

Impact of the Agency Shop on Labor Relations in the Public Sector

Jay W. Waks

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>



Part of the [Law Commons](#)

Recommended Citation

Jay W. Waks, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 Cornell L. Rev. 547 (1970)
Available at: <http://scholarship.law.cornell.edu/clr/vol55/iss4/4>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

COMMENT

IMPACT OF THE AGENCY SHOP ON LABOR RELATIONS IN THE PUBLIC SECTOR

The measure of responsibility with which unions act is particularly important in the public sector, where collective bargaining is still emerging and has not been met with universal acceptance. Attitudes with which unions approach the problems of labor relations in public employment often reflect the degree of security they enjoy; labor peace is jeopardized if the majority representative of public employees cannot achieve financial and organizational security.¹ One desirable way to enhance union responsibility is to adopt an appropriate form of union security agreement.² Such arrangements prevent the nonunion employee

¹ Gromfine, *Union Security Clauses in Public Employment*, BNA GOV'T EMPLOYEE REL. REP. No. 304: E-1, E-2 (July 7, 1969).

² Classification of the major union security arrangements includes the following:

a. Closed Shop. The employer and union agree that all workers must belong to the union to keep their jobs, and when hiring new workers, the employer will hire only members of the union.

b. Union Shop. Although the employer can hire whom he wants, members or nonmembers, the workers he hires must join the union within a certain time limit or be discharged.

c. Modified Union Shop. The employer agrees that all present and future members of the union shall maintain their union membership for the duration of the contract as a condition of continued employment. Present employees who are not members of the union and who do not join the union in the future may retain employment without ever joining the union. The employer further agrees that new employees must join the union within a specified period of time or lose their jobs.

d. Maintenance of Membership. The employer agrees that all present and future members of the union must remain members of the union for the life of the contract so providing as a condition of continued employment. Employees who are not members of the union and who do not join the union in the future may continue employment without union membership.

e. Agency Shop. The employer and union agree that no employee shall be forced to join or remain a member of the union as a condition of employment. If an employee opts for nonmembership, he must tender to the union a sum equivalent to union dues. This sum represents a fee charged him by the union for acting as his agent in collective bargaining and in the administration of the collective bargaining agreement.

See LABOR LAW GROUP TRUST, *LABOR RELATIONS AND THE LAW* 633-35 (3d ed. 1965); Hopfl, *The Agency Shop Question*, 49 CORNELL L.Q. 478 (1964).

In private employment the right to bargain for a closed shop is generally prohibited. E.g., 29 U.S.C. § 158(a)(3) (1964); 45 U.S.C. § 152 Eleventh (1964). Collective bargaining over a union shop only is protected conditionally by federal statute; the right-to-work or local-option clause of the Taft-Hartley Act (29 U.S.C. § 164(b) (1964)) permits the states to prohibit such agreements, and several states have done so. See note 31 and accompanying text *infra*. Inasmuch as the union shop permitted by the Taft-Hartley Act conditions continued employment only on the payment of union dues and fees, the agency shop is the practical equivalent of the union shop. *NLRB v. GMC*, 373 U.S. 734, 744 (1963).

from sharing in the benefits resulting from union activities without also sharing in the obligations.³ In addition, the security agreement stabilizes the bargaining relationship by providing security from attack by rivals and enables union leaders to devote more attention to bargaining and administration of collective agreements.⁴

The suggestion that union security is a necessary, preliminary step toward peaceful and productive labor relations in the public sector leaves unresolved which type of union security arrangement is best able to accommodate the conflicting considerations inherent in public employment labor relations. These considerations include: (1) security of and financial support for the bargaining representative; (2) freedom of dissenting or objecting employees; and (3) encroachment on the sovereign powers and operations of government.

Of the most common forms of union security,⁵ the closed shop seems as unreasonable an objective for public employee unions as it is in private employment.⁶ Its application in the public sector would cause government to transfer its hiring power to the union, in opposition to the civil service principles of merit employment. Few governmental units will be willing to place this power in the hands of the

³ In the private sector, an awareness of the "free rider" problem has been met by contractually imposing the obligation that each employee pay his fair share of the costs of bargaining and contract administration. See *NLRB v. GMC*, 373 U.S. 734 (1963) (action under the National Labor Relations Act); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), and *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (actions under the Railway Labor Act). Where, in fact, there is exclusive recognition of a majority union, the policy favoring the imposition of a fair financial burden on the nonmember seems equally justified in public employment. There is as great a potential in public employment as in private for acrimony between employees who support the union "that gains substantial benefits for them and those [employees] who are . . . willing to accept the benefits received but are not willing to pay the costs involved in obtaining them." *Grand Rapids Bd. of Educ. and Grand Rapids Educ. Ass'n* (Fact-Finder's Report, Mich. L.M.B.), in *BNA Gov't EMPLOYEE REL. REP.* No. 289: B-1, B-2 (March 24, 1969); accord, *Board of Educ., City of Inkster and Inkster Fed'n of Teachers, Local 1068* (Fact-Finder's Report, Mich. L.M.B. Sept. 7, 1968), in *BNA Gov't EMPLOYEE REL. REP.* No. 263: F-1, F-2 (Sept. 23, 1968).

⁴ The militancy displayed by public employee unions often results from defending themselves against organizational attacks by rival unions in the public service. See Oberer, *The Future of Collective Bargaining in Public Employment*, 20 *LAB. L.J.* 777, 781 (1969). A strike situation is as much a product of the union's lack of strength, inability to maintain effective control over the employees it represents, and need to develop a sense of solidarity as it is a product of the union's assertion of economic strength after reaching a substantive impasse at the bargaining table. See Gromfine, *supra* note 1, at E-1.

⁵ See note 2 *supra*.

⁶ The first proviso of § 8(a)(3) of the Labor-Management Relations Act of 1947 (29 U.S.C. § 158(a)(3) (1964)) and § 2 Eleventh of the Railway Labor Act (45 U.S.C. § 152 Eleventh (1964)) establish the illegality of the closed shop in the private sector.

public employee union.⁷ Similarly, the union shop's requirement of union membership is contrary to the individual's freedom of association as well as the guarantees implicit in the merit system, such as equality of opportunity for appointment and promotion.⁸

The agency shop does not suffer from the same infirmities as the closed or union shop. Although this arrangement requires monetary support of the majority representative, it protects the freedom not to join the union.⁹ Of course, tendering an amount sometimes equivalent to union dues as a condition of continued employment is a strong inducement to join the majority union,¹⁰ but it is the employee who decides whether or not to join. More importantly, the agency shop arrangement, like the less desirable union and closed shop, promotes the policy of stability within the bargaining unit and results in a more responsible bargaining representative.

I

AGENCY SHOP IN THE PUBLIC SECTOR—LEGAL STATUS AND CONFLICT

A. *The Agency Shop as a Valid Objective under Existing State Law*

Although the agency shop is receiving significant attention as a subject for collective bargaining in the public sector,¹¹ the application of the agency shop principle to public employment presents trouble-

⁷ See H. KAPLAN, *THE LAW OF CIVIL SERVICE* 331 (1958).

⁸ See TASK FORCE REPORT § III(k) (1961), in 1 H. ROBERTS, *LABOR MANAGEMENT RELATIONS IN THE PUBLIC SERVICE* 29 (1968), which recommended to the President a program of labor relations within the federal service: "The Task Force wishes to state its emphatic opinion that the union shop and the closed shop are contrary to the civil service concept upon which Federal employment is based, and are completely inappropriate to the Federal service."

⁹ See note 2 *supra*; *Warczak v. Board of Educ.*, 73 L.R.R.M. 2237 (Mich. Cir. Ct. 1970).

¹⁰ Note, *Municipal Employment Relations in Wisconsin: The Extension of Private Labor Relations Devices into Municipal Employment*, 1965 Wis. L. REV. 671, 683 n.47.

¹¹ In 1968, 100 out of 500 contracts negotiated by the Michigan Education Association contained agency shop clauses. Board of Educ., City of Inkster and Inkster Fed'n of Teachers, Local 1068 (Fact-Finder's Report, Mich. L.M.B. Sept. 7, 1968), in BNA GOV'T EMPLOYEE REL. REP. No. 263: F-1, F-2 (Sept. 23, 1968). The movement toward the agency shop alternative seems to be growing among teacher unions and school boards. Waterford Township Sch. Dist. and Waterford Educ. Ass'n (Fact-Finder's Report, Mich. L.M.B.), in BNA GOV'T EMPLOYEE REL. REP. No. 275: B-2, B-3 to -4 (Dec. 16, 1968) (noting the prevalence of agency shop contracts in 78 municipalities throughout Michigan). However, the success of AFSCME, one of the largest public employee unions, in obtaining union security in 43% of its approximately 700 collective bargaining agreements is perhaps indicative of a trend toward other forms of union security. Of these, agency shop provisions represent only 12% of the union's successes, while the union shop represents 37% and the modified union shop comprises 28%. See Gromfine, *supra* note 1, at E-9.

some legal questions. These problems arise in the context of the three patterns of state laws against which the principle of the agency shop must be analyzed. Some states have enacted no statutes concerning collective bargaining between public employers and unions representing public employees.¹² A second category of states, which to some degree overlaps the first, includes those with right-to-work legislation or constitutional provisions.¹³ Finally, a number of states have provided a statutory scheme for collective bargaining by public employees.¹⁴ It is necessary to explore the extent to which the agency shop is a permissible bargaining objective within the boundaries of each of these schemes.¹⁵

1. *States Without Public Sector Labor Legislation*¹⁶

Legislation governing collective bargaining in the private sector rarely encompasses, and is often expressly inapplicable to, public employees.¹⁷ Similarly, courts have recognized the differences between collective bargaining in the private and public sectors and have been hesitant to raise the status of collective bargaining in public employment to that found in private employment.¹⁸ In some jurisdictions without enabling legislation, no right of public employees to bargain collectively is recognized.¹⁹

¹² See note 16 *infra*.

¹³ See note 31 *infra*.

¹⁴ See note 48 *infra*. The statutory authorization for collective bargaining may be directed at public employees generally or at specific units of state employees, municipal employees, public school personnel, or fire and police department personnel. Certain statutes also encompass employees of publicly owned mass transportation and utility systems, but these statutory schemes are not dealt with herein.

¹⁵ A basic characteristic of public employment—the civil service or merit system—transcends an analysis of the agency shop under each of the three legal schemes. The particular problems thus created shall be treated separately. See text at notes 128-75 *infra*.

¹⁶ Arizona, Arkansas, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Mississippi, New Mexico, Oklahoma, South Carolina, Tennessee, Utah, Virginia, and West Virginia. States with collective bargaining laws only for public employees in mass transportation or in public utilities are classed as states without public sector labor legislation and include Illinois (ILL. ANN. STAT. ch. 111½, § 328a (Smith-Hurd 1966)), Louisiana (LA. REV. STAT. § 23:890 (Supp. 1970)), and Ohio (OHIO REV. CODE ANN. § 717.03 (Page 1954)). North Carolina and Texas have no collective bargaining laws for the public sector, but they are not uncommitted inasmuch as legislation prohibits collective bargaining in the public sector (N.C. GEN. STAT. §§ 95-98 (1965)), or declares collective bargaining in public employment to be against public policy (TEX. REV. CIV. STAT. ANN. art. 5154c (1962)); see BNA GOV'T EMPLOYEE REL. REP. No. 335: B-4 (Feb. 9, 1970)).

¹⁷ E.g., 29 U.S.C. § 152 (1964); TEX. REV. CIV. STAT. ANN. art. 5154c, § 1 (1962).

¹⁸ *United States v. UMW*, 330 U.S. 258 (1947) (Norris-LaGuardia Act not applicable to public employees); *Nutter v. Santa Monica*, 74 Cal. App. 2d 292, 168 P.2d 741 (1946); *Mugford v. Baltimore*, 185 Md. 266, 44 A.2d 745 (1946); *Weakley County Municipal Elec. Sys. v. Vick*, 43 Tenn. App. 524, 309 S.W.2d 792 (1957).

¹⁹ E.g., *Nutter v. Santa Monica*, 74 Cal. App. 2d 292, 168 P.2d 741 (1946); *Mugford v. Baltimore*, 185 Md. 266, 44 A.2d 745 (1946).

Where the validity of collective bargaining agreements between public employee unions and government units has been upheld absent enabling legislation,²⁰ there is an avenue of argument available in promoting the agency shop principle. An analogy can be drawn from experience in the private sector. Common law principles supported the validity of the closed shop²¹ even before the National Labor Relations Act (NLRA) formally provided for the closed shop in 1935.²² After that date, and even subsequent to the 1947 amendment prohibiting the closed shop,²³ some states continued to uphold closed shop provisions without supporting legislation and absent federal preemption in the area.²⁴ Without some legislative mandate for collective bargaining a court could in like manner balance union security in the public sector, specifically the agency shop, against the interests of the state. If the courts recognize the importance of union security within a framework of collective bargaining in public employment,²⁵ the experience of the private sector could provide sufficient precedent for validating an agency shop provision as a common law right.²⁶

The notion that union security devices are inconsistent with civil service legislation²⁷ and the merit system²⁸ presents the major barrier to acceptance of the agency shop as a bargainable item. Certainly, many conditions of public employment (hours and grievances for example) are within the discretion of administrative officials and could easily

²⁰ *E.g.*, *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *see* Annot., 31 A.L.R.2d 1133 (1953 and Supp.). Executive decisions have provided the basis for collective bargaining by public employees in the absence of specific enabling legislation. *E.g.*, *OP. ATT'Y GEN. IDAHO*, March 18, 1959 (absent local ordinances to the contrary, municipalities can "contract and be contracted with" by virtue of IDAHO CODE ANN. § 50-301 (1967)); [1966] *OP. ATT'Y GEN. IND.* 144, 158, Oct. 6, 1966. To the same effect is an arbitrator's opinion in *Toledo Bd. of Educ. v. Toledo Fed'n of Teachers Local 250*, BNA GOV'T EMPLOYEE REL. REP. No. 325: B-8 (Dec. 1, 1969), that in the absence of permissive legislation, the school board has the authority to negotiate teacher bargaining agreements. *But see IUOE v. Water Works Bd.*, 276 Ala. 462, 163 So. 2d 619 (1964); *Mugford v. Baltimore*, 185 Md. 266, 44 A.2d 745 (1946); *Weakley County Municipal Elec. Sys. v. Vick*, 43 Tenn. App. 524, 309 S.W.2d 792 (1957).

²¹ *See* 37 MICH. L. REV. 320 (1938); Annot., 95 A.L.R. 10, 18-21 (1935).

²² Ch. 372, § 8(3), 49 Stat. 452 (1935) (Wagner Act).

²³ 29 U.S.C. § 158(a)(3) (1964) (Taft-Hartley Act).

²⁴ *E.g.*, *Park & Tilford Import Corp. v. Teamsters Local 848*, 27 Cal. 2d 599, 165 P.2d 891 (1946); *Yeager v. Teamsters Local 313*, 39 Wash. 2d 807, 239 P.2d 318 (1951).

²⁵ *See* text at notes 1-10 *supra*. Underlying this analysis of the validity of the agency shop absent public sector labor legislation is the assumption that public employees can collectively bargain in the absence of statutory authority. *See Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 276-77, 83 A.2d 482, 485-86 (1951).

²⁶ *See Hopfl, supra* note 2, at 483; *cf.* 82 C.J.S. *Statutes* § 393, at 940-41 (1953).

²⁷ *See Petrucci v. Hogan*, 5 Misc. 2d 480, 486-90, 27 N.Y.S.2d 718, 726-29 (Sup. Ct. 1941).

²⁸ *See Los Angeles v. Los Angeles Bldg. Trades Council*, 94 Cal. App. 2d 36, 45, 210 P.2d 305, 312 (1949).

be made negotiable with a recognized employee representative without usurping executive or legislative authority.²⁹ The same may not be true of rules and regulations for the discharge of employees, however, and the agency shop is premised on some abdication of discretion in this regard by the employer. Substantial difficulties arise, therefore, when the agency shop is measured against the requirement that in permitting public bargaining without enabling legislation there can be no irrevocable surrender to the bargaining agent of the power to make governmental rules and regulations.³⁰

2. "Right-to-Work" States

An additional complication involves the general right-to-work provisions applicable in nineteen states,³¹ nine of which are states having no statutory scheme for collective bargaining in the public sector.³² The belief that an employee should not be required to support an organization that he opposes³³ has produced legislation at both the state³⁴ and national levels.³⁵ The local-option clause, section 14(b) of the Labor-

²⁹ See KAPLAN, *supra* note 7, at 339; Herrick, *Unions for Government Employees—Their Implications*, N.Y.U. 15TH CONFERENCE ON LABOR 129, 134 (1962); Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 LAB. L.J. 8, 10 (1964). But cf. *Nutter v. Santa Monica*, 74 Cal. App. 2d 292, 168, P.2d 741 (1946); *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547 (1962); *Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947).

³⁰ See W. HART, *COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE* *passim* (1961). However, even in the absence of enabling legislation a number of public employers have granted union security on occasion. Cf. K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 54 (1967). But see *Foltz v. Dayton*, 73 L.R.R.M. 2548 (Ohio C.P. 1969) (ultra vires for municipality to contract for agency shop).

³¹ ALA. CODE tit. 26, §§ 375(1)-(7) (1958); ARIZ. CONST. art. 25; ARIZ. REV. STAT. ANN. §§ 23-1301 to -1307 (1956); ARK. CONST. amend. 34; ARK. STAT. ANN. §§ 81-201 to -205 (1960); FLA. CONST. art. 1, § 6; GA. CODE ANN. §§ 54-901 to -908 (1961); IOWA CODE ANN. §§ 736A.1-.8 (1950); KAN. CONST. art. 15, § 12; MISS. CONST. art. 7, § 198-A; MISS. CODE ANN. § 6984.5 (Supp. 1968); NEB. CONST. art. 15, §§ 13, 14, 15; NEB. REV. STAT. §§ 48-217 to -219 (1968); NEV. REV. STAT. §§ 613.130, 613.230-300 (1967); N.C. GEN. STAT. §§ 95-78 to -84 (1965) (applicable to private employment); *id.* §§ 95-97 to -100 (applicable to public employment); N.D. CENT. CODE § 34-01-14 (1960); S.C. CODE ANN. §§ 40-46 to -46.8 (1962); S.D. CONST. art. 6, § 2; S.D. COMPILED LAWS ANN. § 60-8-3 (1967); TENN. CODE ANN. §§ 50-208 to -212 (1966); TEX. REV. CIV. STAT. ANN. art. 5207a (1962) (applicable to private employment); *id.* art. 5154c, §§ 1-4, 6 (applicable to public employment); UTAH CODE ANN. §§ 34-34-1 to -17 (Supp. 1969); VA. CODE ANN. §§ 40.68-74.5 (Supp. 1969); WYO. STAT. ANN. §§ 27-245.1-.8 (1967). The right-to-work law in a twentieth state, Louisiana, applies solely to agricultural workers. LA. REV. STAT. ANN. §§ 23:881-889 (1964).

³² Arizona, Arkansas, Iowa, Kansas, Mississippi, South Carolina, Tennessee, Texas, and Virginia.

³³ The problems inherent in the coercion of public employees to support the union financially are treated in the text at notes 181-221 *infra*.

³⁴ See note 31 *supra*; *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 28, 360 P.2d 456, 468, *cert. denied*, 368 U.S. 829 (1961) (reversing a trial court ruling that the agency shop provision was not within the prohibitions of the Kansas right-to-work law).

³⁵ 29 U.S.C. § 164(b) (1964).

Management Relations Act (LMRA), expressly authorizes states to outlaw agreements requiring *membership* in a labor organization as a condition of employment.³⁶ Upon this authority, twelve states continue to prohibit agreements that either establish union membership as a condition of employment (union shop clauses) or require the payment of fees or charges from nonmembers (agency shop clauses).³⁷ The seven remaining states³⁸ have right-to-work statutes directed only at union membership, but even in these states the validity of the agency shop is judicially and administratively circumscribed.³⁹

The applicability of state right-to-work provisions to the public sector is a formidable obstacle to union security in public employment. Only two states specifically except government employment from the operation of right-to-work laws.⁴⁰ Most make some provision in their constitutions,⁴¹ statutes,⁴² or administrative⁴³ and judicial⁴⁴ decisions

³⁶ Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring *membership* in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Labor-Management Relations Act of 1947 (Taft-Hartley Act) § 14(b), 61 Stat. 151, 29 U.S.C. § 164(b) (1964) (emphasis added).

³⁷ Alabama, Arkansas, Georgia, Iowa, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Utah, Virginia, and Wyoming. See statutes of these states cited in note 31 *supra*. The legality of these prohibitions is clear, notwithstanding the use of the term "membership" in the federal enabling legislation. Compare *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 98, 103 (1963), with *NLRB v. GMC*, 373 U.S. 734, 744 (1963).

³⁸ Arizona, Florida, Kansas, Nevada, North Dakota, South Dakota, and Texas. See note 31 *supra*.

³⁹ See, e.g., *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957); *Schermerhorn v. Local 1625, Retail Clerks*, 141 So. 2d 269 (Fla. Sup. Ct. 1962); *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456 (1961); *Op. ATT'Y GEN. NEV.*, No. 407, Sept. 22, 1958, in 2 CCH LAB. L. REP.—STATE LAWS, NEV. ¶ 41025.05 (1966) (*accord*, *Street Elec. Ry. Employees, Div. 1225 v. Las Vegas-Tonopah-Reno Stage Line, Inc.*, 319 F.2d 783 (9th Cir. 1963)); [July 1, 1954-June 30, 1956] *Op. ATT'Y GEN. N. DAK.* 73, 74, Jan. 13, 1956; [1967-68] *Op. ATT'Y GEN. S. DAK.* 221, July 8, 1958; *Op. ATT'Y GEN. TEXAS*, March 14, 1961, in 2 CCH LAB. L. REP.—STATE LAWS, TEX. ¶ 41205.10 (1966).

⁴⁰ GA. CODE ANN. § 54-901(a) (1957): "When used in this Chapter—(a) The term 'employer' . . . shall not include . . . any State, or any political subdivision thereof . . ."; *Keeble v. City of Alcoa*, 204 Tenn. 286, 319 S.W.2d 249 (1958) (holding the state right-to-work statute not applicable to municipal employment; the statute did not mention government as an employer, giving rise to a presumption against application to government units).

⁴¹ ARIZ. CONST. art. 25: "[N]or shall the State or any subdivision thereof . . . enter into any agreement . . . which excludes any person from employment or continuation of employment because of non-membership in a labor organization;" *accord*, KAN. CONST. art. 15, § 12.

⁴² NEV. REV. STAT. § 613.250 (1967); TEX. REV. CIV. STAT. ANN. art. 5154c § 4 (1962): "[N]o person shall be denied public employment by reason of membership or nonmembership in a labor organization;" UTAH CODE ANN. § 34-34-2 (Supp. 1969): "[T]he right of persons to work, whether in private employment or for the state, its counties, cities, school

for a right-to-work in the public sector, commensurate with that applicable to private employment. Some right-to-work states, however, have taken no position on the application of their statutes to the public sector.⁴⁵ As unions of public employees strengthen their bargaining status with governmental units in this last group of states, however, movement towards application of the right-to-work principle to public employment may, in fact, result.⁴⁶

Notwithstanding the five states that remain uncommitted,⁴⁷ right-to-work legislation is a barrier to application of union security principles in public employment. Further discussion is directed, therefore, only to the conceptual difficulties presented in applying union security, and especially the agency shop, within the framework of the various schemes for collective bargaining by public employees.

districts, or other political subdivisions, shall not be denied or abridged on account of membership or nonmembership in any labor union"

⁴³ 45 OP. ATT'Y GEN. ALA. 93, Dec. 19, 1946, 92 OP. ATT'Y GEN. ALA. 38, Aug. 25, 1958 (concerning school districts), 87 OP. ATT'Y GEN. ALA. 35, June 1957 (concerning municipalities), 23 OP. ATT'Y GEN. ALA. 55, April 10, 1941 (concerning counties), and 45 OP. ATT'Y GEN. ALA. 19, Dec. 3, 1946 (concerning the University of Alabama) review the lack of authority of government subdivisions and agencies to contract with labor unions and the state's power to prohibit making membership in a union a condition of continued employment. See [1960] OP. ATT'Y GEN. IOWA 168, Jan. 27, 1960 (concerning the right-to-work of school teachers); [July 1, 1944-June 30, 1946] OP. ATT'Y GEN. N. DAK. 176, Dec. 17, 1945 (state agencies cannot be compelled to employ union members).

⁴⁴ Potts v. Hay, 229 Ark. 830, 318 S.W.2d 826 (1958) (applying the general right-to-work provision of ARK. CONST. amend. 34 to public employees); Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903, 905 (Fla. Sup. Ct. 1969) (public employees have the same rights as are granted private employees by the right-to-work provision in the revised constitution of 1968, with the exception of the right to strike); Levasseur v. Wheeldon, 79 S.D. 442, 112 N.W.2d 894 (1962) (applying the general right-to-work provision of S.D. CONST. art. 6, § 2 to public employees).

⁴⁵ Mississippi, Nebraska, South Carolina, Virginia, and Wyoming.

⁴⁶ A growing concern with the institutional development of public employee unions in the third group of uncommitted states (note 45 *supra*) may be reflected in any of several courses of action: (1) amending existing right-to-work laws to apply to public as well as to private employees, see Classroom Teachers' Ass'n v. Ryan, 225 So. 2d 903, 905 (Fla. Sup. Ct. 1969) (Declaration of Human Rights of the Florida constitution art. 1, § 6 was amended in 1968 to reflect concern for the right-to-work of public and private employees); (2) enacting specific right-to-work legislation for the public sector, including (a) a separate right-to-work statute (see note 42 *supra*) as embodied in a proposed "Federal Employee Freedom of Choice Act" to establish a right-to-work for federal employees (see BNA GOV'T EMPLOYEE REL. REP. No. 244: A-13 (May 13, 1968)); or (b) a union security prohibition written into legislation granting collective bargaining rights to public employees.

⁴⁷ See states cited in note 45 *supra*.

3. States With Labor Legislation for the Public Sector

A majority of states have special provisions governing collective bargaining on behalf of various groups of government employees.⁴⁸

⁴⁸ States having collective bargaining laws for public employees:

Alabama:	Teachers and Municipal Employees	—ALA. CODE tit. 55, § 317(3) (Supp. 1967).
	Firefighters	—ALA. CODE tit. 37, § 450(3) (Supp. 1967).
Alaska:	Public Employees	—ALASKA STAT. §§ 23.40.010-040 (1962).
California:	Public Employees	—CAL. GOV'T CODE §§ 3500-11 (West 1966 and Supp. 1970).
	Firefighters	—CAL. LABOR CODE §§ 1960-63 (West Supp. 1970).
	Teachers	—CAL. EDUC. CODE §§ 13080-88 (West 1969).
	Public Employees of Los Angeles County	—Los Angeles County Employee Relations Ordinance (Sept. 3, 1968) in BNA GOV'T EMPLOYEE REL. REP. No. 261: F-1 to -7 (Sept. 9, 1968).
Connecticut:	Municipal Employees	—CONN. GEN. STAT. REV. §§ 7-467 to -478 (Supp. 1969).
	Teachers	—CONN. GEN. STAT. REV. §§ 10-153 a-f (1967), as amended, (Supp. 1969).
Delaware:	Public Employees	—DEL. CODE ANN. tit. 19, §§ 1301-12 (Supp. 1968).
	Teachers	—DEL. CODE ANN. tit. 14, §§ 4001-13, in BNA GOV'T EMPLOYEE REL. REP. No. 322: F-1 to -3 (Nov. 10, 1969).
Florida:	Public Employees	—FLA. STAT. ANN. § 839.221 (1965).
	Firefighters	—Ch. 791, [1969] Fla. Laws, in 1 CCH LAB. L. REP.—STATE LAWS, FLA. ¶ 47,200 (1969).
Georgia:	Public Employees of Chatham County & Savannah	—No. 967, [1968] Ga. Laws 2953 (declared unconstitutional in Local 574, Internat'l Ass'n of Firefighters v. Floyd, 225 Ga. 625, 170 S.E.2d 394 (1969)).
Hawaii:	Public Employees	—HAWAII REV. LAWS §§ 76-101 to 102 (1968).
Maine:	State Employees	—ME. REV. STAT. ANN. tit. 5, §§ 751-53 (Supp. 1970).
	Municipal Employees	—ME. REV. STAT. ANN. tit. 26, §§ 961-71 (Supp. 1970).
Maryland:	Teachers	—MD. ANN. CODE art. 77, §§ 160(a)-(n) (1969).
	Municipal Employees of Baltimore	—BALT. CITY CODE art. 1, §§ 110-25, in BNA GOV'T EMPLOYEE REL. REP. No. 266: E-1 to -8 (Oct. 14, 1968).

However, only four of the relevant statutes⁴⁹ expressly authorize the execution of union security agreements by a public employer, even

Massachusetts:	Municipal Employees	—MASS. GEN. LAWS ANN. ch. 149, §§ 178G-N (Supp. 1969).
	State Employees	—MASS. GEN. LAWS ANN. ch. 149, §§ 178D-F (Supp. 1969).
Michigan:	Public Employees	—MICH. STAT. ANN. §§ 17.455(1)-(16) (1968).
Minnesota:	Public Employees	—MINN. STAT. ANN. §§ 179.50-58 (1966).
	Teachers	—MINN. STAT. ANN. §§ 125.19-26 (Supp. 1970).
Missouri:	Public Employees	—MO. ANN. STAT. §§ 105.500-530 (Supp. 1969).
Montana:	Nurses	—MONT. REV. CODES ANN. §§ 41-2201 to -2209 (Supp. 1969).
Nebraska:	Teachers	—NEB. REV. STAT. §§ 79-1287 to -1295 (Supp. 1967).
	Public Employees	NEB. REV. STAT. §§ 48-801 to -836 (1968), <i>as amended</i> , in BNA GOV'T EMPLOYEE REL. REP. NO. 295: F-1 to -3 (May 5, 1969).
Nevada:	Local Government Employees	—Ch. 650, §§ 1-27 [1969] Nev. Stat. 1376.
New Hampshire:	State Employees	—N.H. REV. STAT. ANN. §§ 98-C:1 to -C:7 (Supp. 1969).
	Municipal Employees	—N.H. REV. STAT. ANN. § 31:3 (Supp. 1967).
New Jersey:	Public Employees	—N.J. REV. STAT. ANN. §§ 34:13A-1 to -11 (Supp. 1969).
New York:	Public Employees	—N.Y. CIV. SERV. LAW § 200-12 (McKinney Supp. 1969).
	New York City	—ADMIN. CODE OF THE CITY OF NEW YORK ch. 54, §§ 1170 to -73-13.0 (1967), in 2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,450 (1968).
North Dakota:	Public Employees	—N.D. CENT. CODE §§ 34-11-01 to -05 (1960).
	Teachers	—N.D. CENT. CODE §§ 15-38.1-01 to -15 (Supp. 1969).
Oregon:	Public Employees	—ORE. REV. STAT. §§ 243.710-780 (1968), <i>as amended</i> , ch. 579 [1969] Ore. Laws, in 4A BNA LAB. REL. REP. 47: 2340 (1969).
	Teachers	—ORE. REV. STAT. §§ 342.450-470 (1968), <i>as amended</i> , ch. 647 [1969] Ore. Laws, in 4A BNA LAB. REL. REP. 47: 244 (1969).
Pennsylvania:	Firefighters and Policemen	—PA. STAT. tit. 43, §§ 217.1-10 (Supp. 1969).
	Public Employees	—PA. STAT. tit. 43, §§ 215.1-5 (1964).
Rhode Island:	Municipal Employees	—R.I. GEN. LAWS ANN. §§ 28-9.4-1 to -19 (1956).
	State Employees	—R.I. GEN. LAWS ANN. §§ 36-11-1 to -6 (Supp. 1967).
	Firefighters	—R.I. GEN. LAWS ANN. §§ 28-9.1-1 to -14 (1956).

with a union recognized as the exclusive representative of the employees in an appropriate unit. Most legislation affording government employees the right to join or associate with unions for the purpose of negotiating collectively with public employers also protects the right to refrain from forming, joining,⁵⁰ or even assisting⁵¹ any public employee or-

	Teachers	—R.I. GEN. LAWS ANN. §§ 28-9.3-1 to -16 (1956).
	Policemen	—R.I. GEN. LAWS ANN. §§ 28-9.2-1 to -14 (1956).
South Dakota:	Public Employees	—Ch. 88, §§ 1-8, [1969] S.D. Laws 154.
Vermont:	Municipal Employees	—Vt. STAT. ANN. tit. 21, §§ 1701-05 (Supp. 1969).
	State Employees	—Vt. STAT. ANN. tit. 3, §§ 901-1007 (Supp. 1969).
	Teachers	—Vt. STAT. ANN. tit. 16, §§ 1981-2010 (Supp. 1969).
Washington:	Public Employees	—WASH. REV. CODE ANN. §§ 41.56.010-900 (Supp. 1969).
	Teachers	—WASH. REV. CODE ANN. §§ 28.72.010-.090 (Supp. 1969).
Wisconsin:	Municipal Employees	—Wis. STAT. ANN. § 111.70 (Supp. 1969).
	State Employees	—Wis. STAT. ANN. §§ 111.80-94 (Supp. 1969).
Wyoming:	Firefighters	—WYO. STAT. ANN. § 27-265 to -273 (1967).

⁴⁹ In Massachusetts a special statute directs the treasurers of the City of Boston and Suffolk County to make payroll deductions from the salaries of employees and to pay such deductions to the properly recognized or designated exclusive bargaining agent as an agency service fee pursuant to an agreement to that effect. Ch. 335, [1969] Mass. Acts, in BNA GOV'T EMPLOYEE REL. REP. No. 300: B-1 (June 9, 1969).

Municipal employees in Vermont have the same rights, with the exception of the right to strike, as are enjoyed in private employment under the State Labor Relations Act. Compare Vt. STAT. ANN. tit. 21, §§ 1701-05 (Supp. 1969), with *id.* §§ 1501-05, 1541-44, 1581-85, 1621-23. Thus, municipal employees may join or refrain from joining unions (*id.* § 1503), but may be subject to an express authorization of a union shop as a condition of employment (*id.* § 1621(b)); accord, R.I. GEN. LAWS ANN. §§ 28-7-13.5, 36-11-6 (1967). Vermont also allows maintenance of membership provisions (Vt. STAT. ANN. tit. 3, § 962(3) (Supp. 1969)) and an agency shop variation (*id.* § 941(k)).

⁵⁰ ALA. CODE tit. 35, § 450(3) (Supp. 1967) (firefighters); CAL. EDUC. CODE § 13082 (West 1969) (teachers); CAL. GOV'T CODE § 3502 (West 1970) (public employees); CONN. GEN. STAT. REV. § 10-153a (1967) (teachers); FLA. STAT. ANN. § 839.221(2) (1965) (public employees); HAWAII REV. LAWS § 76.101 (1968) (public employees); ME. REV. STAT. ANN. tit. 26, §§ 963, 967(2) (Supp. 1970) (municipal employees); MASS. GEN. LAWS ANN. ch. 149, § 178D (Supp. 1969) (state employees); MINN. STAT. ANN. § 125.21 (Supp. 1969) (teachers); MINN. STAT. ANN. § 179.52 (1966) (public employees); MO. ANN. STAT. § 105.510 (Supp. 1969) (public employees); Ch. 650, § 9(1), [1969] Nev. Stat. 1376 (municipal employees); N.Y. CIV. SERV. LAW § 202 (McKinney Supp. 1969) (public employees); N.D. CENT. CODE §§ 15-38.1-07(1), (2) (Supp. 1969) (teachers); Wis. STAT. ANN. § 111.70(2) (Supp. 1969) (municipal employees).

⁵¹ BALT. CITY CODE art. 1, § 113, in BNA GOV'T EMPLOYEE REL. REP. No. 266: E-1, E-4 (Oct. 14, 1968) (municipal employees); N.H. REV. STAT. ANN. § 98-C:2 (Supp. 1969) (classified employees and non-academic university employees; the language of this statute suggests that "assist" connotes merely serving as an officer or representative of the union

ganization or union.⁵² The statutes also prohibit employer or union interference with, or discrimination because of, the exercise of these rights.⁵³ This is similar to the scheme in the federal statute protecting private employees.⁵⁴

In assessing the possible validity of the agency shop under these statutory schemes for public employment, it is instructive to note the recent history of union security in the private sector. Section 7 of the NLRA guaranteed to employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."⁵⁵ This is the same right to *join* protected by a minority of state statutes in the public sector.⁵⁶ Coupled with this was the explicit provision in section 8(3) of the NLRA permitting

rather than payment of money); N.J. REV. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); VT. STAT. ANN. tit. 16, § 1982(a) (Supp. 1969) (teachers); WIS. STAT. ANN. § 111.82 (Supp. 1969) (state employees).

⁵² A minority of collective bargaining statutes for public employment protect the right to *join* unions only. *E.g.*, CAL. LABOR CODE § 1960 (West Supp. 1970) (firefighters); CONN. GEN. STAT. REV. § 7-468(a) (Supp. 1969) (municipal employees); DEL. CODE ANN. tit. 91, § 1302 (Supp. 1969) (public employees); ME. REV. STAT. ANN. tit. 26, § 963 (Supp. 1969) (municipal employees); MD. ANN. CODE art. 77, § 160(c) (1969) (teachers); MASS. GEN. LAWS ANN. ch. 149, § 178H (Supp. 1969) (municipal employees); MICH. STAT. ANN. § 17.455(9) (1968) (public employees); N.D. CENT. CODE § 34-11-01 (1960) (public employees); ORE. REV. STAT. § 243.730 (1968) (public employees); WASH. REV. CODE ANN. § 41.56.040 (Supp. 1969) (public employees).

A statute's failure to mention the right to refrain from joining unions of public employees may be significant if there is independent evidence of legislative acceptance of union security. If a law authorizing deductions of dues from salaries of public employees stipulates that such deduction is voluntary *unless* there is in effect an agreement between the public employer and the exclusive bargaining representative making union membership a condition of continued employment, the deference shown the union shop in the check-off statute is convincing evidence of a legislative intent not to protect the public employee against union security under the collective bargaining statute.

⁵³ *E.g.*, MICH. STAT. ANN. § 17.455(10) (1968): "It shall be unlawful for a public employer . . . (c) to discriminate in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization . . ." *See also* WIS. STAT. ANN. § 111.84(1) (Supp. 1969) (interference or discrimination by state employer); *id.* § 111.84(2) (interference or discrimination by public employee union).

⁵⁴ 29 U.S.C. §§ 157, 158(a)(1), (3), 158(b)(1), (2) (1964). Of course, the federal law makes a specific exception for the union shop, agency shop, and similar agreements. *Id.* § 158 (a)(3) (1st proviso).

⁵⁵ National Labor Relations Act of 1935, ch. 372, § 7, 49 Stat. 452.

⁵⁶ *See* Note 52 *supra*.

the closed shop and other forms of union security.⁵⁷ In 1947 the LMRA amended section 7 to guarantee the right of employees to *refrain* from union membership and activities.⁵⁸ Moreover, both the right to join and the right to refrain from joining were protected from infringement by the employer⁵⁹ and the union,⁶⁰ the same protection now accorded to public employees under most collective bargaining laws.⁶¹ The original closed shop proviso in section 8(3) was modified in LMRA section 8(a)(3) to legalize only the union shop⁶² and other less onerous forms of union security.⁶³

Absent the closed shop proviso of section 8(3) in the NLRA, the dictates of sections 7 and 8(3) would have made union security arrangements illegal.⁶⁴ The LMRA's modification of the language in the first proviso of NLRA section 8(3) outlaws the closed shop, but it also indicates a congressional intention to allow employers and unions that wish to eliminate the "free rider" the right to continue to do so by less burdensome arrangements, notwithstanding the policy of section 7 of the amended Act.⁶⁵

Because most state statutes for public employment create no exception to the rights of membership and nonmembership in order to accommodate union security arrangements, agency shop agreements in the public sector appear to have been rejected. In other words, if the language of a state statute authorizing collective bargaining by public employees⁶⁶ embodies the language and principles of sections 7 and

⁵⁷ *Provided*, That nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees . . . in the appropriate collective bargaining unit covered by such agreement when made.

National Labor Relations Act of 1935, ch. 372, § 8(3), 49 Stat. 452.

⁵⁸ 29 U.S.C. § 157 (1964).

⁵⁹ *Id.* §§ 158(a)(1), (3).

⁶⁰ *Id.* §§ 158(b)(1), (2).

⁶¹ See notes 50-51 and accompanying text *supra*.

⁶² *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein *on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later*

Labor-Management Relations Act of 1947 (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140-41, 29 U.S.C. § 158(a)(3) (1964) (emphasis added).

⁶³ See *NLRB v. GMC*, 373 U.S. 734, 739 & n.6 (1963).

⁶⁴ *Id.* at 738-41; see 79 CONG. REC. 7570 (1937) (statement of Senator Wagner); *id.* at 7674 (statement of Senator Walsh).

⁶⁵ S. REP. NO. 105, 80th Cong., 1st Sess. 6, 7, in 1 LEG. HIST. LMRA 412, 413 (1947).

⁶⁶ See notes 48, 50-52 *supra*.

8(3) of the NLRA or sections 7 and 8(a)(3) of the LMRA, the conspicuous absence of a union security proviso gives rise to the negative implication that the state statute was intended neither to validate such a device nor to carve out an exception to the rights of public employees created therein.

However, the history of legislation for the private sector is not a conclusive guide to the interpretation of state statutes for the public sector. Recent pronouncements by state courts and administrative tribunals point in the direction of permanent acceptance of the agency shop, notwithstanding the absence of a "Wagner" or a "Taft-Hartley" type proviso.

A demonstrative precedent can be found in *Tremblay v. Berlin Police Union*,⁶⁷ a declaratory judgment action decided by the Supreme Court of New Hampshire. New Hampshire has no statute protecting the right of public employees to union membership; instead the case arose under a municipal ordinance authorizing recognition of unions of municipal employees for the purpose of collective bargaining,⁶⁸ as permitted by the legislature.⁶⁹ Pursuant to the ordinance, the defendants, Berlin police commissioners and the police union, agreed upon the terms of a contract, including a so-called union shop clause.⁷⁰ This provision, together with the contract's "check-off" clause, imposed a financial obligation on each police officer equal to that of union dues. Although the contract "required" a police officer to be a union member, the union could cause the discharge of an employee only for withdrawal of the check-off authorization.⁷¹ Thus the purported union shop arrangement imposed no greater liability than an agency shop provision.⁷²

The New Hampshire court held that the union security clause was a reasonable concomitant of the state's declared public policy⁷³ of collective bargaining for public employees. The court pointed out that no law in New Hampshire prohibited this form of union security; moreover, a statute prohibited compelling any person to agree *not* to join a labor organization as a condition of continued employment.⁷⁴ Since the latter statute related only to mandatory *nonmembership*,⁷⁵

⁶⁷ 108 N.H. 416, 237 A.2d 668 (1968).

⁶⁸ *Id.* at 419, 237 A.2d at 670.

⁶⁹ N.H. REV. STAT. ANN. § 31:3 (Supp. 1967). *Tremblay* held the collective bargaining ordinance of the city of Berlin valid under the New Hampshire statute.

⁷⁰ 108 N.H. at 422, 237 A.2d at 672.

⁷¹ *Id.*

⁷² See *NLRB v. GMC*, 373 U.S. 734 (1963).

⁷³ See N.H. REV. STAT. ANN. § 31:3 (Supp. 1967).

⁷⁴ N.H. REV. STAT. ANN. § 275:1 (1966). Violation of the statute is punishable by fine, imprisonment, or both. *Id.* § 275:2.

⁷⁵ *Id.* § 275:1.

mandatory *membership* as a condition of continued employment was a permissible subject of collective bargaining and a permissible contract provision so long as discharge of the municipal employees was only for failure to meet the financial obligation.⁷⁶ This resulted in the validity of a union security clause similar to the Taft-Hartley type of union shop.⁷⁷

The *Tremblay* rationale is unfortunately broad. The court rested its decision, in part, on the general legislation prohibiting only the coercion of union *nonmembership*. It was unable to rely on a Taft-Hartley type of union security proviso as found in section 8(a)(3). Litigation may therefore arise over the effects of such a union shop provision upon a dissenting public employee who is—unlike the situation in *Tremblay*—a voluntary member of a rival union that did not negotiate the contract. In this variation of *Tremblay* the court could declare the union shop invalid since it may coerce the public employee, paying dues to and actively participating in the minority union, to forego his membership in that minority union. Had the New Hampshire court in *Tremblay* limited its decision to the legality of the provision for financial support of the union (the agency shop element) rather than validating the requirement of union membership, the case would better support an interpretation of the enabling legislation in favor of union security.

The obstacles inherent in the New Hampshire court's analysis of the legality of the dues-payment obligation are overcome in a line of cases construing Michigan's Public Employment Relations Act (PERA).⁷⁸ The agency shop was first accepted as a negotiable subject in public employment in a decision of the Michigan Labor Mediation Board, which held that a public employer violated the PERA by refusing to bargain with the American Federation of State, County and Municipal Employees (AFSCME) on an agency shop contract for sheriff's employees.⁷⁹ AFSCME had argued that union security provi-

⁷⁶ 108 N.H. at 422, 237 A.2d at 672. In support of its decision the court also noted that in authorizing collective bargaining by public employees, N.H. REV. STAT. ANN. § 31:3 (Supp. 1967) did not exclude police departments, as other statutes did. 108 N.H. at 422, 237 A.2d at 672.

⁷⁷ 29 U.S.C. § 158(a)(3) (1964) (1st proviso).

⁷⁸ MICH. STAT. ANN. §§ 17.455(1)-(16) (1968). The PERA protects the right of employees of any political subdivision of the state "to organize together or to form, join or assist in labor organizations . . ." *Id.* § 17.455(9). The PERA also prohibits a public employer from discriminating "in regard to hire, terms or other conditions of employment in order to encourage or discourage membership in a labor organization . . ." *Id.* § 17.455(10)(c).

⁷⁹ *Oakland County Sheriff's Dep't v. Local 23, AFSCME*, 1968 Mich. L.M.B. Ops. 1(a), BNA GOV'T EMPLOYEE REL. REP. No. 227: F-1 (Jan. 15, 1968).

sions were permissible subjects for collective bargaining and did not violate section 10(c)⁸⁰ of the PERA as an encouragement of union membership.⁸¹ The Oakland County Sheriff and the Board of Supervisors, as respondents, contended that the conspicuous absence in section 10(c) of a union security proviso similar to that in the Taft-Hartley Act evidenced a legislative intention to exclude all forms of union security from the scope of collective bargaining in the public sector. Respondents' argument rested not on the legislative history of the PERA, which was unavailable, but on the experiences of the private sector in applying sections 7 and 8(a)(3) of the Taft-Hartley Act.⁸² The contentions were similar to those already reviewed,⁸³ but were rejected by a majority of the Board.⁸⁴

Chairman Howlett's opinion for the Board defined the discrimination prohibited by section 10(c) to include treatment affecting all employees,⁸⁵ not merely as treatment distinguishing or "differentiating" among employees.⁸⁶ Since section 10(c) prohibits discrimination "in order to encourage or discourage membership in a labor organization"⁸⁷ and contains no Taft-Hartley-type proviso, the Chairman reasoned that a closed or union shop is prohibited. He went on to say, however, that an agency shop neither encourages nor discourages *membership* in the union; rather, the provision is an encouragement merely to pay the costs of bargaining.⁸⁸ Howlett favored a policy of discouraging the

80 MICH. STAT. ANN. § 17.455(10)(c) (1968); see note 78 *supra*.

81 1968 Mich. L.M.B. Ops. at 18, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-8.

82 *Id.* at 15-17, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-7 to -8.

83 See text at notes 55-66 *supra*.

84 1968 Mich. L.M.B. Ops. at 33, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-14. Member Weiss dissented on the union security issue, in part, because a traditional interpretation of the background and substance of the union security issue in private employment dictated a result similar to that suggested in the text at notes 55-66 *supra*. 1968 Mich. L.M.B. Ops. at 41, 47-49, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-18, F-20 to -21.

85 1968 Mich. L.M.B. Ops. at 34-35, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-15.

86 Member Walsh, concurring, had argued that only *some* maintenance-of-membership provisions violate § 10(c) by discouraging union membership, in that certain employees never have to pay an equivalent agency service fee. *Id.* at 38-39, 40, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-16 to -17, citing *Local 357, Teamsters v. NLRB*, 365 U.S. 667, 689 (1961) (Clark, J., dissenting). It is now Board policy that maintenance-of-membership clauses violate the PERA. See *Saginaw v. Service Employees Int'l Union*, 1969 Mich. L.M.B. Ops. 293, 296 n.1, BNA GOV'T EMPLOYEE REL. REP. No. 297: B-6, B-7 n.1 (May 19, 1969). Maintenance-of-membership in public employment previously had been discarded for purely policy reasons. See *Waterford Township Sch. Dist. and Waterford Educ. Ass'n. (Fact-Finder's Report, Mich. L.M.B.)*, in BNA GOV'T EMPLOYEE REL. REP. No. 275: B-2 (Dec. 16, 1968).

87 MICH. STAT. ANN. § 17.455(10)(c) (1968).

88 1968 Mich. L.M.B. Ops. at 33, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-14; see 14 WAYNE L. REV. 1238, 1246 (1968).

free rider inasmuch as the union is the exclusive representative and must fairly represent all the unit employees, including nonmembers.⁸⁹ He noted that the absence of union security may, in fact, discourage union membership.⁹⁰ In answer to the respondents' analogy to the Taft-Hartley Act, Howlett concluded that the legislature, in prohibiting discrimination with regard to *membership* only, did not desire to imitate the relevant Taft-Hartley sections in their entirety.⁹¹

This view is supported by the decisions of several Michigan circuit courts which, unlike the Board in the *Oakland* case, considered the PERA provisions as both protecting the right to join unions⁹² and prohibiting discrimination to encourage or discourage union membership.⁹³ In *City of Warren v. Local 1383, Firefighters*,⁹⁴ the city sought a declaratory judgment interpreting an agency shop clause in its contract.⁹⁵ The court upheld the agency shop provision in an opinion that recognized that the clause required only payment and not membership as a condition of continued employment. It also indicated that the legislature in section 10 did not intend to invalidate union security agreements that are nondiscriminatory and made pursuant to the legislative authorization for collective bargaining in public employment.⁹⁶

Relying on the language of *City of Warren*, the Circuit Court for Wayne County in *Smigel v. Southgate Community School District*⁹⁷ upheld an agency shop clause negotiated by the school district and a teachers' union, the exclusive representative. The court held that the clause, similar to the one in *City of Warren*, did not require union membership and did not cause discrimination in violation of section 10(c) of the PERA.⁹⁸ Further noting that the agency shop "has become an acceptable method of creating stability in public employee-employer relationships,"⁹⁹ the court concluded that the agency shop is a valid subject for collective bargaining in the public sector.¹⁰⁰

⁸⁹ 1968 Mich. L.M.B. Ops. at 32 & n.36, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-14 & n.36, *citing* *Vaca v. Sipes*, 386 U.S. 171 (1967).

⁹⁰ 1968 Mich. L.M.B. Ops. at 33, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-14.

⁹¹ *Id.* at 32, BNA GOV'T EMPLOYEE REL. REP. No. 227: at F-14.

⁹² MICH. STAT. ANN. § 17.455(9) (1968).

⁹³ *Id.* § 17.455(10)(c).

⁹⁴ 68 L.R.R.M. 2977 (Mich. Cir. Ct. 1968).

⁹⁵ The provision is reproduced in 68 L.R.R.M. at 2977.

⁹⁶ 68 L.R.R.M. at 2978.

⁹⁷ 70 L.R.R.M. 2042 (Mich. Cir. Ct. 1968).

⁹⁸ *Id.* at 2044.

⁹⁹ *Id.* at 2043.

¹⁰⁰ *Id.* The court denied plaintiffs' motion for an order to show cause why an injunction should not issue restraining the school district from discharging them for their failure to pay the agency fee. *Id.* at 2045.

Although only one Michigan appellate court has considered a case involving the validity of the agency shop as a subject for collective bargaining by public employees,¹⁰¹ the foregoing decisions make an affirmative answer probable in future appeals.¹⁰² Recent decisions not only condemn the free rider, but also recognize the necessity for the financial security of the public employee union as an independent basis for agency shop validity.¹⁰³

This does not mean that the Michigan courts will automatically uphold an agency shop provision similar to that in *City of Warren*; at least one court has recognized a necessary limitation on the operation of an agency shop. The Circuit Court for Wayne County in *Nagy v. Detroit*¹⁰⁴ circumscribed the duty to pay an agency service fee within a duty of "fair contribution."¹⁰⁵ The court refused to enforce an agency fee that did not reflect a pro rata share of the actual cost of collective bargaining. The fee could not properly include any additional costs to the union that were unrelated to the services rendered the nonmember and arose from activities in which the nonmember plays no part and has no voice.¹⁰⁶

Michigan's recognition of the agency shop¹⁰⁷ as a permissible sub-

101 See *Pullen v. County of Wayne*, No. 8201 (Mich. Ct. App. Dec. 2, 1969), discussed in BNA GOV'T EMPLOYEE REL. REP. No. 327: B-1 (Dec. 15, 1969) (refusing to disturb a Wayne County Circuit Court decision, which upheld the validity of agency shop provisions in contracts covering public employees because an abuse of discretion by the trial court was not demonstrated).

102 The decision in *City of Warren* was not appealed (see Brief for Defendant Local 1061, AFSCME at 13, *Grand Rapids v. Local 1061, AFSCME*, 72 L.R.R.M. 2257 (Mich. Cir. Ct. 1969)), but an appeal in *Smigel* has been filed with the Michigan Court of Appeals (letter from Erwin B. Ellman, Esq., to the author, Oct. 21, 1969, on file with the *Cornell Law Review*). An appeal of the most recent Michigan case is also contemplated. See *Warczak v. Board of Educ.*, 73 L.R.R.M. 2237 (Mich. Cir. Ct. 1970), discussed in BNA GOV'T EMPLOYEE REL. REP. No. 333: B-2, B-3 (Jan. 26, 1970).

103 The court in *Nagy v. Detroit*, 71 L.R.R.M. 2362 (Mich. Cir. Ct. 1969) commented: A bargaining agent without financial security would indeed be weak and ineffective. It requires financial security to give it the stature, aggressiveness and confidence as a responsible and capable representative institution and to enable it to adequately protect and promote the best interests of the employees it represents, both union and non-union. What is more, a strong capable bargaining agent is necessary to achieve a better relationship between labor and management and to guard against labor disorders which too often arise to endanger the country's economy and which should be avoided.

Id. at 2364; see *Grand Rapids v. Local 1061, AFSCME*, 72 L.R.R.M. 2257, 2260 (Mich. Cir. Ct. 1969).

104 71 L.R.R.M. 2362 (Mich. Cir. Ct. 1969).

105 *Id.* at 2364.

106 *Id.*

107 See note 53 *supra*. The reasoning employed by the Michigan board and courts suggests that the union shop and its variations are illegal subjects for bargaining in any state that prohibits encouragement or discouragement of union membership, whether

ject of collective bargaining is significant because PERA section 10(c) is representative of provisions in a majority of state statutes concerning the public employee's freedom from discrimination with regard to membership in a union. The Michigan precedents clearly emphasize the desirability of the agency shop or variations of it.¹⁰⁸ They provide a rationale for sustaining union security arrangements that the decision of the New Hampshire Supreme Court in *Tremblay* fails to provide. The policy analysis of *Tremblay* is sound, but *Tremblay's* reasoning should not be accepted in any state that prohibits the encouragement or discouragement of union membership. The Michigan analysis of the agency shop appears equally applicable under a "right-to-join" statute (as in Michigan) or under the majority of statutes containing the double-edged sword of organizational rights—the right to join or refrain from joining.¹⁰⁹ Because the agency shop does not require membership,¹¹⁰ there is no direct interference with a public employee's right to refrain from joining a union.¹¹¹

the state merely protects the right to join a public employee union, as do Michigan and a minority of states (*see note 52 supra*), or also protects the correlative right to refrain from joining (*see notes 50-51 supra*).

¹⁰⁸ *Grand Rapids v. Local 1061, AFSCME*, 72 L.R.R.M. 2257 (Mich. Cir. Ct. 1969), concerned a "modified" agency shop which required nonmembers to contribute the equivalent of dues to an educational fund servicing the children of all municipal employees, rather than to the union. This agreement was held not to violate the PERA's anti-discrimination provision (MICH. STAT. ANN. § 17.455(10)(c) (1968)) because: (1) § 10(c) was designed to prevent employer discrimination and not to preclude bargained-for contract provisions; (2) the scholarship contribution prevented discrimination against union members (*i.e.*, the "free rider" argument); and (3) the modified agency shop had no more tendency than the traditional agency shop to encourage or discourage membership. 72 L.R.R.M. at 2259-61. The court commented that the rationale of this modified agency shop was not the principle of unjust enrichment which underlies the traditional agency shop; rather, the provision was intended to make free riders "hurt" as much as union members. *Id.* at 2260. This view is contrary to the one taken by the plaintiff, that the ultimate objective of the union was *security* within the collective bargaining framework, although the city was unwilling to grant the traditional agency shop. Brief for Plaintiff at 16-17, *Grand Rapids v. Local 1061, AFSCME*, 72 L.R.R.M. 2257 (Mich. Cir. Ct. 1969).

Although the union did not accomplish one of its objectives, namely, remuneration for its efforts at representing all employees, the union's modified agency shop would seem to accomplish a second objective—inducing the employee to become a union member. 72 L.R.R.M. at 2259. Given the choice of joining the union and receiving the benefits therefrom or of remaining a nonmember obligated to pay the equivalent of union dues to a scholarship fund unrelated to the nonmember's conditions of employment, a non-member may decide to channel the compulsory wage deduction to the union by opting for union membership. Thus, the *Grand Rapids* case is authority for permitting an agency shop even if it has the result of encouraging union membership.

¹⁰⁹ *See notes 50-52 and accompanying text supra.*

¹¹⁰ *But cf.* text at note 10 *supra*.

¹¹¹ *But cf.* the experience in New York State. In New York the Taylor Act (N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1969)) protects the right to join and the

However, the legality of an agency shop under a statute providing for the double-edged sword of organizational rights may depend, to some degree, upon the judicial balancing of protections to be afforded a majority union, a minority union, and the employees. In Wisconsin, for example, a collective bargaining law protects the right of municipal employees to join or refrain from joining unions¹¹² and, like Michigan, prohibits discrimination that encourages or discourages such union membership or nonmembership.¹¹³ Although there was an attempt to write an agency shop proviso into the law,¹¹⁴ the attempt was unsuccessful and the Wisconsin statute is silent on union security.¹¹⁵ In that context a recent decision of the Wisconsin Supreme Court appears to foreclose consideration of meaningful union security. In *Board of School Directors v. Wisconsin Employment Relations Commission*,¹¹⁶ the court was faced with a challenge to a check-off agreement negotiated

right to refrain from joining a union of public employees (*id.* § 202) and prohibits discrimination encouraging or discouraging union membership (*id.* §§ 209-a.1(a) to -2(a)). Although the legality of an agency shop is unclear (*see Note, Exclusivity, Necessity of Elections, and "Union" Security Agreements under New York's Public Employees' Fair Employment Act*, 32 ALBANY L. REV. 138, 151-54 (1967)), existing administrative precedent is unfavorable to the agency shop. Counsel to the Public Employment Relations Board (PERB), the agency administering the Taylor Act, has construed the right to join or refrain from joining as precluding at least two forms of compulsory union membership—the closed shop (OP. PERB COUNSEL ¶ 1-509 (Dec. 11, 1967)) and the union shop (OP. PERB COUNSEL ¶ 1-519 (Feb. 9, 1968)). A fact-finder for PERB recommended that a union security clause that in part provided for an agency shop was of "doubtful legality," as were those forms of union security resulting in union membership. *See City of Auburn, N.Y. and District Council 30, AFSCME* (PERB June 6, 1968), in *BNA Gov't EMPLOYEE REL. REP.* No. 250: B-2 (June 24, 1968). *See also Ritto v. Fink*, 58 Misc. 2d 1032, 297 N.Y.S.2d 407 (City Ct. 1968).

A test of the legality of the agency shop may be forthcoming in New York City, governed under the Taylor Act by the local New York City Collective Bargaining Law. ADMIN. CODE OF THE CITY OF NEW YORK ch. 54, §§ 1173-1.0 to -13.0 (Supp. 1969), in 2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,450 (1968). In the summer of 1969 the United Federation of Teachers and the City Board of Education entered into a three-year agreement providing for what may be termed a "most-favored-union clause"—the UFT is guaranteed an agency shop if any other municipal union is granted the privilege in future negotiations with the City of New York. *See BNA Gov't EMPLOYEE REL. REP.* No. 303: B-6, B-8 (June 30, 1969). The New York Legislature is considering a proposal to permit negotiation of agency shop agreements. *See BNA Gov't EMPLOYEE REL. REP.* No. 337: B-16 (Feb. 23, 1970).

¹¹² WIS. STAT. ANN. § 111.70(2) (Supp. 1969).

¹¹³ *Id.* § 111.70(3)(a).

¹¹⁴ *See BNA Gov't EMPLOYEE REL. REP.* No. 122: B-4 (Jan. 10, 1966), reporting Governor Knowles's veto of a bill authorizing the agency shop as a valid subject of collective bargaining between any political subdivision of the state and an employee organization. *See generally* Notes, *Municipal Employment Relations in Wisconsin*, 1965 WIS. L. REV. 652 & 671.

¹¹⁵ *See WIS. STAT. ANN.* §§ 111.70(1)-(5) (Supp. 1969).

¹¹⁶ 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

by the majority union representative of the teachers and the local school board.¹¹⁷ A minority union asserted that the municipal employer could not grant the privilege of check-off exclusively to the majority union, and the court agreed.¹¹⁸

Relying on the dictates of subsections 2 and 3(a) of the Wisconsin statute, the court adopted a test to determine what subjects of collective bargaining in the public sector result in the prohibited practice of encouraging or discouraging union membership:

*Those rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative.*¹¹⁹

Applying this standard, the court held that the check-off agreement, a minimum form of union security,¹²⁰ was a prohibited practice under the state statute.¹²¹ The court further condemned the exclusive check-off as "self-perpetuation and entrenchment"¹²² contrary to the policy expressed in the Wisconsin law.

Viewing this decision prospectively, it appears likely that the Supreme Court of Wisconsin will extend *Board of School Directors* to include the agency shop as unlawful discrimination under subsection 3(a) of the statute. By its very nature, the agency shop is a form of *union security*, having as one of its goals the self-perpetuation and entrenchment of the union.¹²³ Moreover, the Wisconsin approach may be attractive to courts in jurisdictions with similar statutes¹²⁴ that have not as yet recognized the policy considerations controlling the positions in Michigan¹²⁵ or New Hampshire.¹²⁶ The Wisconsin precedent serves,

¹¹⁷ A check-off provision is also a form of union security involving a deduction by the employer of, most typically, the union dues from an employee's wages. The amounts so deducted are paid over to the union. *LABOR LAW TRUST GROUP, supra* note 2, at 635.

¹¹⁸ 42 Wis. 2d at 648-50, 168 N.W.2d at 97-98.

¹¹⁹ *Id.* at 649, 168 N.W.2d at 97 (emphasis by the court).

¹²⁰ *Id.* at 649 n.4, 168 N.W.2d at 97 n.4.

¹²¹ *Id.* at 650, 168 N.W.2d at 98.

¹²² *Id.* at 649, 168 N.W.2d at 98. *Contra, Bauch v. New York*, 54 Misc. 2d 343, 282 N.Y.S.2d 816 (Sup. Ct.), *aff'd*, 28 App. Div. 2d 1209, 285 N.Y.S.2d 263 (1st Dep't 1967), *aff'd*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951, *cert. denied*, 393 U.S. 834 (1968); *Kugler v. New York*, 73 L.R.R.M. 2478 (Sup. Ct. 1970).

¹²³ The Wisconsin Supreme Court cites the exclusive check-off, which it condemns, as not nearly so effective as a "union security" agreement, but as falling in the same category of provisions. 42 Wis. 2d at 649, 168 N.W.2d at 97.

¹²⁴ See notes 50, 52-53 and accompanying text *supra*.

¹²⁵ See notes 92-111 and accompanying text *supra*.

¹²⁶ See text at notes 67-77 *supra*.

by analogy, as highly persuasive authority in opposition to efforts towards union security and its concomitant, a greater guarantee of stable labor relations in public employment.¹²⁷

The legality of the agency shop remains a controversial issue for those states that authorize collective bargaining rights for public employees. To the extent that the determination of the issue depends upon an interpretation of the guaranteed rights to join or not to join and the prohibitions of coercion in the exercise of these rights, it appears that the threshold question concerns the relevant public policy, absent substantial legislative history or statutory direction regarding union security. On the other hand, a legal basis for the agency shop appears foreclosed where there is a right-to-work guarantee or where there is legislative silence in the sphere of public employment. Separate problems arising from the civil service laws and rules by which public employment is uniquely governed add to this dilemma.

B. Erosion of the Traditional Operations of the Civil Service by the Agency Shop

The merit system, as embodied in state and local civil service laws, seeks to protect the public employee from political and arbitrary infringement upon employment rights, including the conditions under which an employee may be discharged or disciplined.¹²⁸ Friction has resulted in the operation of civil service systems when collective bargaining has been allowed to include subjects traditionally within the exclusive operations of a merit system but not essentially related to the principle of merit employment.¹²⁹ The notion that union security, with its accompanying sanction of discharge, is incompatible with civil service concepts of merit employment has become a popular theme among commentators.¹³⁰

¹²⁷ Special problems for the agency shop may arise where the statute also protects the right to refrain from assisting the union, as does another Wisconsin statute. Wis. STAT. ANN. § 111.82 (Supp. 1969) (state employees); see note 51 and accompanying text *supra*.

¹²⁸ See Rubenstein, *The Merit System and Collective Bargaining in Delaware*, 20 LAB. L.J. 161 (1969).

¹²⁹ E.g., discharge pursuant to an agency shop arrangement.

¹³⁰ Mr. Vosloo in his study of collective bargaining by federal employees concluded:

Compulsory membership in a union as a prerequisite for . . . continuation in the public service would be as incompatible with the merit principle as discrimination based on political affiliation, religious belief, race or creed. It therefore appears that the "open shop" is the only type of union arrangement that may assume a proper place in the civil service.

W. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE 32 (1966). See Hart, *supra* note 30, at 190-91. See also Kaplan, *supra* note 7, at 331; S. SPERO, GOVERNMENT AS EMPLOYER 378 (1948). But see HANSLOWE, *supra* note 30, at 115; Anderson, *Labor Relations in the Public Service*, 1961 Wis. L. REV. 601, 618.

In the absence of state legislation authorizing collective bargaining in the public sector, courts were willing to defer to the dominant interests of the merit system in early attempts by public employee unions to achieve union security. For instance, in *Petrucci v. Hogan*,¹³¹ a court granted an injunction against picketing to promote union security. In that case employees of the city-acquired transit system, on being classified in the civil service, resigned from the union. In light of the constitutional and statutory civil service provisions, the court held that picketing at the employees' homes to coerce them into resuming membership was illegal:

The right to appointment depends upon merit and fitness, not upon membership in a labor organization. Inasmuch as plaintiffs have acquired civil service status, they may be removed only for causes recognized by law . . . and not for their failure to resume union membership.¹³²

Recognition of the necessity for collective bargaining in the public sector requires a reevaluation of the traditional operation of civil service and merit employment, especially with regard to accommodating the latter to the principle of union security. With the enactment of the various collective bargaining laws for the public sector¹³³ many states have provided a framework within which the conflict between operation of the civil service system and collective bargaining can be resolved.¹³⁴

1. *State Statutes Affording Predominance to the Civil Service Scheme*

There are certain patterns and attitudes expressed in statutes deferring to the civil service or merit system. For instance, the California Government Code¹³⁵ and similar state statutes¹³⁶ maintain the pre-

¹³¹ 5 Misc. 2d 480, 27 N.Y.S.2d 718 (Sup. Ct. 1941).

¹³² *Id.* at 487, 27 N.Y.S.2d at 725; *cf.* *Hagerman v. City of Dayton*, 147 Ohio St. 313, 71 N.E.2d 246 (1947) (check-off in support of a maintenance-of-membership provision in a unit of public employees was an unlawful union security arrangement in violation of the standards for discharge inherent in the civil service system).

¹³³ See note 48 *supra*.

¹³⁴ All statutes providing for some accommodation of the principles of merit employment and collective bargaining contain statements similar to that in New York's Taylor Act regarding the right to union representation: "Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder." N.Y. CIV. SERV. LAW § 203 (McKinney Supp. 1969).

¹³⁵ Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations.

CAL. GOV'T CODE § 3500 (West 1966) (public employees).

¹³⁶ *E.g.*, MD. ANN. CODE art. 77, § 160k (1969) (teachers): "Nothing contained herein

dominance of the merit system over any right to bargain collectively over subjects which affect, in particular, the tenure of public employees.¹³⁷ A second group of collective bargaining laws maintains "due regard" for certain practices of merit employment.¹³⁸ A third type of statute defers to certain exclusive management rights including the right to discharge "for cause."¹³⁹

The latter two categories of statutes provide few guidelines for

shall be deemed to supersede other provisions of this Code and the rules and regulations of public school employees which may establish and regulate tenure."

MASS. GEN. LAWS ANN. ch. 149, § 178N (Supp. 1969) (municipal employees, with the exception of Boston where the agency shop is specifically authorized): "Nothing in sections one hundred and seventy-eight F to one hundred and seventy-eight M, inclusive, shall diminish the authority and power of the civil service commission"

Ch. 650, § 10(2), [1969] Nev. Laws 1377 (municipal employees): "Each local government is entitled, without negotiation or reference to any agreement resulting from negotiation . . . (b) To hire, promote, classify, transfer, assign, retain, suspend, demote, discharge or take disciplinary action against any employee"

N.J. REV. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees): "Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations."

R.I. GEN. LAWS ANN. § 36-11-5 (Supp. 1969) (state employees): "Whenever the procedures under a merit system statute or rule are exclusive with respect to matters otherwise comprehended by this chapter, they shall apply and shall be followed."

WASH. REV. CODE ANN. § 41.56.100 (Supp. 1969) (public employees):

[N]othing contained herein shall require any public employer to bargain collectively with any bargaining representative concerning any matter which by ordinance, resolution or charter of said public employer has been delegated to any civil service commission or personnel board similar in scope, structure and authority to the board created by chapter 41.06 RCW.

137 See HANSLOWE, *supra* note 30, at 60.

138 For example, article 1, § 10 of the BALTIMORE CITY CODE, in 4 BNA LAB. REL. REP. 30:223 (1968), provides:

Municipal agencies and employees and their representatives shall have a mutual obligation to endeavor in good faith to resolve grievances and differences relating to terms and conditions of employment with due regard for and subject to the provisions of applicable laws relating to personnel policies, including hiring, promotion, suspension, discharge, position classification and fixing of compensation and any and all other laws, ordinances and Charter provisions governing public employment and fiscal practices in the City of Baltimore.

A variation of this scheme is found in Minnesota:

Governmental agencies and public employees and their representatives shall have a mutual obligation to endeavor in good faith to resolve grievances and differences relating to terms and conditions of employment, acting within the framework of laws and charter provisions, and giving consideration to personnel policies, position classification and compensation plans, and other special rules governing public employment.

MINN. STAT. ANN. § 179.50 (1967).

139 For example, the Wisconsin collective bargaining statute for state employees provides that nothing in the law may be construed to interfere with the right of a public employer to "discharge for just cause" under the applicable law, rule, and regulation. WIS. STAT. ANN. § 111.90 (Supp. 1969); see Note, *supra* note 10, at 685-86.

determining the scope of the preemption by the civil service scheme of the collective bargaining rights of public employees. Rather than removing the substantive subject of union security from the purview of collective bargaining, perhaps all that was intended by such statutes was the creation of a procedural safeguard whereby the operation of an agency shop would be subject to the remedial or appellate procedures of a civil service system regarding a tenure matter.¹⁴⁰ Moreover, if a public employer enters an agency shop relationship with the exclusive representative of its employees in an attempt to stabilize labor relations in the public sector, the employer, in effect, declares "good cause" for discharge to be the failure to support the union.¹⁴¹ Thus the civil service requirement seems satisfied.

2. *State Statutes Affording Predominance to the Collective Bargaining Agreement*

A clear expression of legislative intent to accommodate the system of merit employment with collective bargaining is found in the collective bargaining legislation announcing the dominance of the labor contract. The Delaware law is the best example of this trend.¹⁴² Originally the statute provided that procedures under the merit system were exclusive with regard to matters covered by the collective bargaining provision for public employees.¹⁴³ This provision was repealed in 1968, and the law now provides that nothing contained in the statute governing the merit system of personnel administration for state employees shall deny, limit, or infringe upon the right of the collective bargaining agent to engage in collective bargaining.¹⁴⁴ More specific language is found in statutes of other states.¹⁴⁵

¹⁴⁰ See Brief for Plaintiff at 22, *Grand Rapids v. Local 1061, AFSCME*, 72 L.R.R.M. 2257 (Mich. Cir. Ct. 1969).

¹⁴¹ See *Smigel v. Southgate Community Sch. Dist.*, 70 L.R.R.M. 2042, 2044 (Mich. Cir. Ct. 1968).

¹⁴² DEL. CODE ANN. tit. 19, §§ 1301-12 (Supp. 1969).

¹⁴³ Ch. 126, § 1312, [1965] Del. Laws 438 (repealed 1968).

¹⁴⁴ DEL. CODE ANN. tit. 19, § 1312 (Supp. 1969).

¹⁴⁵ *E.g.*, CONN. GEN. STAT. ANN. § 7-474(f) (Supp. 1969) (municipal employees):

Where there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions of sections 7-467 to 7-477, inclusive, on matters appropriate to collective bargaining, as defined in said sections, and any charter, special act, ordinance, rules or regulations adopted by the municipal employer or its agents such as a personnel board or civil service commission, or any general statute directly regulating the hours of work of policemen or firemen, or any general statute providing for the method of covering or removing employees from coverage under the Connecticut municipal employees retirement system, the terms of such agreement shall prevail.

The Connecticut law in § 7-474(g) specifically excludes from the scope of collective bar-

Inclusion of a public bargaining statute in the codified civil service law also evidences the dominance of the subsequent labor relations provisions over the traditional operation of a merit system, absent any provision to the contrary.¹⁴⁶ Where in some instances a statute further provides that "'matters within the scope of collective bargaining' shall mean matters designated to be within the scope of collective bargaining by executive order,"¹⁴⁷ the municipal executive can easily limit the operation of the municipal civil service scheme by designating the agency shop to be within the scope of collective bargaining.¹⁴⁸

3. *Judicial Determination of Civil Service Predominance*

The majority of public bargaining statutes take no position on the relation between collective bargaining rights and the merit principle of employment, thus leaving this issue for judicial determination. It has been suggested that the unique nature of public employment, to which civil service statutes and ordinances are, in part, directed, precludes agency shop provisions in collective bargaining agreements.¹⁴⁹

gaining certain operations of a municipal civil service system, including the conduct and grading of merit examinations, rating and listing of candidates for appointment, and regulating political activity.

The Maine law permits discipline and discharge of a public employee contrary to the traditional principles of merit employment, so long as the disciplinary procedures are subject to terminal arbitration:

If a collective bargaining agreement between a public employer and a bargaining agent contains provisions for binding arbitration of grievances involving the following matters: The demotion, lay-off, reinstatement [*sic*], suspension, removal, discharge, or discipline of any public employee, such provisions shall be controlling in the event they are in conflict with any authority and power, involving such matters, of any such municipal civil service commission or personnel board or its agents.

ME. REV. STAT. ANN. tit. 26, § 969 (Supp. 1970).

As to appointments and promotions, however, the civil service procedures are controlling. *Id.*

¹⁴⁶ *E.g.*, N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1969) (public employees).

¹⁴⁷ ADMIN. CODE OF THE CITY OF NEW YORK ch. 54, § 1173-3.0(m) (Supp. 1969), in 2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,450.08 (1968) (New York City Collective Bargaining Law).

¹⁴⁸ The collective bargaining statute for Vermont teachers gives the same effect to school board decisions: "All decisions of the school board regarding matters in dispute in negotiations shall, after full compliance with this chapter, be final." VT. STAT. ANN. tit. 16, § 2008 (Supp. 1969). Of lesser effect is the Michigan statute for state employees:

The provisions of this act as to state employees within the jurisdiction of the civil service commission shall be deemed to apply insofar as the power exists in the legislature to control employment by the state or the emoluments thereof.

MICH. STAT. ANN. § 17.455(4)(a) (1968).

¹⁴⁹ See *Oakland County Sheriff's Dep't v. Local 23, AFSCME*, 1968 Mich. L.M.B. Ops. 1(a), 16, BNA GOV'T EMPLOYEE REL. REP. No. 227: F-1, F-7 (Jan. 15, 1968).

However, the circuit courts of Michigan, the predominant forum for the litigation of this issue to date, have found little merit in this assertion. *Glampitt v. Board of Education*,¹⁵⁰ for instance, raised the issue of conflict between an agency shop clause negotiated by a teachers' union and the teachers' tenure law, which, like the more general civil service laws, restricts the bases for discharge. The court maintained that the purpose of the teachers' tenure act was to promote "an adequate and competent teaching staff, free from political and personal arbitrary interference."¹⁵¹ It noted that it was not inconsistent with the tenure act for the school board to contract for an agency shop or to enforce an agency shop agreement through the discharge penalty; the union security clause in no way placed "continued employment of the teacher on the mercy and whim of changing office holders."¹⁵²

The civil service principle of merit employment, including the concept of discharge for cause, also came under direct attack when the City of Warren sought a declaratory judgment of the validity of the agency shop clause negotiated with the firefighters' union.¹⁵³ In the *City of Warren* case the court noted that the broader issue involved the conflict between the PERA and the Civil Service Act.¹⁵⁴ The court preferred the provisions of the PERA, as special legislation, over those of the Civil Service Act, a general statute. Thus an agency shop provision of a contract entered into pursuant to the PERA was effective, notwithstanding contrary provisions of the Civil Service Act.¹⁵⁵ The court reasoned that the city was not acting contrary to the Civil Service Act by enforcing a requested discharge of an employee refusing to pay the agency fee pursuant to a valid agency shop clause.¹⁵⁶ Because of the operation of the agency shop agreement, the court suspended the provisions of the Civil Service Act specifying discharge only for neglect of duty and incompetency.¹⁵⁷

Michigan cases subsequent to *City of Warren* have not only attempted to resolve the conflict between collective bargaining and merit

¹⁵⁰ 68 L.R.R.M. 2996 (Mich. Cir. Ct. 1968). The case was ultimately dismissed because plaintiff had not exhausted remedies that were available under the contract and under the tenure statute.

¹⁵¹ *Id.* at 2997 (dictum).

¹⁵² *Id.* at 2999 (dictum).

¹⁵³ *City of Warren v. Local 1383, Firefighters*, 68 L.R.R.M. 2977 (Mich. Cir. Ct. 1968).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2978.

¹⁵⁶ *Id.*; see discussion in text at notes 78-111 *supra* of the legality of the agency shop under the PERA in Michigan.

¹⁵⁷ 68 L.R.R.M. at 2977.

employment, but have also tried to suggest the complementary nature of the two statutory schemes as they relate to union security. In *Smigel v. Southgate Community School District*,¹⁵⁸ the court was faced with alleged violations of the procedural and substantive safeguards of the teachers' tenure law.¹⁵⁹ In assessing the penalty of discharge for failure to tender the agency fees, the court found no conflict with the tenure law's requirement of "reasonable and just cause" for discharge.¹⁶⁰ Because the union security arrangement fell within the limits of permissible collective bargaining under the PERA,¹⁶¹ the determination of the school district that noncompliance with the agency shop provision constituted reasonable and just cause for discharge was controlling.¹⁶² In effect, by making reference to the purposes of both statutes, as the *Clampitt* court had done previously,¹⁶³ the court in *Smigel* concluded that there was "a common unified goal precluding an interpretation of the tenure act urging a conflict with P.E.R.A."¹⁶⁴

The agreement between the union and the school district in *Smigel* made dismissal for noncompliance with the agency shop clause subject to the procedures of the Michigan tenure act,¹⁶⁵ thus assuring review of a teacher's suspension pending his discharge at the end of the semester.¹⁶⁶ Review by a tenure or civil service commission, however, is restricted to a determination that there was nothing arbitrary or capricious about the discharge and that such dismissal was motivated solely by the refusal of the employee to pay a reasonable agency fee

¹⁵⁸ 70 L.R.R.M. 2042 (Mich. Cir. Ct. 1968).

¹⁵⁹ Article IV, § 1, of the tenure act (MICH. STAT. ANN. § 15.2001 (1968)) provides: "Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided."

¹⁶⁰ 70 L.R.R.M. at 2044-45.

¹⁶¹ *Id.* at 2043-44.

¹⁶² *Id.* at 2044. The second section of article 2 of the agreement between the Southgate school board and the union recognized that the "refusal of . . . [a] teacher to contribute fairly to the costs of negotiation and administration of this and subsequent agreements is . . . just and reasonable cause for termination of employment." *Id.* at 2043.

¹⁶³ See discussion in text at notes 150-52 *supra*.

¹⁶⁴ 70 L.R.R.M. at 2044; accord, Swartz Creek Bd. of Educ. and Swartz Creek Teachers Ass'n (Fact-Finder's Report, Mich. L.M.B.), in BNA GOV'T EMPLOYEE REL. REP. No. 267: B-3 (Oct. 21, 1968).

¹⁶⁵ 70 L.R.R.M. at 2043.

¹⁶⁶ The court in *Clampitt* dismissed an action by a teacher to enjoin enforcement of the agency shop agreement because the teacher had not exhausted procedures for reviewing a discharge. 68 L.R.R.M. at 2999. However, the *Smigel* court took the case notwithstanding the failure of the complaining teacher to use the tenure act's appellate procedures because "[t]o subject a teacher to discharge and the subsequent cumbersome procedures seeking to test the foregoing conclusions would constitute an unreasonable burden." 70 L.R.R.M. at 2045.

to the union. A civil service commission cannot disagree with what a municipal employer defines as "cause" under a valid agency shop provision. To hold that the commission has this legal capacity would abrogate the municipal employer's authority to establish working conditions within the framework of collective bargaining formulated by the PERA;¹⁶⁷ moreover, it would bring the civil service commission in conflict with the agency created to enforce the collective bargaining statute for public employees.

Since both the collective bargaining law and the civil service statute pertain to conditions of public employment, the possibility of conflict between the public employer and the civil service commission looms large.¹⁶⁸ There is a danger that the debate concerning the legality and desirability of the agency shop in public employment will become subordinated to a conflict over who, the commission or the public employer, has authority to negotiate and administer contracts. Failure to resolve the conflict might result in restrictive legislation benefiting neither the union and its members nor the governmental employer.¹⁶⁹

One way to avoid the possibility of conflict is to recognize the civil service commission as a necessary and proper party to all collective bargaining sessions and contract disputes involving issues, such as the agency shop, that establish conditions of employment independent of those originally contemplated by the civil service regulations.¹⁷⁰ Also, the existing civil service machinery might be used to administer some public employment programs.¹⁷¹ The authority of a civil service com-

¹⁶⁷ *Grand Rapids v. Local 1061, AFSCME*, 72 L.R.R.M. 2257, 2262 (Mich. Cir. Ct. 1969).

¹⁶⁸ See BNA GOV'T EMPLOYEE REL. REP. No. 282: B-9 (Feb. 3, 1969), wherein it is reported:

The [Detroit] Civil Service Commission fears that union-management contracts negotiated under PERA may strip it of regulatory and policy-making functions, leaving it only with the job of administering rules and procedures drafted by other parties, much as the company personnel office in private industry. . . . It fears that permitting elected officials to negotiate personnel practices threatens to subject public employment to the sort of political manipulation whose [sic] abuses led to creation of the merit system years ago.

¹⁶⁹ For example, chapter 12, § 3640, of a proposed amendment to the California statute governing labor relations in the public sector would restrict negotiable subjects to matters expressly delegated by the legislature and not within the authority of the state personnel board or covered under the civil service law. BNA GOV'T EMPLOYEE REL. REP. No. 285: E-1, E-3 (Feb. 24, 1969).

¹⁷⁰ See *Nagy v. Detroit*, 71 L.R.R.M. 2362, 2366-69 (Mich. Cir. Ct. 1969). Under present schemes for collective bargaining by public employees, however, most civil service commissions do not participate in negotiation or administration of collective bargaining agreements. This was the most significant finding in a survey by the California Personnel Board of federal, state, and local civil service agencies. BNA GOV'T EMPLOYEE REL. REP. No. 303: D-1 (June 30, 1969).

¹⁷¹ See HANSLOWE, *supra* note 30, at 52.

mission to so participate in collective bargaining and contract administration will remain uncertain until the commission's power to review a discharge pursuant to an agency shop agreement is finally determined.¹⁷² Such an accommodation appears possible, however, even though provisions of civil service statutes that are inconsistent with special collective bargaining laws for public employees may, by implication, be repealed or at least suspended upon adoption of a valid agency shop arrangement.¹⁷³ The inconsistencies need not operate as a suspension or repeal of all parts of the civil service statutes that deal with some aspect of the bargaining relationship.¹⁷⁴

Except in those jurisdictions where statutes specifically exclude the discharge of public employees governed by civil service law from the range of negotiable subjects,¹⁷⁵ the agency shop may be accommodated with the civil service scheme of merit employment. To better illustrate how the agency shop may be a permissible objective in the public sector, a proposal will be made to aid in evaluating the line of developments heretofore reviewed.

II

RESOLVED: A MODEL AGENCY SHOP STATUTE

Public employees should enjoy rights comparable to those guaranteed their counterparts in private employment. Insofar as states have recognized the organizational and collective bargaining needs of public employees,¹⁷⁶ they should also be willing to adopt the concept of union security. Without a secure union the stability of the bargaining unit is impaired, and the exclusive agent cannot adequately represent the interests of its constituency.

¹⁷² On February 26, 1970, the Michigan Tenure Commission upheld a discharge for failure to pay an agency service fee. The teacher involved announced plans to appeal. See *Applegate v. Grand Banc Community Sch.*, discussed in BNA GOV'T EMPLOYEE REL. REP. No. 339: B-8 to -9 (March 9, 1970).

¹⁷³ See *City of Warren v. Local 1383, Firefighters*, 68 L.R.R.M. 2977 (Mich. Cir. Ct. 1968).

¹⁷⁴ See *Civil Service Comm'n v. District Council 77, AFSCME*, No. 124936 (Mich. Cir. Ct. 1969), noted in BNA GOV'T EMPLOYEE REL. REP. No. 295: B-2, B-3 (May 5, 1969). Where the state constitution authorizes a governmental subdivision to maintain a tenure or merit system for its employees (e.g., MICH. CONST. art. XI, § 6; CALIF. CONST. art. XXIV, § 1) or the local charter or ordinance designates a civil service agency to exercise power over appointments, contracts of employment, promotions, and discharges (see 62 C.J.S. *Municipal Corporations* §§ 704-05 (1949)), a complete suspension of the civil service scheme is not intended.

¹⁷⁵ See notes 135-36 *supra*.

¹⁷⁶ See note 48 *supra*.

Of course, the unique nature of government as employer gives rise to conflicting considerations, and it is therefore necessary to accommodate the union security principle with both the statutory scheme for labor relations in the public sector and the civil service scheme of merit employment. As in the private sector, consideration must also be given to the individual rights of the public employees working under union security provisions.¹⁷⁷ What is needed is a comprehensive framework within which the public employer and the exclusive representative of a unit of public employees may negotiate an agency shop agreement. To this end, a statute in support of the agency shop concept is suggested. The statute offers a model for those jurisdictions in need of enabling legislation as well as a model of the terms and conditions to be considered in drafting a union security agreement between the public employer and the bargaining agent.

For the purpose of the model statute, certain terms are defined:

- (1) *Public employer* refers to the governmental subdivisions to which the agency shop statute is made applicable, such as the state or any agency of the state, or any other political subdivision of or within the state, or any agency thereof;
- (2) *Union* refers solely to the organization that has been designated or selected by a majority of the public employees in an appropriate unit as the exclusive representative of all employees in such unit for purposes of collective bargaining pursuant to law;
- (3) *Appropriate unit* refers to a unit of public employees at any plant or installation or in a craft or in an operational department of a public employer which establishes a clear and identifiable community of interest among the public employees concerned;
- (4) *Objecting employee* refers to an employee of the public employer in the appropriate unit who refuses to tender to the union an agency service fee pursuant to an agency shop agreement as authorized by the model statute.

As the comments following the text of the model statute reveal, the language reflects, for the most part, the experiences under the Taft-Hartley and Railway Labor Acts as well as the experiences with the recent attempts at union security in the public sector.

A. *A Model Agency Shop Statute*

Section 1. *Purpose.*—This Act shall validate the agency shop as a permissible subject of collective bargaining between a public employer and the union representing an appropriate unit of its public employees if such agency shop provision meets the standards as hereinafter described.

¹⁷⁷ See Oberer, *supra* note 4, at 782.

Section 2. *Provisions and Conditions of an Agency Shop Agreement.*—Nothing in any other law of this state or any political subdivision of or within the state shall preclude a public employer from executing an agreement with the union to require as a condition of continued employment the payment by all employees to the union of any agency service fee, subject to the following provisions:

(1) *Amount of Payment.*—The agency service fee shall be a sum proportionately commensurate with the costs of collective bargaining and contract administration; *provided however,*

first, such sum representing an agency service fee shall not reflect the additional costs of other expenses or activities that have no relation to the collective bargaining and contract administering services rendered by the union to the public employees;

second, such sum representing an agency service fee shall not reflect the costs of financial support of political causes, except to the extent that it is necessary for the union to engage in political activity in order to foster the goals of the union in collective bargaining and contract administration or to secure for the employees it represents advances in wages, hours, and other conditions of employment which ordinarily cannot be secured through bargaining collectively with the public employer. Nothing in this section shall authorize inclusion in the agency service fee of any sum representing expenditures or contributions to a political party, to a candidate for a political or elected office, or to a current officeholder.

(2) *Time of Payment.*—Payment of the agency service fee shall be made to the union, during the term of the collective bargaining agreement so providing, on or after, but in no case sooner than:

a. the thirtieth day following the beginning of employment or the date of satisfactory completion of the appropriate probationary period, whichever is later, for new employees appointed to positions in the collective bargaining unit from employment or promotional lists;

b. the tenth day following the beginning of employment for employees entering into work in the bargaining unit from re-employment lists;

c. the date of satisfactory completion of the probationary period or the completion of a three-month period following the beginning of employment, whichever is sooner, for employees hired on a temporary basis;

provided however, no employee in the aforementioned categories nor any employee in the employ of the public employer at the time an

agency shop agreement becomes effective shall be required to tender the agency service fee before the thirtieth day following the date the said agreement becomes effective.

(3) *Methods of Payment.*—Payment of the agency service fee shall be made by the public employee so affected either directly to the union or its agent at reasonable intervals or by executing a check-off authorization empowering the public employer to deduct the agency service fee from the salary or wages of the employee at reasonable intervals and to forward such sums so collected to the union or its agent, according to an agreement so providing; *provided however*, a check-off authorization, once executed by an employee and delivered to the public employer pursuant to an agreement, shall remain in effect for a twelve-month period from the date of delivery to the public employer or until the agency shop agreement has been terminated, whichever condition occurs first.

(4) *Nonpayment, Default.*—

a. In the event that the agency service fee is not tendered by the employee in compliance with sections 2(2) and 2(3) of this Act, according to an agreement so providing, the public employee shall be considered in default of his duty to pay such sum.

b. The procedure following default shall be as follows:

(i) Notification of the existence of the default shall be made by the union to both the public employer and the defaulting employee. Immediately upon receipt of the notification of default, the public employer shall notify the defaulting employee of the decision to terminate his employment.

(ii) After the occurrence of a default, the services of the defaulting employee shall be discontinued only upon completion of the employment period peculiar to the work performed by such defaulting employee, but in no event shall such employee be discharged before the thirtieth day following personal notification of the termination of employment.

(iii) The defaulting employee shall have the right to contest the decision to discontinue his services before the tenure, merit, civil service, or personnel commission generally responsible for the appointments, promotions, discipline, and discharges of public employees in his work classification, or before the board generally responsible for the administration of any statute or ordinance authorizing organizations of public employees to collectively bargain with public employers; *provided however, first*, election of the commission or board shall preclude

the jurisdiction of any other forum in the matter; *second*, nothing shall preclude an appeal to a court of competent jurisdiction from the final determination of such commission or board.

(iv) If, at the end of the employment period or the thirtieth day following the personal notification of termination of employment, as referred to in paragraph (ii) above, the defaulting employee shall be pursuing any legal remedies contesting the termination under section 2 (4), such defaulting employee's services shall not be terminated until such time as the defaulting employee shall have either obtained a final determination of the validity or legality of such termination, or said employee has ceased to pursue the legal remedies available by not making a timely appeal of any decision rendered in the matter by the commission, board, or court of competent jurisdiction.

(v) As a condition to contesting the decision to terminate employment upon default as provided above, the defaulting employee shall authorize his public employer prior to the end of the employment or thirty-day period, as referred to in paragraph (ii) above, to deduct from his wages funds equivalent to the agency service fee at appropriate intervals, which funds shall be paid into an escrow account administered by the commission, board, or court pending final determination of the defaulting employee's claim, as provided in paragraph (iv) above. The authorization to deduct the funds to be held in escrow shall include authorization to deduct back fees due, but such deduction shall be reasonably proportioned so as not to unnecessarily burden the defaulting employee.

(vi) At the election of the defaulting employee, procedures under section 2(4)(b) shall be terminated, the decision to terminate employment under section 2(4)(b)(i) shall be rescinded, and the defaulting employee no longer shall be considered in default under section 2(4)(a); *provided* the defaulting employee *first*, pays to the union the agency service fees due from the time of default, *second*, executes a written statement of intention to comply with section 2(3), and *third*, pays any reasonable sum representing the cost to the union or employer resulting from the default.

(5) No agency shop agreement executed pursuant to this Act:

a. shall take effect until a civil service commission or public employment relations board or similarly constituted agency, as stipulated by the union and employer, shall have certified that at least a majority of the public employees to be affected by the agency shop agreement have indicated their support for the agency shop agreement as negotiated;

b. shall authorize any relationship or obligation to the union on the part of an objecting employee other than that authorized by the Act;

c. shall take, or remain in, effect if membership in the union was not available to all employees subject to the payment of the agency service fee on the same terms applicable to members of the union generally.

B. *Comments on the Model Act*

1. *Section 1—The Right to Bargain for an Agency Shop*

Section 1 of the model statute establishes the legality of bargaining over and contracting for an agency shop provision. By enabling such collective bargaining, this part of the model statute denies the applicability of right-to-work laws to the public sector¹⁷⁸ and resolves the conflicts arising from the ambiguous guarantees and prohibitions of many of the collective bargaining laws directed at public employment.¹⁷⁹

However, the model statute does not intend to label the agency shop as a mandatory subject of collective bargaining, as it is in private employment.¹⁸⁰ Because the model statute should be most acceptable in states having statutory schemes for collective bargaining, to present the agency shop as a mandatory subject might conflict unnecessarily with a contrary determination under the relevant language of the general collective bargaining statute. Thus, the model statute merely removes the shadow of illegality from an agreement that embodies the principle of an agency shop and permits bargaining over the provision.

2. *Section 2(1)—Protection of the Employee's Rights from the Coercive Nature of the Agency Shop Provision*

The provisions of section 2(1) and its two provisos generally reflect recognition of the freedom of association and expression guaranteed to an objecting employee by a series of Supreme Court cases.¹⁸¹ In one of the cases, *Railway Employees' Department v. Hanson*,¹⁸² the Court held, in part, that the union shop authorization of the Railway Labor Act¹⁸³ did not unconstitutionally deprive a worker of his property with-

¹⁷⁸ See text at notes 31-47 *supra*.

¹⁷⁹ See text at notes 48-53 *supra*.

¹⁸⁰ See *NLRB v. GMC*, 373 U.S. 734 (1963).

¹⁸¹ *Brotherhood of Ry. & Steamship Clerks v. Allen*, 373 U.S. 113 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

¹⁸² 351 U.S. 225 (1956).

¹⁸³ 45 U.S.C. § 152 Eleventh (1964).

out due process of law or infringe upon his freedom of association by requiring union membership and payment of dues, initiation fees, and assessments pursuant to an agreement between a union and an employer so providing.

Setting aside the issue of union membership, an authorization of the agency shop for public employees presents issues similar to those raised in *Hanson*. It may be argued that the justification for requiring all employees to share the costs of union activity on their behalf is somewhat reduced in the public sphere where government, as employer, has demonstrated a greater willingness to protect the interests of its workers.¹⁸⁴ But in upholding the legality of agreements made pursuant to the union shop provision of the Railway Labor Act the Supreme Court found the union shop to be a permissible means of achieving "[i]ndustrial peace along the arteries of commerce."¹⁸⁵ In this same manner a state government's interest in using the agency shop to stabilize labor relations and encourage union responsibility outweighs the threat of possible restrictions of the objecting employee's first and fourteenth amendment rights,¹⁸⁶ especially when those constitutional rights receive adequate protection under the agency shop agreement.

The public employee needs protection from the obligation to pay an unreasonable agency service fee. Union fees and dues reflect a variety of expenditures, many of which are unrelated to the services an objecting employee receives from the public employee union as bargaining agent. A troublesome problem in public employment concerns the propriety of using compulsory payments representing an agency service fee for purposes not germane to collective bargaining.¹⁸⁷ Section 2(1) and its first proviso require only the payment of an employee's pro rata share of the costs of bargaining and administering the contract.¹⁸⁸ Certainly, internal union provision for other expenditures, such as scholarship and emergency relief funds, remains the obligation of only the member.¹⁸⁹

The extent to which an agency service fee can reflect an assessment for the costs of external political activity engaged in by the union poses

¹⁸⁴ See Note, *Labor Relations in the Public Sector*, 75 HARV. L. REV. 391, 403 (1961).

¹⁸⁵ 351 U.S. at 233.

¹⁸⁶ See *id.* at 233-38.

¹⁸⁷ See *id.* at 235 & n.7.

¹⁸⁸ This is wholly consistent with the Supreme Court's interpretation of union security under the Railway Labor Act in *Hanson*. *Id.* at 235.

¹⁸⁹ See Hopfl, *supra* note 2, at 480; *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 236 (1961).

a more complex issue.¹⁹⁰ In the private sector the contractual obligation requiring contribution to the costs of collective bargaining by all employees may not lawfully include support of political activities of the union over the objection of an individual member.¹⁹¹ But unlike the situation in the private sector, political activity by a public employee union is intricately connected to the union's program of advancing conditions of employment in the public sphere.¹⁹² This is particularly true where the right to strike is denied the public employee and his union; to a considerable degree the public employee union must rely on political pressure rather than economic sanctions to achieve its goals.¹⁹³ It is because of the particular *public* nature of the process that a public employee union must look to the state or local legislatures for the realization of that part of its program not achieved through traditional collective bargaining. For this reason, the concept of political

¹⁹⁰ Concern with the use of compulsory-dues money for political purposes prompted a Detroit teachers' group to challenge the agency shop provision in the present contract between the Detroit Federation of Teachers and the school board. A Michigan trial court dismissed the suit holding that the teachers' rights guaranteed by the first, third, fourth, fifth, ninth, and fourteenth amendments of the United States Constitution and Article I of the Michigan Constitution were not violated. *Warczak v. Board of Educ.*, 73 L.R.R.M. 2237 (Mich. Cir. Ct. 1970). Plans to appeal this case, the first to raise the issue of agency fees used for political purposes, have been announced. BNA Gov't EMPLOYEE REL. REP. No. 333: B-3 (Jan. 26, 1970).

¹⁹¹ *Brotherhood of Ry. Clerks v. Allen*, 373 U.S. 113 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). In the *Street* case a group of railroad employees sued to enjoin enforcement of a union shop agreement, alleging that a substantial part of the money they were compelled to pay was used, over their protests, to finance the campaigns of political candidates whom they opposed and to promote the propagation of political doctrines with which they disagreed. The Supreme Court held, in part, that section 2, Eleventh, of the Railway Labor Act, in authorizing union shop agreements, denied unions the power, over an employee's objection, to use his exacted funds to support political causes which he opposes. 367 U.S. at 765-70.

In *Allen*, which arose under facts similar to *Street*, the Court held that a union using sums exacted under a union shop agreement to finance political activities, over an employee's objection, must refund to him "a portion of the exacted funds in the same proportion that union political expenditures bear to total union expenditures, and [must reduce such future] . . . exactions from him by the same proportion." 373 U.S. at 122-24.

Both cases arose under the Railway Labor Act, which permits negotiation of a union shop agreement. Insofar as the Taft-Hartley Act encompasses a similar public policy, the *Street* and *Allen* restrictions are applicable to all private employees covered thereunder.

¹⁹² For example, public employee unions expend much time and money in appearing before legislative committees, drafting legislation, and lobbying for their programs of labor relations in public employment. See Note, *supra* note 184, at 403; BNA Gov't EMPLOYEE REL. REP. No. 338: D-1, D-4 (March 3, 1970).

¹⁹³ See Note, *supra* note 10, at 691.

activity of public employee unions is distinguishable from that of their private sector counterparts.¹⁹⁴

This distinction exists solely with regard to the union's activities concerned directly with advancing the employment conditions of its constituents. The second proviso to section 2(1) of the model statute recognizes this by permitting only the costs of political activity closely connected with the employees' economic employment interests to be included in the agency service fee.¹⁹⁵

One observer, however, foresees the possibility for abuse in carving out a public employment exception to the strict *Street* and *Allen* rules¹⁹⁶ of the private sector:

Thus there arises the possibility of involuntary contributions to organizational support of politicians who, while ready to improve the working conditions of public employees, on other questions take positions of which such public employees disapprove. Unless careful protections are worked out, enabling individual public employees to "contract out" from compelled support of unwanted political parties, politicians, and public policies, the union [or agency] shop in public employment has the potential of becoming a neat mutual back-scratching mechanism, whereby public employee representatives and politicians each reinforce the other's interests and domain, with the individual public employee and the individual citizen left to look on, while his employment conditions, and his tax rate, and public policies generally are being decided by entrenched and mutually supportive government officials and collective bargaining representatives over whom the public has diminishing control.¹⁹⁷

The second proviso to section 2(1) of the model statute recognizes the possibility of this "back-scratching" abuse and seeks to protect the employees and the public by precluding assessment in the agency service

¹⁹⁴ See Note, *supra* note 184, at 403-04. But cf. the dissenting opinion of Mr. Justice Frankfurter in the *Street* case, 367 U.S. at 812-15.

¹⁹⁵ See Hopfl, *supra* note 2, at 480; accord, *Nagy v. Detroit*, 71 L.R.R.M. 2362, 2364-65 (Mich. Cir. Ct. 1969) (validating an agency fee payment representing a fair contribution to the costs of bargaining and contract administration to the union).

The accounting involved, while somewhat burdensome, is not an impossible task. Accounting techniques have been used to allocate the numerous cost factors in the operations of manufacturing concerns. The union as a business presents no more formidable a problem. Hopfl, *supra* note 2, at 480. *Contra*, *The Supreme Court*, *supra* note 189, at 238. One solution to the fee apportionment problem is suggested by the Swiss experience where nonmembers pay only the approximate costs of collective bargaining. Dudra, *The Swiss System of Union Security*, 10 LAB. L.J. 165 (1959).

¹⁹⁶ See note 191 *supra*.

¹⁹⁷ HANLOWE, *supra* note 30, at 115.

fee for contributions or expenditures made on behalf of political parties, candidates, or current office holders.¹⁹⁸

3. Section 2(2)—*The Agency Shop Grace Period*

Section 2(2) provides a grace period within which certain categories of public employees may either begin to tender an agency service fee as provided by contract or leave the employ of a particular public employer. Provisions of this kind are supported by the policy of authorizing a grace period for private employment, embodied in the first proviso to section 8(a)(3) of the Taft-Hartley Act.¹⁹⁹

Under the model statute, the period of time within which a public employee must make the individual choice to remain in a unit subject to an agency service fee depends upon his employment status. Subsections (a), (b), and (c) of section 2(2) attempt to take account of probable status classifications inherent in a system of employment and promotion which, up to the time of an agency shop contract, have been governed solely by civil service or merit regulations. The purpose of section 2(2), then, is to accommodate the civil service practice with the grace period.²⁰⁰

For a permanent employee who was not a union member when the contract was executed the grace period incorporated in the proviso to section 2(2) is the same as that in the Taft-Hartley proviso for section 8(a)(3)—thirty days. In the other subsections of section 2(2) it is recognized that by the nature of certain public employment (*e.g.*, teaching and fire fighting) a probationary period longer than thirty days may be required. During such probationary period an employee may be subject to summary discharge or discharge for less than cause. The model statute recognizes the point at which the public employee achieves some degree of permanence in employment as the effective date for the initiation of the agency fee requirement.

¹⁹⁸ Section 2(1) of the model statute in no way addresses itself to the application of the *Street* and *Allen* precedents to the financial obligation of a *member* of a public employee union where an agency shop provision is in force.

¹⁹⁹ Although the legislative history of the 30-day grace period in the LMRA is scant, reference is made to it in H.R. REP. NO. 245, 80th Cong., 1st Sess. 9 (1947); 93 CONG. REC. 3615 (1947) (remarks of Representative Brehm); 93 CONG. REC. A2011 (1947) (remarks of Representative Meade). The purpose of the grace period was merely to give the new employee enough time to decide if he wished to remain at his job subject to a union security provision.

²⁰⁰ Cf. BNA GOV'T EMPLOYEE REL. REP. NO. 313: B-3 (Sept. 8, 1969), reporting a union security agreement negotiated in August 1969 for hospital employees of the state of Rhode Island incorporating a scheme for initial payment based upon employment status.

Thus, the intent of section 2(2) is to stabilize the representational ability of the union through financial contributions as soon as the employment status of a particular employee becomes reasonably secure. The time provisions as they apply to (a) new employees in the unit, (b) re-employed employees, or (c) temporary employees are general and should be adjusted for the problems of the particular unit represented. For instance, the statutory probationary period for teachers is usually three years before tenure can be granted.²⁰¹ To permit a newly hired teacher to be free from an agency shop obligation for that length of time would undermine the purpose of the model statute. Therefore, the statutory basis of a "probationary period" should not be considered to coincide with the granting of tenure. A more equitable period should be adopted by the parties; in the case of teachers the grace period should perhaps approximate that period of time covered by the first scholastic term from the time of hiring. The language of the model statute's section 2(2)(a), providing for an "appropriate probationary period," should be considered as permitting the parties to the agreement to vary the strict probationary period of a tenure or civil service statute or regulation where it is necessary.

4. *Section 2(3)—Direct Payment or Check-Off of the Agency Shop Fee—The Individual's Choice*

Once it has been decided that the agency shop is in the best interests of the public employment relationship, expedient methods for payment of the service fee should be set forth. Section 2(3) of the model statute permits the public employer and the union to bargain for an arrangement whereby its employees are permitted to assign out of their wages an amount representing the negotiated agency service fee, which is then paid over to the union at regular intervals. Such a check-off has become commonplace in private industry²⁰² and in the labor policies of governmental bodies.²⁰³

²⁰¹ See M. MOSKOW, *TEACHERS AND UNIONS* 77 (1966); E. SHILS & C. WHITTIER, *TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING* 493 (1968).

²⁰² For example, the Railway Labor Act, in 45 U.S.C. § 152 Eleventh(b) (1964), specifically empowers the carrier and the exclusive bargaining agent to agree on an exclusive dues check-off.

²⁰³ The practice is authorized in the federal civil service. See Exec. Order 11491, § 21, 34 Fed. Reg. 17607 (1969); REPORT OF THE PRESIDENT'S REVIEW COMM. ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, in BNA GOV'T EMPLOYEE REL. REP. No. 280: 10 Special Supp. (Jan. 20, 1969). State laws also promote use of the check-off in public labor relations. See, e.g., N.Y. CIV. SERV. LAW § 208 (McKinney Supp. 1969). Questions concerning the constitutionality of provisions for exclusive check-off in public employment are dealt with in *Bauch v. New York*, 54 Misc. 2d 343, 282 N.Y.S.2d 816 (Sup. Ct.), *aff'd*, 28 App. Div. 2d 1209, 285 N.Y.S.2d 263 (1st Dep't 1967), *aff'd*, 21 N.Y.2d 599, 237 N.E.2d 211,

While the check-off is an efficient method of implementing a policy of stable labor relations in public employment, the right of individual choice in the mechanics of fulfilling the agency shop requirement should be maintained to the greatest extent possible. Thus, section 2(3) permits the check-off only as an alternative to direct payment to the union.

Section 2(3) contemplates *voluntary, written* authorization of the check-off by the employee or the exercise of an option at his discretion to make payments directly to the union. Thus the alternate provisions for payment of the agency service fee should in no way conflict with an express state policy prohibiting involuntary wage deductions.²⁰⁴ But in order to guarantee a measure of certainty in the method of financial support of the union during the term of a contract embodying the union security agreement, provision is made in the proviso to section 2(3) obligating an employee for a year once he has voluntarily authorized the check-off.

5. Section 2(4)—*Procedural Fairness for the Objecting Employee*

Section 2(4) provides certain safeguards protecting the employment status of an objecting and defaulting public employee. At the same time this section contemplates an efficient means for the union to police the obligation to pay the agency service fee. The paragraphs of section 2(4)(b) attempt to reconcile potential conflicts in the administration of a civil service system and an agency shop arrangement.²⁰⁵

Paragraph (ii) and succeeding paragraphs establish a period between the default and the ultimate termination of employment during which a defaulting employee can attempt to avert the possibility of discharge. The purpose of these paragraphs is to accommodate the principle of employment based upon merit with the totally unrelated concept, novel to the public sector, of discharge for failure to pay a fee. For the most part, the time limit of paragraph (ii) reflects conditions peculiar to certain classes of public employees. It is not in the public interest, for example, to dismiss a teacher who defaults in February before the end of the school year. Conversely, the sanitation worker is basically unskilled and can, in most cases, be easily replaced; he should be provided with employment beyond his default only insofar as is

289 N.Y.S.2d 951, *cert. denied*, 393 U.S. 834 (1968); *cf. Kugler v. New York*, 73 L.R.R.M. 2478 (Sup. Ct. 1970).

²⁰⁴ See, e.g., MICH. STAT. ANN. § 28.585 (1954), prohibiting *involuntary* wage deductions and punishing violations as misdemeanors under the Penal Code.

²⁰⁵ See text at notes 128-75 *supra*.

necessary to effectuate his resort to the remedial procedures outlined in the other paragraphs of section 2(4)(b).

The language of paragraphs (iii) and (iv) conforms to the approach of the parties in the *Smigel* case,²⁰⁶ in which an agency shop agreement made discharge for failure to tender the agency fee subject to the dismissal procedure of the Michigan tenure act for teachers. Paragraph (iii) permits, in addition, an election between the processes of a civil service commission and those of a public employment relations board which oversees the administration of a public bargaining statute, if one exists. The latter extension is provided because the agency shop provision is a product of the bargaining relationship; the public employment relations board is a superior forum because of its expertise in resolving issues raised by defaulting employees contesting an agency shop dismissal. Deference to a civil service commission is made in paragraph (iii) merely because of its traditional role in reviewing the discharge of public employees, but such deference operates only upon the express election of the defaulting employee.

Section 2(4)(b)(iv) secures continuity of employment beyond the period specified in section 2(4)(b)(ii) so long as there is some unresolved legal issue regarding discharge pursuant to the model statute and an agency shop agreement.²⁰⁷ Delay in the discharge of a defaulting employee is accompanied by commensurate protection for the union. Section 2(4)(b)(v) provides for compulsory authorization of the check-off as a condition precedent to challenging the decision to terminate. This guarantees the employee's ability to pay, as well as prompt payment to the union, should the union be successful in the contest. Moreover, the check-off during the course of the often lengthy litigation contemplated in paragraph (iii) should to some degree guard against frivolous or harassing claims against the union. By providing that the objecting employee is not excused from paying the agency service fee while suing to obtain relief, section 2(4)(b)(v), to some degree, embodies the experience in the private sector.²⁰⁸ Section 2(4)(b) does not attempt to apportion the costs of a section 2(4)(b)(iii) action among the parties.

Section 2(4)(b)(vi) permits rescission of the notice or decision to terminate after default. It is in the best interests of all parties that differences be resolved during the "delay" periods of paragraphs (ii) or (iv) without a formal determination by a commission, board, or court.

²⁰⁶ *Smigel v. Southgate Community Sch. Dist.*, 70 L.R.R.M. 2042 (Mich. Cir. Ct. 1968); see text at notes 165-66 *supra*.

²⁰⁷ Section 2(4)(b)(iv) is patterned, in part, after the guarantees embodied in the agency shop agreement in *Smigel*, 70 L.R.R.M. at 2043.

²⁰⁸ See *Brotherhood of Ry. & Steamship Clerks v. Allen*, 373 U.S. 113, 120 (1963).

However, the provisions of paragraph (vi) obligate the defaulting employee who elects to change his section 2(4) status to demonstrate his good faith compliance with the terms and conditions of the model statute and an agency shop provision pursuant thereto. Moreover, section 2(4)(b)(vi) supports charging a defaulting employee coming within its provisions with any reasonable costs incurred by the parties as a result of the employee's decision initially to withhold payment of the agency service fee.²⁰⁹

6. *Section 2(5)(a)—A Voice for the Objecting Employee in Adopting an Agency Shop Provision*

Section 2(5)(a) incorporates into the model statute a referendum provision similar to the one originally included in section 8(a)(3), first proviso (ii), of the LMRA of 1947.²¹⁰ In amending the Wagner Act in 1947, Congress imposed the requirement, as a precondition to the promulgation of a union security clause, that the employees of the bargaining unit authorize the execution of such a clause in a secret ballot election. In almost every election held by the NLRB under that provision during the years 1947 to 1951 the employees voted overwhelmingly to authorize a union security clause;²¹¹ as a result, the voting requirement was repealed by the Taft-Humphrey amendments in 1951.²¹²

By including in section 2(5)(a) of the model statute a provision requiring a referendum on the agency shop agreement, the model statute defers to the position, similar to that voiced in 1947, that employees do not necessarily support compulsory payments to unions.²¹³ Because of the greater propensity for conflict between the agency shop

²⁰⁹ The model statute in § 2(4) is not intended to apply an exclusive procedure for challenging the validity of either the model statute or an agency shop provision executed pursuant thereto. If other state statutes provide a declaratory judgment procedure, for example, an objecting employee may resort to it so long as he is not in default for purposes of § 2(4) of the model statute. See § 2(4)(b)(iii) (first proviso).

Section 2(4)(b) does not provide a remedy for a public employee who successfully challenges the validity of an agency shop agreement. The successful employee seems entitled to no more than the wages withheld under paragraph (v) while he litigated the matter. See *Brady v. TWA Inc.*, 196 F. Supp. 504 (D. Del. 1961) (sole remedy for an employee wrongfully discharged under a Railway Labor Act union shop contract is back pay; claim for damages for mental suffering and unforeseen expenses as well as punitive damages rejected).

²¹⁰ Act of June 23, 1947, ch. 120, § 101, 61 Stat. 140-41.

²¹¹ See Hogan, *The Meaning of Union Shop Elections*, 2 IND. & LAB. REL. REV. 319, 322-23 (1949); Kuhn, *Right-to-Work Laws—Symbols or Substance?*, 14 IND. & LAB. REL. REV. 587, 592 (1961).

²¹² Act of October 22, 1951, ch. 534, 65 Stat. 601.

²¹³ See H. NORTHRUP & G. BLOOM, *GOVERNMENT AND LABOR* 224-25 (1963).

and both the statutory principles of collective bargaining and the civil service concept of merit employment unique to the public sector, section 2(5)(a) is desirable in order to dispel any notion that an agency shop agreement is not one supported by most public employees.

It is not certain that the individual preferences of public employees will follow those experienced in the private sector between 1947 and 1951; the referendum provision is therefore necessary at least during the early years.²¹⁴ Section 2(5)(a) lacks the original LMRA formal requirement of a majority vote, but would allow the board or commission discretion in selecting the method of measuring the consensus. One method might be the execution of authorization cards by a majority of employees supporting the agency shop agreement.

7. *Section 2(5)(b)—No Membership Obligations under the Model Statute*

Section 2(5)(b) limits the conditions of employment that may be imposed by an agency shop agreement to payment of the agency service fee; it precludes forcing an objecting employee to join the union, either in law or in fact. In effect, section 2(5)(b) seeks to avoid the problems associated in private employment with the *Allis-Chalmers*²¹⁵ and *Wisconsin Motor Corp.*²¹⁶ types of situations.

In *Allis-Chalmers*, nominal union membership was required only to the extent that an employee pay his monthly dues.²¹⁷ The Supreme Court held that union disciplinary action through a fine (levied against the employees for crossing a picket line) did not violate the national labor policy as long as it did not affect the employees' employment rights. In *Wisconsin Motor Corp.* a union security clause required as a condition of employment that the employee either become and remain a member of the union after thirty days or decline membership and pay an agency service fee.²¹⁸ The Supreme Court in *Wisconsin Motor Corp.* relied on its *Allis-Chalmers* opinion to find no violation of the national labor policy when the union imposed fines on employees who elected membership and who violated the union's piecework ceiling rules. As in

²¹⁴ A similar referendum requirement has been incorporated into the agency shop law governing the City of Boston. Ch. 335, [1969] Mass. Acts, in BNA GOV'T EMPLOYEE REL. REP. No. 300: B-1 (June 9, 1969). The Wisconsin State Assembly recently approved a bill authorizing agency shop agreements negotiated in the public sector if ratified by two-thirds of the public employees in the unit. BNA GOV'T EMPLOYEE REL. REP. No. 335: B-11 (Feb. 9, 1970).

²¹⁵ *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

²¹⁶ *Scofield v. NLRB [Wisconsin Motor Corp.]*, 394 U.S. 423 (1969).

²¹⁷ 388 U.S. at 196.

²¹⁸ 394 U.S. at 424 n.1.

Allis-Chalmers, the Court allowed enforcement of internal union rules against a voluntary union member so long as the employer was not induced "to use the emoluments of the job to enforce the union's rules."²¹⁹ But the Court suggested that the result would be different if the employees had opted for nonmembership;²²⁰ in that case the only power the union could exercise over the nonmember would be to cause his discharge for failure to pay the service fee.

The *Wisconsin Motor Corp.* case presented the problem that the Supreme Court in *Allis-Chalmers* reserved for future decision, *i.e.*, whether the national labor policy is violated if unions "imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues"²²¹ The cases illustrate, then, the fine line in the extent of union control over employees (beyond causing the discharge for failure to fulfill a lawful union security requirement) which is tenuously based on the implications of nominal union membership. The prohibition of section 2(5)(b) protects an objecting public employee from the pressures of internal union policy that an employee in the private sector, under the rulings in *Allis-Chalmers* and *Wisconsin Motor Corp.*, may be subjected to because of a mere oath to the union. Of course, nothing in section 2(5)(b) prevents an employee from voluntarily joining any union.

8. *Section 2(5)(c)—Membership Discrimination and the Invalidity of an Agency Shop*

Finally, section 2(5)(c) simply assures that no public employee union will receive financial support from public employees to whom it denies membership generally available to others. In this respect the model statute draws on similar language in the second proviso of section 8(a)(3) of the Taft-Hartley Act.²²²

CONCLUSION

At a time when public employees increasingly are being granted the right to negotiate collectively over their wages, hours, and conditions of employment, it seems both logical and desirable to expand this right to include a right to union security. The agency shop is the most acceptable form of union security compatible with the scheme of labor relations in the public sector.

²¹⁹ *Id.* at 428-29.

²²⁰ *Id.* at 435.

²²¹ 388 U.S. at 197.

²²² 29 U.S.C. § 158(a)(3) (1964).

Like collective bargaining in general, however, the agency shop has not received universal acceptance in the public sector. Union security often falls within the purview of local right-to-work legislation and decisions or can be classed as requiring an unlawful delegation of governmental authority.

An agency shop provision may be most safely promulgated within the context of collective bargaining legislation for public employment. Most such legislation, however, does not authorize bargaining over union security in any form. If an analogy is made to the legislative history of the federal statute for the private sector, the conspicuous absence of any union security proviso in state legislation for public employment could be determinative of the invalidity of such a provision. On the other hand, the agency shop may be acceptable if the state statutes carry no legislative history reflecting a policy precluding union security. The agency shop does not directly encourage union membership but, in fact, prevents discouragement of membership in a union that bargains on behalf of both member and nonmember employees. Under this interpretation of the statutes, a policy in favor of union security is recognized, and only those forms requiring formal membership as a condition of employment are prohibited.

The possibility of conflict between the agency shop and the civil service concept of merit employment must be resolved before the parties can enjoy the benefits of union security. Where the legislature requires the predominance of either the civil service rules or a collective bargaining scheme, the problem of accommodation is, of course, foreclosed. But where the statutory language is ambiguous, there is reason to believe that an agency shop arrangement can exist side by side with the civil service operation.

On its face, the strict agency shop rule of discharge for failure to pay a fee to the union does not run counter to the purpose of the various civil service statutes regulating discharge in the public sector; *i.e.*, to prevent the arbitrary and politically motivated dismissal of employees. Procedural safeguards in the civil service sense are essential, however, to afford the objecting employee opportunity to contest the validity of the agency shop and its application to him.

Limitations on the operation of an agency shop arrangement are necessary to protect the public employee from onerous obligations. Thus, a model agency shop statute from which an agency shop agreement can be derived is suggested. In drawing the line short of actual union membership, the proposed scheme balances the individual employee's free agency against the requisite stability for the majority

representative of public employees. And to the extent that the introduction of such stability in public labor relations through the inclusion of the agency shop promotes a commensurate diminution in the influence and operations of a civil service system for public employment, the agency shop issue is only one aspect of the struggle to replace the "paternalistic" concept of civil service employment with active involvement through collective bargaining.

Jay W. Waks