham* court found that the City received adequate consideration for the release pay it provided to officers.[13] The court noted that the release pay provision should not be viewed in isolation.[14] Rather, the adequacy of consideration question must take into account the entirety of the CBA, which is bargained for by the City in return for the employees' agreement to work.[15] The court reasoned that the consideration received by the City is the labor secured by ratification of the CBA itself.[16] Indeed "had the release time provisions been omitted, the officers might have received other benefits under the compensation package, such as personal time or paid vacation time."[17]

Similarly, in *Wistuber v. Paradise Valley Unified Sch. Dist.*, the Arizona Supreme Court held that a release time provision in an agreement between the school district and the local teachers' association did not violate the State's gift clause.[18] The contract released the association president from all teaching duties but continued to pay a portion of her salary.[19] In return, the association president agreed to "pursue a number of activities and undertake duties that inure to the benefit of the District . . . [including] providing information to a number of groups, meeting monthly and logging time with the Assistant Superintendent for personnel."[20] The obligations were explicitly laid out in the contract. The court upheld

7. *Cheatham*, 379 P.3d at 217–18 (Ariz. 2016).
8. *Id.* at 216.
9. *Id.*
10. *Id.* at 217.
11. *Id.* at 218.
12. *Id.*
13. *Id.* at 219–20.
14. *Id.* at 219.
15. *Id.*
16. *See id.* at 219–21.
17. *Id.* at 220.
18. 687 P.2d 354, 358 (Ariz. 1984).
19. *Id.* at 356.
20. *Id.*

the release provision as constitutionally valid because "the duties imposed upon her by the [contract] are substantial, and the relatively modest sums required to be paid by the District [are] not so disproportionate as to invoke the constitutional [gift clause] prohibition."[21]

### *B. Gift Clause Litigation in Pennsylvania, Idaho, and Texas*

Cases have also been filed in Pennsylvania, Idaho, and Texas challenging the public purpose of release pay under those States' respective constitutional gift clauses.[22] In Pennsylvania, the "Fairness Center," filed a lawsuit against the Allentown School District, challenging the release time provisions of a teacher's CBA under the Pennsylvania gift clause.[23] They alleged that release pay had cost city taxpayers over $1 million since 2003.[24] In a separate lawsuit, the "Idaho Freedom Foundation" argued that release pay provided to teachers of the Boise Independent School District constituted a violation of Idaho's gift clause.[25] Similarly, in Texas, the "Goldwater Institute" filed a lawsuit against firefighters, challenging the constitutional validity of a release time provision under the State's gift clause.[26] One source estimated release pay to have cost Austin taxpayers between approximately $200,000 and $600,000 per year.[27] As of Fall 2016, all three cases were still in discovery stages.[28]

## III. ANALYSIS UNDER ILLINOIS' GIFT CLAUSE

The constitutions of forty-six states contain a gift clause or otherwise impose a public purpose requirement for public spending.[29] The Illinois Constitution contains a general bar on public spending for non-public purposes, stating: "[p]ublic funds, property, or credit shall be used only for public purposes."[30] In adjudicating challenges to public spending brought under this clause, Illinois courts have given "broad discretion" to legislatures in determining what may constitute a public purpose.[31] The Illinois Supreme Court "has long recognized that what is for the public

21. *Id.* at 358.
22. Trey Kovacs, *The Sneaky Way Public Unions are Getting Tax Dollars for Union Activities*, DAILY SIGNAL (Sept. 28, 2016), http://dailysignal.com/2016/09/28/the-sneaky-way-public-unions-are-getting-tax-dollars-for-union-activities/.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *See* Nicholas Houpt, *Shopping for State Constitutions: Unequal Gift Clauses as Obstacles to Optimal State Encouragement of Carbon Sequestration*, 36 COLUM. J. ENVTL. L. 359, 379 (2011).
30. *Id.* at 44 n.229; ILL. CONST. art. VIII, § 1(a).
31. *See In re* Marriage of Lappe, 680 N.E.2d 380, 388 (Ill. 1997).

good and what are public purposes are questions which the legislature must in the first instance decide."[32]

Unlike Arizona constitutional jurisprudence, Illinois courts have not expressly imposed a requirement that public spending be supported by adequate consideration in order for spending to be constitutionally valid. However, the public purpose inquiry itself implies that in order for spending to benefit the public, the public needs to get something of value in return. Thus, the public purpose inquiry implicitly requires a showing of consideration.

While Illinois courts have not been faced with a challenge to release time provisions under the gift clause, several Illinois supreme and appellate court decisions are useful in defining the boundaries of the Illinois gift clause's prohibitions. In the seminal gift clause case of *People ex rel. Douglas v. Barrett*, the Illinois Supreme Court held that the Illinois legislature's enactment of a private law compensating the widow of a deceased legislator did not violate the gift clause of the pre-1970 Illinois Constitution.[33] Emphasizing the legislature's broad discretionary power, the court reasoned that even though the law expends public funds without securing any services in return, payments stemming from "moral obligations" may nevertheless serve a "public purpose[]."[34]

In *Vill. of Oak Lawn v. Faber*, the First District was faced with the question of whether severance pay for a public employee violated the gift clause.[35] In this case, the outgoing Oak Lawn Board of Trustees voted to fire the long-time village manager, Mr. Faber, who would be paid nine months of severance pursuant to his contract.[36] The Village subsequently sued Faber, alleging that the outgoing board fired Faber with the purpose of gifting him severance pay, and that the severance pay contractual provision itself constituted an unconstitutional gift.[37] In holding that the severance pay provision was constitutional under a public purpose analysis, the court stated that severance pay "served the public interest in that [it] helped secure the professional commitment of an individual in an essential municipal government position—a position in which Faber was perpetually subject to termination at the whim of the board."[38] The court also pointed to the contractual language, which "explicitly recognize[d] that the severance [pay] was part of the [V]illage's consideration to Faber in its statement that the severance benefits 'are provided in consideration of his years of service . . . .'"[39] Finally, the court noted: "[t]he fact that Faber was compensated for his work and commitment to the [V]illage does

32. *Id.* (citing People ex rel. City of Salem v. McMackin, 291 N.E.2d 807 (Ill. 1972); Cremer v. Peoria Hous. Auth., 78 N.E.2d 276 (Ill. 1948)).
33. 19 N.E.2d 340, 343 (Ill. 1939).
34. *Id.* at 342 (internal quotations omitted).
35. 880 N.E.2d 659, 661 (Ill. App. Ct. 2007).
36. *Id.* at 660–61.
37. *Id.* at 663.
38. *Id.* at 668.
39. *Id.*

not invalidate the public benefit his efforts inured to the [V]illage."[40] Thus, the Court found severance pay to be valid under the Illinois gift clause because the Village, in return for paying severance, received value in the form of a qualified municipal employee.[41]

Illinois courts have faced other gift clause challenges to benefits paid to employees. In *Ziebell v. Board of Trustees of the Police Pension Fund of the Village of Forest Park*, the First District held that the plaintiff, a retired police officer, was not entitled to increased benefits under pension code amendments made subsequent to his retirement.[42] The court reasoned that the plaintiff's alternative construction of the amended statute would result in an unconstitutional gift, since it would require the State to increase pension benefits to retirees without receiving any contribution from them in return.[43]

While release time provisions do not mirror the severance pay or pension pay provisions scrutinized under the gift clause in *Faber* and *Ziebell,* the court's language is nevertheless insightful. Severance pay and release time pay are similar in that they both entail payment to individuals without benefitting from specific, direct, and forthcoming services in return. *Faber* indicates that contractual clauses, such as severance pay, that "help[] secure the professional commitment of an individual" do in fact serve the public interest.[44] Like severance pay provisions, release time provisions make up a part of a contract that, as a whole, helps "attract eligible candidates to the position" and "help[s] secure the professional commitment of an individual."[45]

Nevertheless, despite applicable language from the First District, neither *Faber* nor *Ziebell* specifically involved either release time provisions or CBAs. Indeed, the employee-employer relationship in *Faber* was at-will. The *Faber* court indicated that the severance pay provision was consideration for the at-will nature of this employment relationship.[46] Laborers under a CBA, on the other hand, may be subject to a "just cause" firing provision, removing the at-will component of their employment relationship. An Illinois court reviewing the constitutionality of a release time provision might distinguish *Faber* and *Ziebell* on the grounds that the court's gift clause reasoning in those cases relied factually on the presence of an at-will employment relationship.

40. *Id.*
41. *Id.*
42. 392 N.E.2d 101, 106 (Ill. App. Ct. 1979).
43. *Id.* at 104–106.
44. *Faber*, 880 N.E.2d at 668.
45. *Id.*
46. *Id.*

## IV. RECOMMENDATION AND CONCLUSION

It is likely that release time provisions are constitutional under Illinois' gift clause given the comparatively broad language of Illinois' gift clause, the broad discretion courts give the government in determining what constitutes a "public purpose," the traditional use of release time provisions in CBAs, and the value the government derives from the qualified workforce obtained by way of the CBA. To avoid potential litigation and losses, however, release time provisions should be buttressed from attack by strengthening their contractual language.

First, as noted in *Cheatham*, failure to list specific duties of release officers makes it difficult to argue in court that release payments are made in consideration for something of value to the public. Second, as was the case in *Faber*, use of contractual terms such as "in consideration of" may lead to a finding of public purpose. While recitals of purported consideration in contracts are not controlling, they may nevertheless assist a court in interpreting the contract and making a finding of consideration.

Finally, keeping records of the duties performed by officials on release time may not be useful in combating gift clause challenges. Regardless of whether officials keep track of their release time tasks, it is the CBA provision itself that is the subject of constitutional scrutiny. Keeping records of official duties performed on release time might help dispel the notion that public funds are being paid for unperformed work. Mere record-keeping of release time tasks, however, is likely insufficient by itself to necessitate a finding of constitutionality under a state's gift clause. Moreover, it would be wise to list release officers' specific release-time duties in the contract itself. Express contractual language regarding the value being returned to the City should also be included to aid a court's contractual interpretation and finding of constitutional validity.