



THE
COMMONWEALTH
FOUNDATION

for Public Policy Alternatives

**DOES "AGENCY SHOP"
SERVE THE PUBLIC INTEREST?
THE AUTHOR OF ACT 195 SAYS "NO"**

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Mr. Lane's career as a labor lawyer spans three decades. His record includes: Supervisory Attorney in the U.S. Department of Labor (1965-67), Deputy Attorney General under Governor Shapp (1967-70), member of the Jones Commission, Legal Counsel to the Hickman Commission, Legal Counsel to the Senate State Government Committee where he drafted Act 195, and a private labor law practitioner for a large law firm.

EXECUTIVE SUMMARY

WORKERS CAN BE FORCED TO CONTRIBUTE TO UNIONS AS A CONDITION OF PUBLIC SERVICE EMPLOYMENT.

Sixteen states have enacted legislation that requires public employees to pay dues to a public sector union as a condition of employment. Similar legislation known as "agency shop" is advancing in Pennsylvania. The proposed bill could transfer up to \$8 million dollars from the paychecks of current non-union workers into the hands of organized labor.

ACT 195 HAS ALREADY ESTABLISHED A FORMAL COLLECTIVE BARGAINING POLICY FOR GOVERNMENT EMPLOYEES.

Act 195 firmly establishes the freedom of individual public employees to either participate in or refrain from union activity. The act establishes a policy of promoting "orderly" and "constructive" employee-employer relationships, while keeping "paramount" the citizens' rights to health, safety, and welfare. The act specifically protects public sector workers from forced union participation.

PUBLIC LABOR RELATIONS ARE FUNDAMENTALLY DIFFERENT THAN PRIVATE LABOR RELATIONS.

Government employees are indirectly hired by the people at large through their elected representatives. Government officials occupy positions of trust and are expected to act in such a way as to promote the best interest of the citizens of the commonwealth. Unions, on the other hand, are private, non-governmental bodies, organized to further union interests. Government owes its existence to an extremely heterogeneous electorate. Government should not be allowed to select one segment of society, namely public sector unions, and bestow upon them what is tantamount to partial government control.

AGENCY SHOP COULD CONFLICT WITH MINORITY HIRING REQUIREMENTS IN THE PUBLIC SECTOR.

The Commonwealth of Pennsylvania currently imposes requirements on all public employers regarding the hiring of various minority groups differentiated by race, age, handicap, sex, national origin, marital status, religion, etc. Agency shop puts public employers in the position of subordinating all other hiring goals to the terms of mandatory union support. Even members of minority groups would be forced to support a union as a condition of employment.

THE RAMIFICATIONS OF AGENCY SHOP LEGISLATION ARE EXTENSIVE.

As agency shop enhances the financial resources of unions, politics in Pennsylvania could be more influenced by issues of direct concern to government workers, and less by the concerns of the general public which they serve.

Agency shop could have a negative impact on Pennsylvania's private economy. Pennsylvania is ranked near the top of all states in terms of lost productivity due to strikes, many of which are carried out by the public sector. Business surveys repeatedly point to this factor as a major deterrent to business formation and job creation in the state.

INTRODUCTION

At present, public employees -- including teachers, firemen, and policemen -- in sixteen states can be required to pay dues to a public sector union as a condition of employment. In these states, public workers who refuse to pay dues to a union risk either losing their jobs or being subjected to suits for non-payment of dues.

Legislation to create the same conditions for employment in government, called "agency shop", is advancing in Pennsylvania. The bill has passed the House in the Pennsylvania General Assembly and is awaiting action in the Senate, where it is expected by many to pass.

Public sector employment has long been based on the concepts of merit and public service. The Jones Commission under Democratic Governor Milton Shapp, on which I served, concluded that forcing public servants to financially support a union, which they neither voted for nor wished to be members of, was inconsistent with the highest ideals of public service which governments sought to preserve.

Public service involves more than employment; it involves serving the public interest. It means being responsive to the wishes of the general public as expressed by elected representatives.

With growing concern about the role of public sector workers in political campaigns, and more generally, the role of organized interests in the legislative arena, this legislation could add up to \$8 million in resources to organized labor.

THE HISTORY OF PUBLIC SECTOR COLLECTIVE BARGAINING POLICY IN PENNSYLVANIA

When the Pennsylvania Legislature enacted public law 195 in 1970 establishing a formal collective bargaining process for government employees, it firmly established the need to respect the freedom of choice of individual employees -- freedom to join and be represented by unions, and freedom not to.

Since the enactment of Act 195, it has been the standing policy in Pennsylvania to reaffirm the voluntary nature of worker participation in public sector unions. This notion of voluntarism has been reinforced by all studies and review commissions since the passage of the act, and remains deeply embedded in public opinion.

Act 195 was not created overnight. It was the product of extensive study and analysis of a wide range of collective bargaining issues. The Hickman Commission conducted hearings in 1968, which were attended by representatives of labor, management, citizens groups and experts from states having public sector bargaining experience. These policy experts strongly recommended that an agency shop provision not be included in any public employee statute. Governor Raymond Shafer made it known that such a provision would not be acceptable.

When Act 195 was drafted, the Senate State Government Committee, on which I served as Legal Counsel, further scrutinized the issue through hearings, staff analysis, and extensive discussions with the AFL-CIO, the Pennsylvania State Education Association, the Pennsylvania Nurses Association and other interested parties. The end result was a statute that was acceptable to all involved, and which easily passed both bodies of the legislature. No Agency Shop provision was included.

The public policy statement accompanying Act 195 defined the purpose of the act and set forth the various interests that were to be taken into consideration. The public interest and the right of workers to refrain from union representation was central.

THE PUBLIC INTEREST WAS PARAMOUNT. Section 101 of Act 195 reads: "The General Assembly of the Commonwealth of Pennsylvania declares that it is the public policy of this Commonwealth and the purpose of this act to promote orderly and constructive relationships between all public employers and their employees subject, however, to the paramount right of the citizens of the Commonwealth to keep inviolate the guarantees for their health, safety, and welfare."

It can be concluded from this section that, among other things, the welfare of the citizens of the Commonwealth is paramount; that it is the Commonwealth's overall policy to grant public employees the right to organize and choose representatives, providing that the rights of all parties are protected -- of the public employee, the employer, and the public at large.

THE WORKERS WERE PROTECTED AGAINST FORCED PARTICIPATION. Article IV of the Act (section 401), specifies the rights of workers to participate in or refrain from union activity. It states that workers can participate in collective bargaining activities, and related union functions "of their own free choice," and "shall also have the right to refrain from all such activities..."

The right to refrain from union activity -- be it forming, joining, or assisting unions -- was written as a centerpiece of this legislation. The idea of forcing a public sector employee to support or assist a union was studied and rejected.

UNDERSTANDING THE PROCESS AND THE PLAYERS IN STATE LABOR RELATIONS

It is important to recognize that there are several sets of players and interests involved in any process of employer-employee labor relations. And this is true when the employer is the state. Agency shop, in several specific ways, would alter the balance of these interests and change the nature of employment in government.

UNIONS. First, we have the public employee unions, which are organized on the premise that their activities are geared toward looking out for the interests of their members and the unions' purposes. A union is a private, non-governmental body.

A union is not created for the benefit of government, the citizens of the Commonwealth, or for the public welfare. The functions which it performs are self-serving. When public sector unions are given the right to universal representation, government is sharing control with a private institution not selected by or for the benefit of the electorate.

GOVERNMENT EMPLOYERS. The second participant is the public employer, or the government. The legislative branch of government is charged with, among other things, enacting laws which are in the best interest of the citizens of the commonwealth. The executive branch is charged with implementing and enforcing the laws passed by the legislature. In state government, these are different bodies; in local governments, they may or may not be. In either case, however, government officials occupy positions of trust and are expected to act in such a way as to promote the general welfare.

TAXPAYERS. The third participant in the process is the individual citizen, or taxpayer, who is called upon to pay the bill for public services. The terms of the services received for payment rendered are determined by the public's elected representatives. So, in reality, state government workers are employed by the people themselves, whom they are to serve.

GOVERNMENT EMPLOYEES. The fourth participants in the process are public employees, some of whom have chosen to participate in a public sector union; some of whom have chosen not to.

These employees fill a myriad of jobs from the unskilled to the highly skilled and are employed in every geographical area of the state. Under the current proposal, agency shop would apply to education and state employees. However, it is often the case that when agency shop takes root, it is soon extended to employees of township boroughs, cities, and counties as well.

Under a sweeping agency shop, no sector of government would be unaffected except for high public policy-making officials. Well trained, well educated, experienced and dedicated workers -- be they mechanics, teachers, lawyers, engineers, craftsmen, nurses, doctors, therapists, social workers, psychologists, technicians, or professional aides -- would have to leave public service to avoid paying dues to a private, non-governmental body which, as explained above, is organized to further its own interests.

HOW IS PUBLIC SECTOR COLLECTIVE BARGAINING DIFFERENT?

We must keep in mind that, unlike in the private sector, unions in Pennsylvania's public sector do not face competitive pressures or resistance in their organizing efforts. Private sector unionization campaigns are often waged through extensive and competitive campaigning activity, with both the employer and one or more unions espousing their views.

However, when the Commonwealth of Pennsylvania is the employer, this competitive and open process does not exist. The only question to be resolved is which union should represent any given group of individuals.

The General Assembly has adopted the policy of granting public sector workers organizational rights. Government has taken the position not to mount any resistance to organizational efforts. However, the General Assembly has also adopted the policy that it will not force a public employee to join, assist, or financially support a union. The result is that obtaining representational rights in this political climate is a lot different than obtaining these rights in the less accommodating private sector where market forces operate.

Currently, there are thousands of public employees represented by unions in practically every occupational area: laundry workers, truck drivers, bank examiners, game wardens, college professors, cooks, physicians, lawyers, teachers, technicians, engineers and hundreds of other job categories.

The jobs represented range from the least skilled to the highly specialized professional, and they span every county of the state from highly industrialized to sparsely populated areas. Where there is this hugely diversified occupational and geographical mix, one is bound to find considerable difference in attitude toward unionization. Some areas are zealously pro-union; other areas view unions with antipathy or indifference. Agency shop would impose one uniform policy on all communities and all public sector workers.

In the private sector, employees are generally organized along more narrow geographical and occupational lines. In fact, some companies may have a division in Erie which is organized and one in Lancaster which is not.

THE JONES COMMISSION

The whole matter of public employee relations was restudied by the Jones Commission in 1978 during the Shapp Administration. Hearings were held in every area of the state. Testimony was much more voluminous since all facets of the process had been operating for some time. It was the opinion of the commission, as well as the view of experts testifying, that Agency Shop should not be included in its recommendations.

The commission report reaffirmed the basic balance established in ACT 195: The guiding philosophy in the Commission's decision on each and every issue has been the consideration of the public interest, along with the interests of employers and employees.

One of the main objections to the act raised by the unions during the Jones Commission hearings was the requirement that union's represent non-members in the grievance process. Act 195 permits members and non-members alike to present grievances to a public employer providing that the exclusive representative is given the opportunity to be present. Article VI, section 606, which grants exclusive representation rights to unions also contains the following: "Provided, that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the

adjustment is not inconsistent with the terms of a collective bargaining contract then in effect: And, provided further, that the bargaining representative has been given an opportunity to be present at such adjustment."

The objection by the unions that they must represent non-members in the grievance procedure can easily be overcome: non-members can be required to process their own grievances. The extent of this "free rider" problem remains unclear. When unions were asked during the Jones Commission hearings to produce statistical evidence concerning the problem, no meaningful data was provided.

Public sector unions assert that, by virtue of their responsibility to represent government employees, they should have the right to receive contributions in the form of dues from all public workers at the state and municipal levels in Pennsylvania. To grant unions this right would enable them to collect dues from all workers on a non-voluntary basis, and raise additional financial resources to achieve union purposes, including the unions' political objectives. Obviously, this money would be raised from people who currently are not members of a government workers union. This is the essence of "agency shop."

PROTECTING THE RIGHTS OF NON-UNION WORKERS

By requiring this group to pay membership dues to a union -- many of whom have now served their government for many years -- as a condition of employment, could impose an extreme and unwarranted penalty for a life committed to public service.

Generally, when agency shop is enacted it becomes incumbent upon the public employer to take action against a non-union worker, primarily by enforcing the payment of dues. The current legislation would require paycheck withholding of dues.

Under agency shop, the government would also be called upon to perform a range of duties that come with a unionized work force. For example, the state and local governments would have to maintain all necessary bookkeeping, deduct the union dues from state payrolls, and put in place all the necessary procedures required to carry out the terms of the agency shop arrangement.

Some have attempted to respond to concerns about workers' rights of non-participation by inserting language protecting newly unionized state employees from having their dues expended for political activities, or for purposes they might find objectionable on religious grounds. Provision has been made in the legislation to have a percentage of the union dues not related to collective bargaining of conscientiously opposed workers paid directly to a charity -- a charity, however, not of the workers' choice, but the union's. The unions would determine what constitutes "collective bargaining" and "charity."

In the event of disputes over the cost of collective bargaining, arbitration would immediately ensue. However, it is hard to imagine a state worker having sufficient resources or

leverage to successfully challenge trained and experienced union representatives, should he or she be forced to. This renders any such provision nearly meaningless.

AGENCY SHOP COULD UNDERMINE THE RIGHTS AND PROTECTIONS OF MINORITIES

Agency shop could backfire, not only on the minority of public sector workers who have chosen not to be represented by unions, but on members of various racial, ethnic and handicapped minorities. It has been the policy of state government to jealously guard the rights of minorities in a host of areas.

State government, by the passage of Act 195, and by its hands off policy with regard to union organizational efforts, has in fact already imposed union representation upon many workers who neither asked for nor wanted representation. The rights of these employees to independent action in the workplace was taken away. Agency shop would take away the remaining right to refrain from union activity.

The Commonwealth, on the other hand, has imposed upon all public employers certain requirements relative to the hiring and firing of other minority groups on the basis of race, age, handicap, sex, national origin, marital status, and religion, to name a few.

This proposed legislation puts the public employers in the position of subordinating all other hiring goals to the terms of mandatory union support. Public employers are forced to say: "We do not care if you are handicapped, whether you are blind, deaf or paralyzed, you will not work here if you do not pay money to a private organization we think you should support. We admit we could not discriminate against you in the hiring process because you were black or yellow, male or female, Catholic or Jew, Hispanic or Germanic, or over 40 years of age, but we are going to pass a statute that would require you to pay money to a private organization if you choose public service. We simply do not care if you are married with six children and would have to go on unemployment compensation or public welfare. We do not care if we have created havoc with your pension or other retirement rights. We do not care if you have tenure as a teacher with twenty years of experience. You will not be allowed to work here unless you pay your union dues."

What is being said simply boils down to the fact that regardless of the impact, regardless of the inconsistencies, we think the union's rights are more important than the rights of the citizens, the public at large, the government, minority groups or individual employees.

Government employs people from all walks of life, people of different religious, political, and personal beliefs, and it should not require these people to pay money to a private institution if they choose not to.

THE CONSEQUENCES

POLITICAL. Concern has been growing in recent years that organized interest groups are playing too powerful a role in the electoral process. Increasingly, the legislature is seen as an institution that is caught in the grip of competing interest groups and the effect is that the interests of the general taxpaying public are not taken into account. Agency shop would greatly enhance the financial resources of unions, and undoubtedly their influence in the legislative process.

With additional funds at the disposal of public sector unions, politics in Pennsylvania will be more influenced by issues of direct concern to government workers, and less by the concerns of the general public they serve. In fact, public employee unions, having the additional clout and resources provided by agency shop, could significantly affect the makeup of any political subdivision in the state -- counties, municipalities, and schools.

GOVERNMENT SERVICE. Agency shop could fundamentally change the way in which government employment is viewed. The Jones Commission, in which I participated, analyzed public sector unionism and concluded that agency shop could become an insidious form of patronage.

THE COSTS. With the last change of administration in Pennsylvania, the incoming administration announced that its relationship with the public employee unions would be one of a "partnership." The business of government is the protection of the public trust and treasury. By suggesting the creation of a partnership between the state government and public sector unions, the state government has arrived at a point where it is apparently prepared to share its public responsibility with a private institution whose sole purpose is advancing the interests of its members.

It should be pointed out, however, that this partnership quickly proved elusive. Beginning in February, 1988, the State of Pennsylvania was subjected to one of the most costly arbitration awards to date in its bargaining with State Police.

THE IMPACT ON PENNSYLVANIA'S PRIVATE ECONOMY AND POLICY CLIMATE. At present, Pennsylvania is ranked at or near the top of all states in terms of lost productivity due to strikes. It is important to point out that many of these strikes are carried out by public sector workers, primarily teachers. But a strike of any kind affects the overall business and policy climate of any state. Business surveys repeatedly point to this factor as a major deterrent to business formation and job creation in a state. Similarly, businesses who choose to leave the state cite among their chief concerns the rate of lost productivity due to labor unrest.

Any jurisdiction with a poor policy climate, be it a state or locality, can prove to be a costly place for business to generate growth and opportunity. The experience of sixteen other states who have agency shop seems to suggest that the policy environment worsens at least in perception, if not in reality. And perceptions often prove decisive in the final decision of a business to locate in one state or another.

CONCLUSION

Collective bargaining methods that may be deemed appropriate in private industry are not necessarily appropriate in the public sector where, in reality, the people themselves are the employers and the viability of the community must be protected.

A public employer such as the state government is really a monopoly, performing services which are necessary for the well-being of its citizens. If Ford, Inc., for example, went out of existence one would simply go to Chrysler, General Motors, or other manufacturers for the purchase of an automobile. If state government ceased to function, what would replace it?

Government owes its existence to the electorate and its purpose is to act in the best interest of those whom it serves. That electorate is not a homogeneous group. It is made up of people of diverse religious, ethnic, racial, and political backgrounds, who differ in age, sex, skills, physical condition, and status, and who live in a variety of environmental and geographical enclaves.

It is the duty of government to treat each in a fair and equitable manner and not to select one segment of society, in this case public sector unions, and bestow upon them what is tantamount to partial government control and action. To do so would be to delegate governmental authority to a body not selected by the electorate, and not responsive to it. No citizen of the commonwealth should be forced to pay a portion of his earnings to a private organization as a condition of public service.

suggested readings:

"A Summary of Public Sector Collective Bargaining Law in Pennsylvania." By John D. Thrush, Esq. Prepared for The Governor's Study Commission on Public Employee Relations. Published by Governor Milton Shapp's Office, Harrisburg, PA. October, 1978.

Act 195. Published by the Pennsylvania School Boards Association, Inc., Harrisburg, PA. Revised and fourth printing, June 1976.

Compulsory Unionism, The NLRB, and the Courts. A Legal Analysis of Union Security Agreements. Labor Relations and Public Policy Series, No. 15. By Thomas R. Haggard. Published by the University of Pennsylvania, Philadelphia, PA. 1981.

"Dissent of Commonwealth Appointed Arbitrator." A response to Act 111; proceedings between the Commonwealth of Pennsylvania and the Fraternal Order of Police. By Robert J. Bray, Jr., Commonwealth-designated Arbitrator. February 29, 1988.

"Government and Labor. The Role of Government in Union-Management Relations." By Herbert R. Northrup, Ph.D. and Gordon F. Bloom, Ph.D., LL.B. Published by Richard D. Irwin, Inc., Homewood, IL. 1963.

"Pennsylvania Public Sector Bargaining Issues." An Analysis of Testimony Presented to the Governor's Study Commission on Public Employee Relations. By Benjamin R. Jones, Chairman; William J. Atkinson, Executive Director; and others. Published by the Governor's Office, Harrisburg, PA. October, 1978.

"Recommendations for Legislative and Administrative Change to the Public Sector Collective Bargaining Laws of Pennsylvania." A report by the Governor's Study Commission on Public Employee Relations. Hon. Benjamin R. Jones was chairman. June 1, 1978.

"The Public Role in Public Sector Collective Bargaining." By Patricia Crawford, Research Analyst. Published by the Governor's Office, Harrisburg, PA. October, 1978.