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THE PRIVILEGE OF EXCLUSIVE RECOGNITION AND MINORITY UNION RIGHTS IN PUBLIC EMPLOYMENT

Recognition of a union as the exclusive representative¹ of all employees in a governmental unit is provided by a majority of state statutes authorizing collective bargaining in public employment,² as well as by

¹ Exclusive recognition means that a union designated or selected as the collective bargaining representative by a majority of the employees in a particular bargaining unit shall be the exclusive representative of all the employees in such unit, without regard to their membership or nonmembership in that union. See MASS. ANN. LAWS ch. 149, § 178F(2) (Supp. 1969). Compare Labor-Management Relations Act (Taft-Hartley Act) § 9(a), 29 U.S.C. § 159(a) (1964), with *Vaca v. Sipes*, 386 U.S. 171 (1967).

² 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. CONN. GEN. STAT. ANN. § 7-468 (b) (Supp. 1969) (municipal employees); *id.* §§ 10-153b(a), (c) (teachers); DEL. CODE ANN. tit. 19, § 1306 (Supp. 1968) (public employees); *id.* tit. 16, § 4004 (BNA GOV'T EMPLOYEE REL. REP. No. 322, F-1 (Nov. 10, 1969)) (teachers); Ch. 791, § 4, [1969] Fla. LAWS (1 CCH LAB. L. REP.—STATE LAWS, Fla. ¶ 47,204 (Nov. 21, 1969)) (firefighters); ME. REV. STAT. ANN. tit. 26, § 967(2) (Supp. 1970) (municipal employees); MD. ANN. CODE art. 77, §§ 160(d), (e)(5) (1957) (teachers); BALTIMORE, MD., CITY CODE art. 1, §§ 115, 117(c) (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-4 to -5 (Oct. 14, 1968)) (municipal employees); MASS. ANN. LAWS ch. 149, § 178F(2) (Supp. 1969) (state employees); *id.* §§ 178H(1), (3) (municipal employees); MICH. STAT. ANN. § 17.455(11) (1968) (public employees); MO. ANN. STAT. § 105.500(2) (Supp. 1969) (public employees); MONT. REV. CODES ANN. §§ 41-2205 to -2206(2) (Supp. 1969) (nurses); Ch. 650, § 11(2), [1969] Nev. Stat. 1378 (municipal employees); N.H. REV. STAT. ANN. § 98-C:3(I) (Supp. 1969) (state employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); NEW YORK CITY, ADMINISTRATIVE CODE ch. 54, § 1173-3.0(I) (2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,450.08 (March 15, 1968)) (municipal employees); Ch. 579, § 5(1), [1969] Ore. LAWS (4A BNA LAB. REL. REP. 47:234b (Oct. 27, 1969)) (public employees); Ch. 647, [1969] Ore. LAWS (4A BNA LAB. REL. REP. 47:244 (Aug. 18, 1969)) (teachers); ORE. REV. STAT. §§ 342.460(1), (5) (1969); R.I. GEN. LAWS ANN. § 28-9.1-5 (1968) (firefighters); *id.* § 28-9.2-5 (policemen); *id.* §§ 28-9.3-3 to -5 (teachers); *id.* § 28-9.4-4 (municipal employees); *id.* §§ 28-7-14, 36-11-6 (1969) (state employees); VT. STAT. ANN. tit. 16, § 1991(a) (Supp. 1969) (teachers); *id.* tit. 3, § 941(h) (state employees); *id.* tit. 21, §§ 1583, 1703 (municipal employees); WASH. REV. CODE ANN. §§ 28.72.030, 28.72.040 (Supp. 1969) (teachers); *id.* § 41.56.080 (public employees); WIS. STAT. ANN. § 111.83(1) (Supp. 1969) (state employees); WYO. STAT. ANN. § 27-267 (1967) (firefighters). Several of these provisions for exclusive recognition have survived recent constitutional challenges. See, e.g., *Mayor & City Council of Cumberland v. Municipal Employees Local 812* (Md. Cir. Ct. 1969), in BNA GOV'T EMPLOYEE REL. REP. No. 285, B-4 (Feb. 24, 1969); *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969); *Lullo v. International Ass'n of Fire Fighters*, 55 N.J. 409, 262 A.2d 681 (1970). A bill presently under consideration by the Hawaii legislature would require exclusive recognition for the majority representative of state and county employees. BNA GOV'T EMPLOYEE REL. REP. No. 347, B-10 (May 4, 1970).

Absent legislation enabling a public employer to bargain collectively with an organization representing his employees, a public employer may engage in such bargaining but may not confer exclusive recognition on the employee organization. E.g., *State Bd.*

Executive Order No. 11491 covering federal employees.³ Other public employment statutes merely require a majority union to represent the employment interests of employees in the bargaining unit;⁴ on occasion, however, courts⁵ and administrative agencies⁶ have interpreted these provisions to authorize exclusive recognition. Only two states have statutes specifically prohibiting exclusive recognition;⁷ the remaining state laws do not define representational status⁸ although state courts have attempted to define the scope of permissible recognition.⁹

The right of exclusive recognition is expressly granted in the private sector by federal and state legislation.¹⁰ The advantages and

of *Regents v. United Packing House Local 1258*, 175 N.W.2d 110 (Iowa 1970). *But see Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

³ Exec. Order No. 11491, § 10(a), 34 Fed. Reg. 17609 (1969). Over one-half of the federal work force is represented by unions having exclusive recognition. BNA GOV'T EMPLOYEE REL. REP. No. 314, E-1 to -4 (Sept. 15, 1969).

⁴ LOS ANGELES COUNTY, CAL., EMPLOYEE RELATIONS ORDINANCE § 9 (BNA GOV'T EMPLOYEE REL. REP. No. 261, F-5 (Sept. 9, 1968)) (county employees); MINN. STAT. ANN. § 179.52(3) (1966) (public employees); NEB. REV. STAT. § 79-1290 (Supp. 1967) (teachers); N.Y. CIV. SERV. LAW §§ 204, 206-08 (McKinney Supp. 1969) (public employees); N.D. CENT. CODE § 15-38.1-11 (Supp. 1969) (teachers); PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1969) (firefighters & policemen); Ch. 88, § 7.3, [1969] S.D. Laws 156 (public employees); WIS. STAT. ANN. § 111.70(4) (Supp. 1969) (municipal employees).

⁵ *E.g.*, *Board of School Dir. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

⁶ *E.g.*, N.Y. Public Employment Rels. Bd., Rules and Regulations, § 201.11(h) (2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,427.11 (Oct. 17, 1969)) (adopted pursuant to N.Y. CIV. SERV. LAW § 206.1 (McKinney Supp. 1969)).

⁷ CAL. EDUC. CODE §§ 13080-88 (West 1969) (teachers); MINN. STAT. ANN. § 125.22(3) (Supp. 1970) (teachers).

⁸ ALA. CODE tit. 55, § 317(3) (Supp. 1969) (teachers & municipal employees); *id.* tit. 37, § 450(3) (firefighters); ALASKA STAT. §§ 23.40.010 to .040 (Supp. 1969) (public employees); CAL. LABOR CODE §§ 1960-63 (West Supp. 1970) (firefighters); FLA. STAT. ANN. § 839.221 (1965) (public employees); HAWAII REV. LAWS §§ 76-101 to -102 (1968) (public employees); ME. REV. STAT. ANN. tit. 5, §§ 751-53 (Supp. 1970) (state employees); NEB. REV. STAT. §§ 48-801 to -818 (1968), *as amended in* BNA GOV'T EMPLOYEE REL. REP. No. 295, F-1 to -3 (May 5, 1969) (public employees); N.H. REV. STAT. ANN. § 31:3 (Supp. 1967) (town employees); N.D. CENT. CODE §§ 34-11-01 to -05 (1960) (public employees); PA. STAT. ANN. tit. 43, §§ 215.1 to .5 (1964) (public employees).

One statute implies that only unanimous union membership of unit employees is the basis for exclusive representation. CAL. GOV'T CODE §§ 3502, 3503 (West 1966 & Supp. 1970) (public employees, including firefighters pursuant to *id.* § 3501(d) (West Supp. 1970)).

⁹ *See, e.g.*, *Tremblay v. Berlin Police Union*, 108 N.H. 416, 237 A.2d 668 (1968) (validating city ordinance enacted pursuant to N.H. REV. STAT. ANN. § 31:3 (Supp. 1967) under which city contracted with exclusively recognized union). *Contra*, *Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So. 2d 903 (Fla. 1969) (holding that the majority union, a teachers' association, may not act as exclusive representative and sole collective bargaining agent for all teachers in a school system where not *all* teachers have so agreed).

¹⁰ *E.g.*, 29 U.S.C. § 159(a) (1964); N.Y. LABOR LAW § 705 (McKinney 1965); WIS. STAT. ANN. § 111.05(1) (1957).

practical considerations that have marked the success of exclusive recognition in providing effective employee representation in private employment support extension of the policy to the public sector.¹¹ To the extent that exclusive recognition is adopted in public employment, however, there is a commensurate diminution in the freedom of individual employees and of organizations representing a minority of employees in a governmental unit.¹² Because, upon adoption of an exclusive recognition policy, the state will be acting not only in its traditional regulatory role, but also as an employer, a zone of protection for the organizational and representational rights of the members of a minority organization should be cautiously formulated.¹³ The alternative could be the unnecessary, unjust, and perhaps unconstitutional subversion of individual employee and minority union rights in public employment.

In assessing the principle of exclusivity in public employment, it

¹¹ Exclusive recognition status may benefit the public employer and the unit employees by promoting greater stability in the employment relationship, greater union responsibility, and more orderly representation of public employees. See Oberer, *The Future of Collective Bargaining in Public Employment*, 20 LAB. L.J. 777, 781 (1969); Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 901-02 (1969); BNA GOV'T EMPLOYEE REL. REP. No. 323, A-6 (Nov. 17, 1969) (statement of Secretary of Labor Shultz). It is apparent that exclusivity in bargaining for all employees in a given unit is necessary in order that the bargaining process be viable. One group can most successfully perform the bargaining function for the unit employees; a multiplicity of bargaining agents could result, in effect, in negotiating anarchy. The merits of a system of exclusive recognition for public employment are reviewed in: Note, *Labor Relations in the Public Service*, 75 HARV. L. REV. 391, 400-01 (1961); Note, *Municipal Employment Relations in Wisconsin: The Extension of Private Labor Relations Devices into Municipal Employment*, 1965 WIS. L. REV. 671, 672-73. Problems that could result from recognition of competing organizations for the purposes of collective bargaining would be extremely acute in public employment where the public employer needs reasonable assurances that agreement on economic matters may be reached before the budgetary deadline prescribed by law. See R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 73 (1967).

The provision for exclusive recognition is seldom debated and remains largely unlitigated; deference has been shown to the legitimacy of this concept in litigation concerning the corollary duty to represent all employees, whether or not they are members of the union acting as exclusive representative. See *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Donnelly v. United Fruit Co.*, 40 N.J. 61, 75-76, 190 A.2d 825, 832-33 (1963).

¹² Apart from the general diminution in the power of a minority union to function as labor relations representative of some employees, diminution of minority union power may severely affect the ability of black workers to protect a racial minority from alleged discriminatory practices on the part of a majority representative. See BNA GOV'T EMPLOYEE REL. REP. No. 314, B-17 (Sept. 15, 1969) (reporting the frustrating attempt of a minority union of black firemen to gain recognition in the District of Columbia where the majority union has 1,490 members, only a fraction of whom are black).

¹³ See Eisner, *First Amendment Right of Association for Public Employee Union Members*, 20 LAB. L.J. 438, 442 (1969).

is necessary to delineate those privileges granted the majority union that may be denied the minority organization, and, conversely, those in which the minority must share. On the one hand are those privileges directly related to the exclusive collective bargaining function of the majority union; on the other are those merely related to the continuing campaign of the exclusive representative to maintain its majority status and to defeat challenges in subsequent decertification proceedings.

I

CONSTITUTIONAL CONSIDERATIONS

Of critical importance in preserving the rights of minority union members, as well as those of the individual public employee, is the adoption of constitutional means to achieve and foster exclusive recognition. The rights of a minority union should initially be measured against the first amendment rights to speak freely, to assemble peaceably, to petition,¹⁴ and to associate,¹⁵ guaranteed against infringement¹⁶ by either the federal or state governments.¹⁷ For example, the exclusive status of the recognized union for the purposes of bargaining and executing an agreement with the public employer cannot constitutionally prevent an individual employee, or an association of employees comprising a minority union, from petitioning the public employer about grievances¹⁸ arising from the employment relationship.¹⁹ The freedom of individual employees or employees organized into a minority union to speak out on subjects concerning the employment relationship is

¹⁴ U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

¹⁵ *United States v. Robel*, 389 U.S. 258, 263 n.7 (1967); *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287, 288-89 (7th Cir. 1968).

¹⁶ See *United States v. Robel*, 389 U.S. 258, 268 n.20 (1967) (rejecting the principle of "balancing" first amendment rights and taking the position that legislation should be drawn narrowly enough to avoid conflicts between legislative power and individual rights).

¹⁷ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Thomas v. Collins*, 323 U.S. 516 (1945).

¹⁸ See U.S. CONST. amend. I and the state constitutional counterparts; e.g., CONN. CONST. art. 1, § 14; MASS. CONST. pt. 1, art. 19; MICH. CONST. art. 1, § 3; N.Y. CONST. art. 1, § 9; WIS. CONST. art. 1, § 4.

¹⁹ See *Thomas v. Collins*, 323 U.S. 516 (1945), which held that the "grievances for redress of which the right of petition was insured" are not confined to religious or political causes, but include other fields of human interests including business or economic activity. *Id.* at 531.

also constitutionally protected.²⁰ Exclusive recognition, as this concept is applied by a majority of public employment laws,²¹ does not, per se, inhibit public employees in the exercise of their right to form, join,²² assist,²³ or participate in²⁴ any labor organization whether or not it constitutes a minority or majority organization.²⁵ Therefore, so long as

Besides providing a constitutional protection for the right to petition (N.J. CONST. art. 1, ¶ 18) similar to that found in the United States Constitution, the New Jersey constitution embodies a more specific guarantee for public employees: "Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." *Id.* ¶ 19. See *Lullo v. International Ass'n of Fire Fighters*, 55 N.J. 409, 262 A.2d 681 (1970) (holding that exclusive recognition is not inconsistent with N.J. CONST. art. 1, ¶ 19).

²⁰ See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

²¹ See notes 1-9 and accompanying text *supra*.

²² The right to form and join a labor organization is guaranteed in: CONN. GEN. STAT. ANN. § 10-153a (1967) (teachers); DEL. CODE ANN. tit. 19, § 1302 (Supp. 1968) (public employees); *id.* tit. 14, § 4003(a) (BNA GOV'T EMPLOYEE REL. REP. No. 322, F-1 (Nov. 10, 1969)) (teachers); Ch. 791, § 2, [1969] Fla. LAWS (1 CCH LAB. L. REP.—STATE LAWS, Fla. ¶ 47,200 (Nov. 11, 1969)) (firefighters); MINN. STAT. ANN. § 179.52(2) (1966) (public employees); MO. STAT. ANN. § 105.510 (Supp. 1969) (public employees); Ch. 650, § 9(1), [1969] NEV. STAT. 1376 (municipal employees); R.I. GEN. LAWS ANN. §§ 28-9.3-1, 28-9.3-6 (1968) (applying the guarantees of *id.* §§ 28-7-12 to -13) (teachers); *id.* § 28-9.4-1 (municipal employees); Ch. 88, § 7.2, [1969] S.D. LAWS 154 (public employees); WIS. STAT. ANN. § 111.70(2) (Supp. 1969) (municipal employees).

²³ The right to form, join, and assist a labor organization is guaranteed in: EXEC. ORDER No. 11491, § 3(a), 34 Fed. Reg. 17605 (1969); CONN. GEN. STAT. ANN. § 7-468(a) (Supp. 1969) (municipal employees); BALTIMORE, MD., CITY CODE art. 1, § 113 (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-4 (Oct. 14, 1968)) (municipal employees); MASS. ANN. LAWS ch. 149, § 178D (Supp. 1969) (public employees); *id.* § 178F(2) (state employees); *id.* § 178H(1) (municipal employees); MICH. STAT. ANN. § 17.455(9) (1968) (public employees); N.H. REV. STAT. ANN. § 98-C:2 (Supp. 1969) (state employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); R.I. GEN. LAWS ANN. § 28-7-12 (1968) (private employees, applicable to state employees, firefighters, and policemen pursuant to *id.* § 36-11-6 (Supp. 1967)); VT. STAT. ANN. tit. 16, § 1982(a) (Supp. 1969) (teachers); *id.* tit. 3, § 903(a) (state employees); *id.* tit. 21, § 1703 (applying *id.* tit. 21, § 1503 to municipal employees); WIS. STAT. ANN. § 111.82 (Supp. 1969) (state employees).

²⁴ The right to form, join, and participate in a labor organization is guaranteed in: ME. REV. STAT. ANN. tit. 26, § 963 (Supp. 1970) (municipal employees); MD. ANN. CODE art. 77, § 160(b) (1969) (teachers); BALTIMORE, MD., CITY CODE art. 1, § 113 (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-4 (Oct. 14, 1968)) (municipal employees); NEB. REV. STAT. § 79-1288 (Supp. 1967) (public school employees); N.Y. CIV. SERV. LAW § 202 (McKinney Supp. 1969) (public employees); N.D. CENT. CODE § 15-38.1-07(1) (Supp. 1969) (teachers & administrators); ORE. REV. STAT. § 243.730(1) (1963), *as amended*, ch. 579, [1969] Ore. LAWS (4A BNA LAB. REL. REP. 47:234a (Oct. 27, 1969)) (public employees); VT. STAT. ANN. tit. 16, § 1982(a) (Supp. 1969) (teachers).

²⁵ Public employee bargaining laws authorizing exclusive recognition may also protect the right of the public employee to refrain from forming, joining, assisting, or participating in any labor organization: LOS ANGELES COUNTY, CAL., EMPLOYEE RELATIONS ORDINANCE § 4 (BNA GOV'T EMPLOYEE REL. REP. No. 261, F-1 (Sept. 9, 1968)) (county employees); CONN. GEN. STAT. ANN. § 10-153a (1967) (teachers); MD. ANN. CODE art. 77,

no agreement between the government employer and exclusive representative restricts an individual public employee in the exercise of these rights, the constitutional guarantees will not be infringed.

The rights of the individual public employee or his minority union should also be measured against the due process and equal protection requirements of the fourteenth amendment of the Constitution.²⁶ Since exclusivity in bargaining for an entire unit of public employees is essential if the bargaining process is to remain viable,²⁷ the requirements of due process are satisfied: the privilege of exclusivity is reasonably related to the attainment of a permissible objective—stable labor relations in public employment.²⁸ Similarly, there is a reasonable equal protection basis for classifying the majority union as the exclusive representative.²⁹

But what of the conduct of the parties to the exclusive relationship? Even if an individual employee refuses to join the exclusively recognized union, he is constitutionally entitled to representation by that union without discrimination and without regard to his nonmembership.³⁰ Exclusive recognition and a collective bargaining contract made pursuant thereto inevitably involve constraints on the individual employee and on the influence and power of a minority organization,³¹ but these constraints must be reasonably related to the policies supporting the grant of exclusive status. Although it is difficult to mark

§ 160(c) (1969) (public school employees); BALTIMORE, MD., CITY CODE art. 1, § 113 (BNA GOV'T EMPLOYEE REL. REP. NO. 226, E-4 (Oct. 14, 1968)) (municipal employees); MASS. ANN. LAWS ch. 149, § 178D (Supp. 1969) (state employees); MINN. STAT. ANN. § 179.52(2) (1966) (public employees); NEB. REV. STAT. § 79-1288 (Supp. 1967) (public school employees); Ch. 650, § 9(1), [1969] Nev. Stat. 1377 (municipal employees); N.H. REV. STAT. ANN. § 98-C:2 (Supp. 1969) (state employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); N.Y. CIV. SERV. LAW § 202 (McKinney Supp. 1969) (public employees); N.D. CENT. CODE § 15-38.1-07(2) (Supp. 1969) (teachers & administrators); R.I. GEN. LAWS ANN. § 28-9.3-7 (1968) (teachers); *id.* § 28-9.4-8 (municipal employees); *id.* § 36-11-2 (1969) (state employees); Ch. 88, § 7.2, [1969] S.D. Laws 156 (public employees); VT. STAT. ANN. tit. 16, § 1982(a) (Supp. 1969) (teachers); *id.* tit. 3, § 903(a) (state employees); *id.* tit. 21, § 1703 (applying *id.* tit. 21, § 1503 to municipal employees); WIS. STAT. ANN. § 111.70(2) (Supp. 1969) (municipal employees); *id.* § 111.82 (state employees). *Accord*, Exec. Order No. 11491, § 1(a), 34 Fed. Reg. 17605 (1969).

²⁶ "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

²⁷ See note 11 *supra*.

²⁸ See *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 233-35 (1956); *cf.* *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515, 558-59 (1937).

²⁹ *Cf.* *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966); *Morey v. Doud*, 354 U.S. 457, 465 (1957).

³⁰ See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944).

³¹ *Cf. id.* at 203.

precisely the constitutional limits on differences in the treatment of the exclusive and minority representatives by the public employer (acting either unilaterally or bilaterally with the recognized union),³² two examples of fourteenth amendment limitations on the rights of the exclusive representative are appropriate.³³

Pursuant to an agreement with a public employer, an exclusive representative might be granted the sole right to use the employer's bulletin boards, internal mail system, and auditoriums for meetings.³⁴ When measured against the requirement that benefits granted the exclusive representative must be reasonably based in the policy of fostering stable labor relations in public employment, discrimination by a government in permitting the use of these facilities may be circumscribed by the equal protection guarantee of the fourteenth amendment.³⁵ A check-off provision negotiated by the exclusive representative may be a valid way to promote the financial security and stability of the exclusive representative.³⁶ But it may be argued that the collective bargaining process is not strengthened by denying the minority union a corresponding privilege of check-off; the exclusive check-off merely

³² For a more detailed analysis of the correlative rights of minority and exclusive representatives, see text at notes 38-145 *infra*.

³³ The same protections guaranteed a minority union under the fourteenth amendment where an exclusive representative has been recognized pursuant to state law are guaranteed a minority union subject to the provisions of Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969), by the due process clause of the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

³⁴ See BNA GOV'T EMPLOYEE REL. REP. No. 294, B-9 (April 28, 1969) (reporting the initiation of a suit by the Denver Federation of Teachers challenging the constitutionality of the sole right to the use of school premises and facilities granted the exclusive representative, the Denver Classroom Teachers Association).

³⁵ See *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Brown v. Louisiana*, 383 U.S. 131 (1966). In *Yeager*, the Supreme Court held that the state may not be required to provide avenues of appellate review; but that, if they are provided, access must be granted to all persons equally. 384 U.S. at 310-11. In *Brown*, the Court stated in regard to the use of a public library: "A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all." 383 U.S. at 143. Referring to *Brown*, the New York Court of Appeals has declared that under the fourteenth amendment:

The State is not under a duty to make school buildings available for public gatherings . . . [But] defendant has concededly allowed a number of organizations, including the very plaintiff before us, to use the school auditorium for nonacademic purposes for many years. It follows, therefore, that, in deciding who is to be permitted to use its school, the board must not unconstitutionally discriminate against the plaintiff.

East Meadow v. Board of Educ., 18 N.Y.2d 129, 133-34, 219 N.E.2d 172, 174, 272 N.Y.S.2d 341, 344-45 (1966).

³⁶ *Bauch v. City of New York*, 21 N.Y.2d 599, 606-07, 237 N.E.2d 211, 213-14, 289 N.Y.S.2d 951, 954-56, *cert. denied*, 393 U.S. 834 (1968).

hinders the operations of the minority union without protecting the majority union in its role as exclusive representative. Because an exclusive check-off granted by a public employer bears no reasonable relation to improving the capacity of the exclusive representative to fulfill its collective bargaining role, it could be prohibited by the fourteenth amendment.³⁷

Thus, a program of exclusive recognition of the majority union does not, per se, deprive individual employees or minority union members of their constitutional rights. But to ignore the differences between the exclusive bargaining role of the recognized union and the role of that union as a rival to a minority competitor may subject the minority union and the individual employee to unequal treatment prohibited by the fourteenth amendment. What needs to be considered, then, are the relative rights to be accorded the exclusive and minority unions in a viable labor relations framework for public employment.

II

A POLICY FOR MINORITY UNION RIGHTS IN PUBLIC EMPLOYMENT

Application of a system of exclusive recognition to labor relations in the public sector raises the question of the extent to which a majority union should be granted exclusivity. Specifically, how secure should the exclusive representative be with regard to its representational status, access to the public employer's premises, collective bargaining, and subjects related thereto?

A. *Collective Bargaining*

Under the federal executive order,³⁸ and under most state laws,³⁹ equal treatment of a minority organization in all respects is not required after the majority representative has been exclusively recognized. By definition, a grant of exclusive recognition to one union precludes a minority representative from negotiating a labor agreement on behalf of any employees in the particular government bargaining unit.⁴⁰

³⁷ See Petitioner's Brief for Certiorari at 16-18, 26-28, *Bauch v. City of New York*, 393 U.S. 834 (1968).

³⁸ Exec. Order No. 11491, §§ 7(c), 10(e), 14, 19(d), 20, 21(a), 34 Fed. Reg. 17608-14 (1969).

³⁹ See *Milwaukee Bd. of School Dirs.*, Decision No. 6833-A, at 7 (W.E.R.B. March 24, 1966) (decision of Wisconsin Employment Relations Board), *rev'd in part sub. nom.* *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969); notes 2-9 and accompanying text *supra*.

⁴⁰ See note 1 *supra*.

The public employer is also obligated to refrain from negotiating the terms and conditions of employment with individual employees.⁴¹ Of course, adequate guarantees must be provided the individual public employee, including a requirement that representation for purposes of collective bargaining be on behalf of all employees in the unit, without discrimination and without regard to membership in the majority union.⁴²

Just as the minority union or individual employee is prevented from bargaining with the public employer, the recognition of an exclusive representative raises a collateral obligation on the part of the employer to refrain from acting in violation of the exclusive representative's collective bargaining rights. Thus, upon the insistence of the exclusive representative, a public employer must cease dealing with and implementing contract provisions negotiated by a union that loses a representation election.⁴³ Furthermore, the public employer may take no affirmative action having as its object the diminution of the exclusive representative's majority status or effectiveness.⁴⁴

⁴¹ See, e.g., 1 PERB ¶ 1-536 (April 16, 1968) (opinion of counsel); *id.* ¶ 1-543 (May 6, 1968); *id.* ¶ 1-549 (June 26, 1968). PERB (Public Employment Relations Board) is the agency that administers New York's Taylor Law. N.Y. CIV. SERV. LAW § 205 (McKinney Supp. 1969).

⁴² See Exec. Order No. 11491, § 10(e), 34 Fed. Reg. 17610 (1969); 1 PERB ¶ 1-568 (Jan. 7, 1969) (opinion of counsel); note 1 *supra*.

⁴³ See, e.g., *Melvindale-N. Allen Park School Dist. (Melvindale Fed'n of Teachers)*, 1967 Mich. L.M.B. Ops. 167. In the *Melvindale* case, it was held that a school district could not continue an agreement previously in effect with the now-minority union. Pursuant to that agreement the school district had been contributing money at the request of its employees to an insurance plan that required as a condition of coverage employee membership in the now-minority union, even though under the arrangement the employees could choose an alternate insurer or receipt of a cash equivalent of the insurance contribution. In an opinion affirmed by the Michigan Labor Mediation Board, the trial examiner reasoned that the operation of this arrangement in effect promoted a type of proportional representation system in which each of the competing organizations bargained for and represented its own segment of the unit:

Such an arrangement is inimical to the principal [*sic*] of *exclusive* bargaining agents which is written into the Act [MICH. STAT. ANN. § 17.455(11) (1968)]. Loss of a representation election does not mean the losing organization must disband, but it does mean that the employer must cease dealing with the organization in matters affecting wages, hours and conditions of employment, and must accord to the winning organization the status of bargaining representative of *all* the employees within the unit. Where the exclusive agent opposes including its vanquished opponent's insurance plan in the fringe benefit program, it is entitled to insist that any such tie with the losing organization cease.

Id. at 174 (emphasis in original).

⁴⁴ See *City of Detroit (Detroit City Hosp. Employees)*, 1968 Mich. L.M.B. Ops. 798, 801; *Oswego Chapter, CSEA*, 2 PERB ¶ 2-6076 (March 4, 1969) (fact finding).

The Michigan Labor Mediation Board in the *Detroit* case affirmed the trial examiner's decision that once a rival union was designated the exclusive (majority) representative

The determination of what constitutes collective bargaining for the purpose of reaching an agreement between an employer and the recognized exclusive representative presents unique problems in public employment. For example, state "anti-secrecy" laws may forbid formal action of any kind to be introduced, deliberated upon, or adopted at any closed executive session or closed meeting of any state or local governing body.⁴⁵ An exception may be made, however, for the *closed negotiation* of a proposed agreement between a labor organization and an agent of the government employer.⁴⁶

When a labor agreement bargained for in private is submitted for ratification to the governing body sitting in open session, a problem arises as to the rights of a minority union or individual employee before that body. This issue was raised under the Wisconsin statute governing labor relations in municipal employment⁴⁷ in a case involving the Milwaukee school district.⁴⁸ Pursuant to the results of an election in 1964, the Milwaukee Teachers' Education Association (MTEA) was designated the exclusive collective bargaining representative by the Wisconsin Employment Relations Board (WERB).⁴⁹ After the board of school directors had entered into contract discussions with the MTEA, a teacher, acting as a representative of the minority Milwaukee Teachers' Union (MTU), was denied an opportunity to speak on negotiable matters at the public meeting of a committee of the school board. Because representatives of groups other than the MTU had been permitted to speak on such matters at the meeting,⁵⁰ the union filed a

following an election lost by the incumbent representative, the incumbent union could no longer insist upon arbitrating numerous grievances filed prior to its loss of the representation election. Because the incumbent union's right to speak for a group of employees was dependent on its status as exclusive bargaining agent, its privilege ceased entirely when it was defeated. Since the newly-elected representative supplanted the incumbent union in presenting the grievances pending for arbitration, the case was distinguished from *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). The trial examiner observed that: "To hold otherwise would be to deprive the new union of its immediate right to be the exclusive spokesman for all unit employees on every matter affecting wages or conditions of employment." 1968 Mich. L.M.B. Ops. at 803.

⁴⁵ *E.g.*, WIS. STAT. ANN. § 14.90 (Supp. 1969). Such statutes are also known as "government-in-the-sunshine" laws. See *Times Publishing Co. v. Williams*, 222 So. 2d 470, 472 (Fla. Ct. App. 1969).

⁴⁶ See 54 OP. ATT'Y GEN. WIS., at vi (1965).

⁴⁷ WIS. STAT. ANN. § 111.70 (Supp. 1969).

⁴⁸ *Milwaukee Teachers Union*, Decision No. 6995-A, at 12-13 (W.E.R.B. March 24, 1966), *rev'd in part sub nom.* *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

⁴⁹ WERB was redesignated the Wisconsin Employment Relations Commission (WERC) as of August 1, 1967, and will be cited hereinafter as WERB or WERC where appropriate.

⁵⁰ *Milwaukee Teachers Union*, Decision No. 6995-A, at 3 (W.E.R.B. March 24, 1966), *rev'd in part sub nom.* *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92

complaint against the school directors with WERB.⁵¹ The Board determined that the denial of the right to speak was unlawful⁵² and ordered the school directors to cease and desist from depriving any member or representative of an employee organization of the opportunity to be heard "at any public meeting held for any purpose."⁵³

In support of its decision the Board adopted the position that a public hearing is not a forum for collective bargaining in public employment.⁵⁴ Thus, an appearance by a representative of the minority union at a public hearing was not equated with an attempt at collective bargaining even though the hearing agenda involved negotiable subjects; the concept of collective bargaining in public employment was restricted to the "give and take" relationship between the public employer and the exclusive representative "across the 'bargaining table.'"⁵⁵ WERB's decision on this point was reversed on appeal by a circuit court,⁵⁶ and the Wisconsin Supreme Court affirmed the reversal in *Board of School Directors v. Wisconsin Employment Relations Commission*.⁵⁷ In its opinion, the supreme court concluded that the public employer engages in prohibited collective bargaining whenever it permits a representative of a minority union to speak on negotiable subjects during a private or public negotiation session.⁵⁸ Contrary to the decision of WERB, the court held that the collective bargaining process

(1969). The teacher, acting as the minority union representative, was denied the right to speak pursuant to procedural rules agreed to by the school directors and the MTEA. The board's committee chairman indicated that the teacher could speak on negotiable subjects only as an individual, but not as the representative of the minority union. The teacher declined to speak as an individual.

⁵¹ Milwaukee Teachers Union, Decision No. 6995-A, at 1 (W.E.R.B. March 24, 1966). The complaint alleged a violation of Wis. STAT. ANN. § 111.70(3)(a)(1) (Supp. 1969) which prohibits the employer practice of unlawfully interfering with, restraining, and coercing its employees in the exercise of their § 111.70(2) rights "to affiliate with labor organizations of their own choosing." Decision No. 6995-A, at 7.

⁵² *Id.*

⁵³ *Id.* at 8.

⁵⁴ *Id.* at 17 (memorandum accompanying WERB's findings of fact, conclusions of law, and order).

⁵⁵ *Id.*

⁵⁶ Board of School Dirs. v. WERC, 42 Wis. 2d 637, 643-44, 651, 168 N.W.2d 92, 95, 98-99 (1969).

⁵⁷ *Id.* at 654, 168 N.W.2d at 100. The Wisconsin Supreme Court decision in *Board of School Directors* culminated the litigation begun in *Milwaukee Teachers Union*. All the issues presented in the WERB decision were not presented to the Wisconsin Supreme Court for review. *Id.* at 642 n.3, 168 N.W.2d at 94 n.3.

⁵⁸ *Id.* at 651-54, 168 N.W.2d at 99-100. *But see* Appellant's Brief in Support of Motion for Rehearing at 7-8, Board of School Dirs. v. WERC, 42 Wis. 2d 637, 168 N.W.2d 92 (1969) (WERC argued that it is not unlawful to negotiate with a minority union.)

includes the open hearing required by the anti-secrecy law, at which the governing body acts on the agreement negotiated between its agent and the exclusive representative.⁵⁹

The policy expressed by the court is premised on recognition of the majority union as the sole representative for collective bargaining. According to the court, where public affirmation by a governmental body is needed to finalize a collective bargaining contract, bargaining continues until that affirmation takes place. Therefore, permitting the minority union to express its views on negotiable subjects during what amounts to a negotiating session would defeat the purpose of designating the majority union as exclusive bargaining representative.

An appearance at a mandatory public meeting, however, is hardly the negotiation of wages and conditions of employment. The negotiation of the agreement has taken place in private without the interference of any minority unions, dissenting employees, or other interest groups. Formal negotiations between the public employer and the exclusive representative have terminated, at least temporarily. The anti-secrecy law, requiring the public hearing on the agreement, does not contemplate negotiation or discussion between the public employer and the majority union, a minority union, any other group, or an individual employee. The minority union may well intend to influence the public employer by stating its position regarding wages, hours, and working conditions, but the public employer is under no obligation to reply to or treat with the minority organization. The privilege accorded the minority union would be no stronger than that expressed in the basic right "to assemble, and to petition the Government" guaranteed by the first amendment of the Federal Constitution and article 1, section 4, of the Wisconsin constitution.⁶⁰

The anti-secrecy law operated, in this case, to permit individual employees and interested groups to attempt to influence the public employer by speaking on negotiable subjects during the public hearings. To deny only the minority union the right to appear and speak before a public meeting of the governmental body precludes public comment by an organization with a real and immediate stake in the outcome of the deliberations; it also thwarts the policy, as expressed in the anti-secrecy law, of public access "to the fullest and most complete informa-

⁵⁹ 42 Wis. 2d at 652-54, 168 N.W.2d at 99-100. Compare WIS. STAT. ANN. § 14.90 (Supp. 1969), with 54 OP. ATT'Y GEN. WIS., at vii (1965).

⁶⁰ "The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged." WIS. CONST. art. 1, § 4.

tion regarding the affairs of government"⁶¹ during public meetings "open to all citizens at all times."⁶²

It is no answer to allow an individual public employee the right to speak in his own behalf while denying him, as the Wisconsin Supreme Court did, the right to speak on behalf of the minority union he represents. It is doubtful that public comment from any source will undermine the collective bargaining role of the exclusive representative. Moreover, this anomalous policy might violate statutory prohibitions protecting the public employee's right to form, join, assist, or participate in any union of public employees, or to refrain from such activity.⁶³ Guarantees implicit in the first amendment freedoms of speech and association might also be abridged.⁶⁴ Thus, the persuasiveness of the Wisconsin Supreme Court's analysis is questionable.

B. *Presentation of Grievances*

Although the individual public employee and his minority union may be effectively precluded from negotiating the terms of an agreement covering conditions of employment with the public employer, the constitutional right to seek redress for grievances arising in the course of public employment under a contract negotiated by the exclusive representative is absolute.⁶⁵ However, the guarantees of the first amendment of the Constitution and of parallel state provisions support no more than a right to petition the government employer; the government employer is under no constitutional obligation to redress, negotiate, or adjust the grievance alleged.⁶⁶ Any additional guarantees for the public employee and the minority union are furnished at the discretion of the state legislatures and the Federal Executive.

At present, the federal executive order⁶⁷ and most state statutes granting exclusive recognition to a majority union reserve the right of the individual public employee to present grievances concerning the employment relationship to the public employer on an individual basis,⁶⁸ or to present them through a representative of his own choos-

⁶¹ WIS. STAT. ANN. § 14.90(1) (Supp. 1969).

⁶² *Id.* § 14.90(2).

⁶³ See notes 22-25 *supra*.

⁶⁴ Cf. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

⁶⁵ See notes 18-19 and accompanying text *supra*.

⁶⁶ See notes 18-19, 60 *supra*.

⁶⁷ Exec. Order No. 11491, §§ 7(d), 10(e), 13-14, 34 Fed. Reg. 17608, 17610-12 (1969).

⁶⁸ CONN. GEN. STAT. ANN. § 7-463(d) (Supp. 1969) (municipal employees); DEL. CODE ANN. tit. 19, § 1306 (Supp. 1968) (public employees); *id.* tit. 14, § 4007 (BNA Gov't EMPLOYEE REL. REP. No. 322, F-2 (Nov. 10, 1969)) (teachers); ME. REV. STAT. ANN. tit. 26,

ing;⁶⁹ some also grant the minority union an independent opportunity to raise and present grievances.⁷⁰

These guarantees are not unqualified, however. The statutes often provide that any discussion or adjustment of a grievance of an individual public employee⁷¹ or of a minority union⁷² shall not be incon-

§ 967(2) (Supp. 1970) (municipal employees); MD. ANN. CODE art. 77, § 160(h)(3) (1969) (teachers); BALTIMORE, MD., CITY CODE art. 1, § 115(c) (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-4 (Oct. 14, 1968)) (municipal employees); MICH. STAT. ANN. §§ 17.455(1), (11) (1968) (public employees); NEB. REV. STAT. § 79-1288 (Supp. 1967) (teachers); Ch. 650, § 9(2), [1969] Nev. Stat. 1376 (municipal employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); VT. STAT. ANN. tit. 16, § 1983 (Supp. 1969) (teachers); WASH. REV. CODE ANN. § 28.72.050 (Supp. 1969) (teachers); *id.* § 41.56.080 (public employees).

⁶⁹ LOS ANGELES COUNTY, CAL., EMPLOYEE RELATIONS ORDINANCE, §§ 4, 5, 9 (BNA GOV'T EMPLOYEE REL. REP. No. 261, F-1 to -3 (Sept. 9, 1968)) (county employees); CONN. GEN. STAT. ANN. § 10-153b(c) (Supp. 1969) (teachers) (*But see* New Haven Fed'n of Teachers v. New Haven Bd. of Educ., 27 Conn. Supp. 298, 237 A.2d 373 (Super. Ct. 1967)); MINN. STAT. ANN. § 179.52(1) (1966) (public employees); N.H. REV. STAT. ANN. § 98-C:3(II)(a) (Supp. 1969) (state employees); NEW YORK CITY, ADMINISTRATIVE CODE ch. 54, § 1173-10.0(d) (2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,450 (March 16, 1968)) (municipal employees); Ch. 579, § 5(1), [1969] Ore. Laws (4A BNA LAB. REL. REP. 47:234b (Oct. 27, 1969)) (public employees); R.I. GEN. LAWS ANN. §§ 28-7-12 to -14 (1968) (applicable to teachers pursuant to *id.* § 28-9.3-6, to municipal employees pursuant to *id.* § 28-9.4-7, to policemen, firefighters, and state employees pursuant to *id.* § 36-11-6); Ch. 88, §§ 2, 7(1), [1969] S.D. Laws 154-55 (public employees); VT. STAT. ANN. tit. 3, §§ 926, 941(j)-(k) (Supp. 1969) (state employees); *id.* tit. 21, § 1583 (applicable to municipal employees pursuant to *id.* tit. 21, § 1703); WIS. STAT. ANN. § 111.83(1) (Supp. 1969) (state employees).

Besides the express provisions of the collective bargaining laws, related state statutes often provide methods for public employees to take up their grievances with their superiors on an individual basis. *See* MASS. ANN. LAWS ch. 30, § 53 (1966); E. SHILS & C. WHITTIER, TEACHERS, ADMINISTRATORS, AND COLLECTIVE BARGAINING 156 (1968).

⁷⁰ CONN. GEN. STAT. ANN. § 10-153b(c) (Supp. 1969) (teachers); MINN. STAT. ANN. § 179.52(3) (1966) (public employees); NEB. REV. STAT. § 79-1289 (Supp. 1967) (teachers); Ch. 650, § 12(2), [1969] Nev. Stat. 1378-79 (municipal employees); Ch. 579, § 5(1), [1969] Ore. Laws (4A BNA LAB. REL. REP. 47:234(b) (Oct. 27, 1969)) (public employees); Ch. 88, § 7(3), [1969] S.D. Laws 156 (public employees); VT. STAT. ANN. tit. 16, § 1983 (Supp. 1969) (teachers); *id.* tit. 3, §§ 926, 941(j) (state employees); *id.* tit. 21, § 1583 (applicable to municipal employees pursuant to *id.* tit. 21, § 1703); WIS. STAT. ANN. § 111.83(1) (Supp. 1969) (state employees). *See* West, *The NEA and Collective Negotiations*, in READINGS ON COLLECTIVE NEGOTIATIONS IN PUBLIC EDUCATION 157 (S. Elam, M. Lieberman & M. Moskow eds. 1967). Commentators often regard the opportunity of a minority union to present its views and grievances to the governing body as "testimony rights" necessary to protect the interests of the individual employee and minority union where another union negotiates exclusively. *See* R. DOHERTY & W. OBERER, *supra* note 11, at 77; E. SHILS & C. WHITTIER, *supra* note 69, at 140-41.

⁷¹ CONN. GEN. STAT. ANN. § 7-468(d) (Supp. 1969) (municipal employees); DEL. CODE ANN. tit. 19, § 1306 (Supp. 1968) (public employees); ME. REV. STAT. ANN. tit. 26, § 967(2) (Supp. 1970) (municipal employees); BALTIMORE, MD., CITY CODE art. 1, § 115(c) (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-4 (Oct. 14, 1968)) (municipal employees); MICH. STAT. ANN. §§ 17.455(1), (11) (1968) (public employees); Ch. 650, § 9(2), [1969] Nev. Stat. 1377 (municipal employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); NEW YORK CITY, ADMINISTRATIVE CODE ch. 54, § 1173-10.0(d)(3) (2 CCH LAB. L. REP.—

sistent with the terms of any collective bargaining contract or agreement then in effect.⁷³ Although the individual public employee may exercise such rights without the intervention of the exclusive bargaining representative,⁷⁴ the exclusive representative is granted the opportunity to be present at any such adjustment,⁷⁵ or at least at an initial conference.⁷⁶

The limited nature of these statutory "rights" is further illustrated by the qualifications and interpretations imposed by administrative tribunals and state courts. For example, the "right" of an individual employee or minority union to have a grievance adjusted may arise only where a grievance procedure has been established through negotia-

STATE LAWS, N.Y. ¶ 47,450 (March 16, 1968)) (municipal employees); Ch. 579, § 5(1)(a), [1969] Ore. Laws (4A BNA LAB. REL. REP. 47:234b (Oct. 27, 1969)) (public employees); VT. STAT. ANN. tit. 3, § 941(j) (Supp. 1969) (state employees); *id.* tit. 21, § 1583 (applicable to municipal employees pursuant to *id.* tit. 21, § 1703); WASH. REV. CODE ANN. § 41.56.080 (Supp. 1969) (public employees); WIS. STAT. ANN. § 111.83(1) (Supp. 1969) (state employees). The provisions of the executive order for federal employees have the same effect. Exec. Order No. 11491, §§ 7(d), 13-14, 34 Fed. Reg. 17608, 17611-12 (1969). *See also* Black-Clauson Co. v. IAM, 313 F.2d 179, 185-86 (2d Cir. 1962); Labor-Management Relations Act (Taft-Hartley Act) § 9(a), 29 U.S.C. § 159(a) (1964).

⁷² Ch. 650, § 12(2), [1969] Nev. Stat. 1378-79 (municipal employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); NEW YORK CITY, ADMINISTRATIVE CODE ch. 54, § 1173-10.0(d)(3) (2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,450 (March 16, 1968)) (municipal employees); Ch. 579, § 5(1)(a), [1969] Ore. Laws (4A BNA LAB. REL. REP. 47:234b (Oct. 27, 1969)) (public employees); VT. STAT. ANN. tit. 3, § 941(j) (Supp. 1969) (state employees); *id.* tit. 21, § 1583 (applicable to municipal employees pursuant to *id.* tit. 21, § 1703); WIS. STAT. ANN. § 111.83(1) (Supp. 1969) (state employees).

⁷³ This prohibition may apply only to the grievance procedure agreed to by the exclusively recognized union and the public employer. *See* LOS ANGELES COUNTY, CAL., EMPLOYEE RELATIONS ORDINANCE § 11(b) (BNA GOV'T EMPLOYEE REL. REP. No. 261, F-5 (Sept. 9, 1968)) (county employees).

⁷⁴ *E.g.*, MICH. STAT. ANN. §§ 17.455(1), (11) (1968) (public employees); VT. STAT. ANN. tit. 3, § 941(j) (Supp. 1969) (state employees); *id.* tit. 21, § 1583 (applicable to municipal employees pursuant to *id.* tit. 21, § 1703); WASH. REV. CODE ANN. § 41.56.080 (Supp. 1969) (public employees).

⁷⁵ *E.g.*, DEL. CODE ANN. tit. 19, § 1306 (Supp. 1968) (public employees); BALTIMORE, MD., CITY CODE art. 1, § 115(c) (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-4 (Oct. 14, 1968)) (municipal employees); ME. REV. STAT. ANN. tit. 26, § 967(2) (Supp. 1970) (municipal employees); MICH. STAT. ANN. § 17.455(11) (1968) (public employees); Ch. 579, § 5(1)(b), [1969] Ore. Laws (4A BNA LAB. REL. REP. 47:234b (Oct. 27, 1969)) (public employees); VT. STAT. ANN. tit. 21, § 1583 (Supp. 1969) (applicable to municipal employees pursuant to *id.* tit. 21, § 1703); WIS. STAT. ANN. § 111.83(1) (Supp. 1969) (state employees). For a similar provision applicable in the private sector, see Labor-Management Relations Act (Taft-Hartley Act) § 9(a), 29 U.S.C. § 159(a) (1964).

⁷⁶ *E.g.*, WASH. REV. CODE ANN. § 41.56.080 (Supp. 1969) (public employees). Two statutes merely provide for prompt notice to the exclusive representative of any meeting or adjustment of an individual employee's grievance. CONN. GEN. STAT. ANN. § 7-468(d) (Supp. 1969) (municipal employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees).

tions between the public employer and the exclusive representative.⁷⁷ Moreover, the language of many of the statutes⁷⁸ parallels, to some degree, the comparable provision in the Labor-Management Relations Act (LMRA) for the private sector.⁷⁹ The first proviso to section 9(a) of the LMRA speaks of the "right" of an individual employee or group of employees (1) to present grievances to the employer and (2) to have the grievances adjusted without the interference of an exclusive representative, so long as the adjustment is consistent with the terms of a bargaining agreement then in effect.⁸⁰ The leading judicial interpretation of section 9(a), based upon the relevant statutory history of the

⁷⁷ See UMW Local 1 (University of Wis.-Milwaukee), Decision No. 8383 (W.E.R.C. Feb. 5, 1968), discussed in BNA GOV'T EMPLOYEE REL. REP. No. 231, B-2 to -3 (Feb. 12, 1968) (interpreting WIS. STAT. ANN. § 111.83(1) (Supp. 1969) (state employees)). See also notes 71-76 and accompanying text *supra*. This result would be reached in those jurisdictions recognizing an exclusive bargaining representative for public employees, but not requiring the public employer to bargain collectively with the exclusively recognized union. See Indianapolis Educ. Ass'n v. Lewallen, 72 L.R.R.M. 2071 (7th Cir. 1969), *rev'g* 71 L.R.R.M. 2898 (S.D. Ind. 1969) (holding that absent state law for public employee collective bargaining, school board had no constitutional duty to bargain with majority union recognized as exclusive representative); Joint School District No. 8 v. WERB, 37 Wis. 2d 483, 489, 155 N.W.2d 78, 81 (1967) (no duty to bargain collectively imposed on municipal employer by WIS. STAT. § 111.70 (1967) under which majority union was recognized as exclusive representative for purpose of collective bargaining). Absent a duty to bargain with the exclusive representative regarding employment conditions, no right is vested in the minority union to compel a public employer to adjust or bargain over its grievances. *But see* Appellant's Brief in Support of Motion for Rehearing at 7-9, Board of School Dirs. v. WERC, 42 Wis. 2d 637, 168 N.W.2d 92 (1969) (supporting a minority union right to negotiate); Letter from William H. Wilker, Ass't Att'y Gen. of Wis., to the author, March 12, 1970 (on file, *Cornell Law Review*). It should be noted, however, that the inability to have a grievance adjusted does not, per se, subvert constitutional guarantees; the individual employee or minority union maintains the right, no matter how sterile it may be, to petition its government employer. U.S. CONST. amend. I; see notes 18-19, 60, and accompanying text *supra*.

⁷⁸ See notes 68-75 and accompanying text *supra*.

⁷⁹ Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

Labor-Management Relations Act (Taft-Hartley Act) § 9(a), 29 U.S.C. § 159(a) (1964).

⁸⁰ For examples of public employment statutes with comparable language, see notes 68-72 and accompanying text *supra*.

LMRA,⁸¹ states that the first proviso to section 9(a) does not confer a right on the individual employee to compel compliance with the negotiated grievance procedure; it merely *permits* the employee to take his grievance to the employer without violating the exclusive right of the designated representative to bargain collectively for all the employees.⁸²

Section 5(1) of the Wisconsin statute applicable to municipal employees⁸³ contains language similar to that in section 9(a) of the LMRA. However, the proviso to section 5(1) guarantees the grievance presentation right specifically to "any individual employe or any *minority group* of employes"⁸⁴ whereas the LMRA proviso is addressed to "any individual employee or a *group* of employees."⁸⁵ More important is a guarantee in the section 5(1) proviso not found in section 9(a) of the LMRA: "[t]he employer *shall confer* with them [individual employees or minority groups of employees] in relation thereto [their grievances]."⁸⁶ Based on the language distinguishing the Wisconsin law from the LMRA, WERB has construed section 5(1)'s proviso to limit the exclusivity of the so-called exclusive representative by creating a *duty* of the public employer to confer with an individual employee or a minority group.⁸⁷

Under section 11 of the comparable Michigan statute,⁸⁸ as under

⁸¹ See *Black-Clawson Co. v. IAM*, 313 F.2d 179, 185-86 (2d Cir. 1962). See also *LABOR LAW GROUP TRUST, LABOR RELATIONS AND THE LAW* 941-44 (3d ed. J. Williams 1965).

⁸² *Black-Clawson Co. v. IAM*, 313 F.2d 179 (2d Cir. 1962).

It seems clear, therefore, that rather than conferring an indefeasible right upon the individual employee to compel compliance with the grievance procedure up to and including any arbitration provision, section 9(a) merely set up a buffer between the employee and his union, "permitting" the employee to take his grievances to the employer, and "authorizing" the employer to hear and adjust them without running afoul of the "exclusive bargaining representative" language of the operative portion of section 9(a).

Id. at 185 (footnote omitted).

⁸³ Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any *minority group of employes* in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

WIS. STAT. ANN. § 111.05(1) (1957) (emphasis added) (applicable to municipal employees pursuant to *id.* § 111.70(4)(d) (Supp. 1969)).

⁸⁴ *Id.* § 111.05(1) (1957) (emphasis added).

⁸⁵ 29 U.S.C. § 159(a) (1964) (emphasis added); see note 79 *supra*.

⁸⁶ WIS. STAT. ANN. § 111.05(1) (1957) (emphasis added).

⁸⁷ *Milwaukee Teachers Union*, Decision No. 6995-A, at 18-19 (W.E.R.B. March 24, 1966), *rev'd in part sub nom.* *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969). See *id.* at 23 (concurring opinion of Arvid Anderson, Commissioner).

⁸⁸ Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes,

section 9(a) of the LMRA, no right to process his own grievance inures to an individual public employee. However, the Michigan law eliminates the LMRA reference to "group of employees," thereby permitting a construction that minority unions have no mandatory rights in the grievance area. Moreover, in connection with the individual's presentation of a grievance and the employer's adjustment thereof, the permissive word "may" is incorporated into the Michigan law whereas the LMRA employs the phrase "shall have the right." Referring to the result reached under the LMRA,⁸⁹ the Michigan Labor Mediation Board has construed section 11 to be "no more than a grant of immunity to an employer against being charged with a refusal to bargain . . . in the event the employer voluntarily chooses to listen to and adjust an employee's grievance" ⁹⁰

Application of the experiences under the LMRA as well as under the Wisconsin and Michigan statutes may be necessary to determine the proper scope of public employment legislation reserving a right for the individual public employee or the minority union to present grievances to the public employer for adjustment.⁹¹ Unless the statutory language in the remaining states compels a result similar to that in Wisconsin, it would appear that sound labor relations policy supports an application to the public sector of the restrictive Michigan or LMRA approach.⁹² A denial of the grievance procedure to the minority union representative is necessary to prevent use of that procedure as a vehicle for rival union activity, rather than for the processing of legitimate employee grievances.⁹³

shall be the exclusive representatives of all the public employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer: Provided, That any individual employee at any time *may* present grievances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment.

MICH. STAT. ANN. § 17.455(11) (1968) (emphasis added).

⁸⁹ See notes 81-82 and accompanying text *supra*.

⁹⁰ Avondale School Dist. Bd. of Educ., 1967 Mich. L.M.B. Ops. 680, 687 (trial examiner's opinion). *Accord*, New Haven Fed'n of Teachers v. New Haven Bd. of Educ., 27 Conn. Supp. 298, 313-15, 237 A.2d 373, 380-81 (Super. Ct. 1967) (construing CONN. GEN. STAT. ANN. § 10-153b(c) (1967)).

⁹¹ See notes 68-70 and accompanying text *supra*. The Connecticut statute for teachers has been given a construction that accords with the Michigan approach. Note 90 *supra*.

⁹² To date, the only jurisdictions that have judicially considered the application of a provision for individual presentation of grievances are Michigan, Wisconsin, and Connecticut.

⁹³ See *Black-Clawson Co. v. IAM*, 313 F.2d 179, 186 (2d Cir. 1962); *Hughes Tool Co. v. NLRB*, 147 F.2d 69, 74 (5th Cir. 1945); *Ostrofsky v. United Steelworkers*, 171 F. Supp.

In those cases in which the minority union or individual public employee is permitted to process a grievance beyond the petitioning stage, certain restrictions may still be imposed. Thus, a public employer agreeing to process the grievance of an individual public employee may condition its assent upon the presentation of the employee's complaint by the employee alone or with the assistance of counsel agreed to or provided by the exclusive bargaining representative.⁹⁴ Presentation of the employee's grievance at a formal hearing by representatives of a minority union may be strictly prohibited.⁹⁵ This position has a legal basis in the provision that adjustment of an individual employee's grievance may not be inconsistent with the terms of any contract, agreement, or grievance procedure then in effect between the public employer and the exclusive representative.⁹⁶ If such agreement provides that the negotiated grievance procedure shall be the only procedure, the individual employee would be limited to representation by the exclusive representative or its agent, if he wishes representation at all. At least one state law has been construed in this way,⁹⁷ and a similar result may be reached under Executive Order No. 11491. Section 7 (d)(1) of the executive order provides that recognition of an exclusive representative does not preclude a federal employee in the bargaining unit "from choosing his own representative in a grievance . . . action."⁹⁸ However, section 13, which grants the exclusive representative the right to negotiate a grievance procedure, provides that a negotiated procedure "is . . . exclusive . . . when the agreement so provides."⁹⁹ Thus, section 13 appears to detract from the individual's right under section 7(d) of the executive order; if an agreement promulgating an employee grievance procedure so provides, the federal employee may be denied representation by an agent of the minority

782, 790-91 (D. Md. 1959), *aff'd*, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960). See also *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) (dictum).

⁹⁴ See *New Haven Fed'n of Teachers v. New Haven Bd. of Educ.*, 27 Conn. Supp. 298, 314-15, 237 A.2d 373, 380-81 (Super. Ct. 1967); *Avondale School Dist. Bd. of Educ.*, 1967 Mich. L.M.B. Ops. 680, 684, 688-89 (trial examiner's opinion). *But see Milwaukee Teachers Union*, Decision No. 6995-A, at 7 (¶ 5), 19 (W.E.R.B. March 24, 1966), *rev'd in part sub nom.* *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

⁹⁵ See N.J. STAT. ANN. § 34:13A-5.3(c) (Supp. 1969) (public employees); NEW YORK CITY, ADMINISTRATIVE CODE ch. 54, § 1173-10.0(d) (2 CCH LAB. L. REP.—STATE LAWS, N.Y. ¶ 47,450.15 (March 15, 1968)) (municipal employees). *Contra*, 1 PERB ¶ 1-531 (April 2, 1968) (opinion of counsel).

⁹⁶ See notes 71-73 and accompanying text *supra*.

⁹⁷ See *Avondale School Dist. Bd. of Educ.*, 1967 Mich. L.M.B. Ops. 680.

⁹⁸ 34 Fed. Reg. 17608 (1969).

⁹⁹ *Id.* at 17611.

union. The policy basis supporting this interpretation parallels that favoring a restrictive right to grievance adjustment.¹⁰⁰

Although the public employee may be limited in his choice of grievance representatives, he is protected from arbitrary or discriminatory treatment if he chooses to utilize counsel provided by the exclusive representative.¹⁰¹ Even if there is no remedy under the public employment bargaining law for an employee whose exclusive representative refuses to process his grievance,¹⁰² he may have an independent constitutional,¹⁰³ judicial, or statutory¹⁰⁴ basis for action.

C. Other Contractual Privileges

Collective bargaining between the exclusive representative and the public employer may result in a grant of other contractual privileges to the exclusive representative that do not inure to the benefit of the minority union. These may include union security provisions, dues deduction (check-off) provisions, provisions for compensable absences, and provisions governing access to the employees' work place. The propriety and legality of allotting such privileges on an exclusive basis merit discussion.

1. *The Check-Off and Union Security.* The check-off is one method by which a labor organization can maintain some degree of organizational security.¹⁰⁵ It has already been suggested that an *exclusive* check-off provision in public employment runs afoul of the fourteenth amendment.¹⁰⁶ Yet, the federal executive order¹⁰⁷ and several

¹⁰⁰ See text at note 93 *supra*.

¹⁰¹ See U.S. Civil Service Comm'n Bull. No. 711-8 (Aug. 4, 1965), in LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE 173 (H. Roberts ed. 1968) (construing § 6(b) of Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963 Comp.), a provision left substantially unchanged by its successor, Exec. Order No. 11491, § 10(e), 34 Fed. Reg. 17610 (1969)); notes 30, 42, and accompanying text *supra*.

¹⁰² See Board of Educ. (J. Carl Stanley), 1968 Mich. L.M.B. Ops. 621, 623 (trial examiner's opinion).

¹⁰³ See *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202-03 (1944).

¹⁰⁴ See *Vaca v. Sipes*, 386 U.S. 171 (1967) (describing the rules applicable to the private sector). Cf. *Lullo v. International Ass'n of Fire Fighters*, 55 N.J. 409, 262 A.2d 681 (1970) (citing *Vaca*).

¹⁰⁵ A check-off provision is a form of union security involving a deduction by the employer of union dues from an employee's wages, usually upon the employee's express authorization. The amounts so deducted are paid over to the union. *Bauch v. City of New York*, 21 N.Y.2d 599, 603 n.1, 237 N.E.2d 211, 212 n.1, 289 N.Y.S.2d 951, 952 n.1, *cert. denied*, 393 U.S. 834 (1968); LABOR LAW GROUP TRUST, *supra* note 81, at 635.

¹⁰⁶ See text at note 37 *supra*. See also BNA GOV'T EMPLOYEE REL. REP. No. 319, B-17 (Oct. 20, 1969) (reporting a constitutional challenge of the exclusive check-off provision in Baltimore).

¹⁰⁷ Exec. Order No. 11491, § 21(a), 34 Fed. Reg. 17614 (1969) (enabling only a union

states¹⁰⁸ provide for an exclusive check-off privilege upon written authorization by unit employees.¹⁰⁹ Despite vigorous arguments supporting the unconstitutionality of such provisions in public employment,¹¹⁰ New York courts have upheld exclusive check-off provisions,¹¹¹ and the Supreme Court has refused to review the problem.¹¹²

Although it may be reasonable to sustain the constitutionality of an exclusive dues deduction privilege, one state supreme court has recognized the *statutory* invalidity of a negotiated provision denying a minority union the check-off right granted the exclusive representative.¹¹³ In *Board of School Directors v. Wisconsin Employment Relations Commission*,¹¹⁴ the Wisconsin Supreme Court agreed with a minority union assertion that if the municipal employer grants the check-off privilege, it must be granted equally to minority and exclusive representatives.¹¹⁵

The court was concerned with the impact of an exclusive check-off on the statutorily protected¹¹⁶ rights of municipal employees to freely

exclusively recognized under the executive order to negotiate for the check-off privilege); see BNA GOV'T EMPLOYEE REL. REP. No. 330, A-1 (Jan. 5, 1970).

¹⁰⁸ Public employees: DEL. CODE ANN. tit. 19, § 1311 (Supp. 1968); N.Y. CIV. SERV. LAW § 208(b) (McKinney Supp. 1969), as interpreted in *Bauch v. City of New York*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951, cert. denied, 393 U.S. 834 (1968); WASH. REV. CODE ANN. § 41.56.110 (Supp. 1969).

¹⁰⁹ Other jurisdictions merely permit the public employer to check-off union dues of any labor organization of public employees. LOS ANGELES COUNTY, CAL., EMPLOYEE RELATIONS ORDINANCE, §§ 10(b), 12(a)(2) (BNA GOV'T EMPLOYEE REL. REP. No. 261, F-7 (Sept. 9, 1968)); DEL. CODE ANN. tit. 14, § 4003(c) (BNA GOV'T EMPLOYEE REL. REP. No. 322, F-1 (Nov. 10, 1969)) (teachers); BALTIMORE, MD., CITY CODE art. 1, § 120 (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-6 (Oct. 14, 1968)) (municipal employees); N.H. REV. STAT. ANN. § 98-C:3(IV) (Supp. 1969) (state employees); R.I. GEN. LAWS ANN. § 28-14-3 (1968) (applicable to policemen, firefighters, and state employees pursuant to *id.* § 36-11-6 (1969)); WIS. STAT. ANN. § 111.70 (Supp. 1969) (municipal employees), as construed in *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 649-50, 168 N.W.2d 92, 98 (1969).

¹¹⁰ See Appellants' Brief at 11-24, and Petition for a Writ of Certiorari to the Court of Appeals of the State of New York at 16-20, 23-28, *Bauch v. City of New York*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951 (1968).

¹¹¹ *Bauch v. City of 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). See also *Kugler v. City of New York*, 73 L.R.R.M. 2478 (N.Y. Sup. Ct. Feb. 4, 1970). New York is the only jurisdiction that has considered the constitutionality of an exclusive check-off privilege.

¹¹² *Bauch v. City of New York*, 393 U.S. 834 (1968).

¹¹³ *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

¹¹⁴ Another aspect of this case is discussed at notes 47-64 and accompanying text *supra*.

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

¹¹⁶ WIS. STAT. ANN. § 111.70(3)(a) (Supp. 1969) prohibits a municipal employer from:

1. Interfering with, restraining or coercing any municipal employe in the

join or refrain from joining any labor organization. It therefore adopted a WERB-suggested test to determine whether the restrictive grant had so discriminated in favor of the exclusive representative that minority union membership was in effect discouraged:

*"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."*¹¹⁷

Applying this standard, the court held that granting an exclusive check-off provision was a prohibited practice under the state statute.¹¹⁸ In so doing it implied that an exclusive check-off was unrelated to the majority union's bargaining function and that the "self-perpetuation and entrenchment"¹¹⁹ fostered by such a check-off might act to deter membership in other unions.

The Wisconsin approach may be attractive in jurisdictions with similar statutes protecting both aspects of organizational rights—the right to join and the right to refrain from joining a labor organization.¹²⁰ To the extent that the determination of the validity of an exclusive check-off in public employment depends upon an interpretation of these protected rights, it appears that the threshold problem is the formulation of a relevant public policy.

In the private sector the exclusive check-off privilege is commonplace. But in the public sector, the state is acting both as employer and in its traditional public role as regulator of labor relations policy.¹²¹ Thus, the state should be particularly sensitive to the privileges it grants an exclusive majority representative acting *solely* for the purpose of collective bargaining with the public employer. If, indeed, the

exercise of the rights provided in sub. (2) [to join or to refrain from joining a labor organization].

2. Encouraging or discouraging membership in any labor organization . . . by discrimination in regard to hiring, tenure or other terms or conditions of employment.

¹¹⁷ 42 Wis. 2d at 649, 168 N.W.2d at 97 (emphasis in original), quoting Milwaukee Bd. of School Dirs., Decision No. 6833-A, at 8 (W.E.R.B. March 24, 1966).

¹¹⁸ 42 Wis. 2d at 650, 168 N.W.2d at 98.

¹¹⁹ *Id.* at 649, 168 N.W.2d at 98. *Contra*, *Bauch v. City of New York*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951, *cert. denied*, 393 U.S. 834 (1968).

¹²⁰ See, e.g., CONN. GEN. STAT. ANN. § 10-153a (1967) (teachers); ME. REV. STAT. ANN. tit. 26, §§ 963, 967(2) (Supp. 1970) (municipal employees); MASS. ANN. LAWS ch. 149, § 178D (Supp. 1969) (state employees); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969) (public employees); N.Y. CIV. SERV. LAW §§ 202, 209-a(1), (2) (McKinney Supp. 1969) (public employees).

¹²¹ See *Eisner*, *supra* note 13, at 442.

denial of a check-off privilege contributes little or nothing—except that it makes the collection of minority union dues relatively more difficult¹²²—to the stability of the collective bargaining relationship established between the public employer and the exclusive representative, a rational labor relations policy need not support an exclusive check-off privilege. And if the end sought is the destruction or dissolution of the minority union, it is indeed improper.¹²³

Whether or not the exclusive check-off is considered a modified or minimum form of union security arrangement,¹²⁴ it appears to be unrelated to the policies supporting an extension of the traditional provisions for union security¹²⁵ to the public sector. Adoption of a union security arrangement helps to achieve a degree of financial and organizational security necessary to enhance union responsibility.¹²⁶ The traditional forms of union security prevent the nonunion employee from sharing in the benefits resulting from the activities of the exclusive bargaining representative without also sharing in the obligations. In the private sector, an awareness of the “free rider” problem has been met by requiring that each employee pay his fair share of the costs of bargaining and contract administration.¹²⁷ 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.¹²⁸ But inasmuch as the check-off is

¹²² See Petition for a Writ of Certiorari to the Court of Appeals of the State of New York at 7-8, *Bauch v. City of New York*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951 (1968).

¹²³ See note 120 and accompanying text *supra*. See also Petition for a Writ of Certiorari to the Court of Appeals of the State of New York at 9, 16-17, *Bauch v. City of New York*, 21 N.Y.2d 599, 237 N.E.2d 211, 289 N.Y.S.2d 951 (1968).

Contrary to the above expressed views are those of two presidential review commissions that recognized the value of the exclusive check-off in producing stable labor-management relations in the federal service. See LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE, *supra* note 101, at 25; BNA GOV'T EMPLOYEE REL. REP. No. 230, A-2 (Jan. 20, 1969).

¹²⁴ See *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 649 n.4, 168 N.W.2d 92, 98 n.4 (1969).

¹²⁵ *E.g.*, closed shop, union shop, modified union shop, maintenance of membership, and agency shop. See LABOR LAW GROUP TRUST, *supra* note 81, at 633-35; Hopfl, *The Agency Shop Question*, 49 CORNELL L.Q. 478 (1964).

¹²⁶ See Gromfine, *Union Security Clauses in Public Employment*, in BNA GOV'T EMPLOYEE REL. REP. No. 304, E-1 to -2 (July 7, 1969).

¹²⁷ See *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963); *IAM v. Street*, 367 U.S. 740 (1961).

¹²⁸ A union security agreement, unlike a denial of check-off equality to the minority organization, stabilizes the collective bargaining relationship by providing security from attack by rivals and enables the exclusive representative to devote more attention to collective bargaining and the administration of collective agreements.

The militancy displayed by public employee unions often results from defending

merely a convenience guaranteeing the orderly collection of dues by the respective union, such policies are not advanced by an exclusive check-off arrangement.

If some form of union security arrangement is negotiated by the exclusive representative of public employees, it is not objectionable so long as: (1) it is legally permissible,¹²⁹ and (2) it has as its primary purpose the enhancement of peaceful and productive labor relations in the public sector rather than mere discrimination against employees because of minority union membership.¹³⁰ An *exclusive* check-off arrangement does not fulfill the latter requirement. If the check-off is granted an exclusive representative, it should be made equally available to a rival minority union.

2. *Access to the Employment Premises and Related Preferences.* Agreements that exceed the bounds of permissible cooperation between the exclusive representative and the employer may arise concerning access to employment premises and facilities granted exclusively to the recognized majority union. It has been suggested that exclusive access to the physical facilities of the work premises for communication purposes may be constitutionally objectionable.¹³¹ The public employer may, however, condition the use of or access to such facilities upon compliance with reasonable regulations.¹³² Constitutional and statutory

themselves against organizational attacks by rival unions. See Oberer, *supra* note 11, at 781. 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 of the union's assertion of economic strength after reaching a substantive impasse at the bargaining table. See Gromfine, *supra* note 126, at E-1.

¹²⁹ 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 (1964). Inasmuch as the union shop permitted by the Taft-Hartley Act conditions continued employment solely on the payment of union dues and fees, the agency shop is the practical equivalent of the union shop. *NLRB v. General Motors Corp.*, 373 U.S. 734, 744 (1963). In balancing the security and financial support necessary to sustain an exclusive bargaining representative with a consideration for the freedom of an individual employee, it appears that the agency shop may be the best union security alternative for public employment. See Oberer, *supra* note 11, at 781-82. For a discussion of the legality and desirability of union security, especially the agency shop, in public employment, see Comment, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547 (1970).

¹³⁰ See *Wallace Corp. v. NLRB*, 323 U.S. 248, 256 (1944).

¹³¹ Note 35 and accompanying text *supra*.

¹³² See, *e.g.*, 2 PERB ¶ 2-5009 (June 3, 1969) (opinion of counsel); VT. STAT. ANN. tit. 16, § 2002 (Supp. 1969) (teachers):

The school board shall permit teachers, administrators, and their respective organizations access at reasonable times to areas in which teachers and administrators work, and to use institutional bulletin boards, mail boxes, or other communication media subject to reasonable regulation by the school board, and to

protections afforded the individual employee or his minority union are satisfied where the use of such facilities has been accorded the exclusively recognized union to enable it to perform its function as the designated collective bargaining representative.¹³³ Whether the exclusive use of such facilities is granted unilaterally by the public employer¹³⁴ or through collective bargaining with the exclusive representative,¹³⁵ this standard must be met.

It would not appear to be unlawful discrimination for the public employer to provide adequate space in its facilities solely for the use of the exclusive representative for executive sessions and caucuses during active negotiations. If an exclusive representative is properly to represent employees in the processing of their grievances, it should have the opportunity to discuss the grievances with the employees involved at convenient times and places. Similarly, sole use of the internal mail system and bulletin boards granted the exclusive representative for such purposes would not unlawfully entrench the majority union or discriminate against a minority organization.¹³⁶

Related to the practice of permitting the exclusive use of facilities for bargaining purposes is the policy of compensating an employee acting as agent of the exclusive representative during working hours. Based upon the foregoing analysis, provision for time off with pay granted exclusively to an officer of the recognized majority union to allow him to negotiate or conduct bargaining unit business would not be improper.¹³⁷ The denial of a comparable privilege to an of-

use school facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by this chapter.

¹³³ See Avondale School Dist. Bd. of Educ. (Avondale Fed'n of Teachers), 1968 Mich. L.M.B. Ops. 518, 525 (trial examiner's opinion); Milwaukee Bd. of School Directors, Decision No. 6833-A, at 2-3 (W.E.R.B. March 24, 1966) (declaratory ruling), *rev'd in part sub nom.* Board of School Dirs. v. WERC, 42 Wis. 2d 637, 168 N.W.2d 92 (1969).

¹³⁴ See U.S. Civil Service System, Federal Personnel Manual, System Letter No. 711-6 (Dec. 14, 1966) (under Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963 Comp.)), in LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE, *supra* note 101, at 154.

¹³⁵ See 2 PERB ¶ 2-5009 (June 3, 1969) (opinion of counsel).

¹³⁶ See Avondale School Dist. Bd. of Educ. (Avondale Fed'n of Teachers), 1968 Mich. L.M.B. Ops. 518, 525 (trial examiner's opinion): "Such conveniences help the exclusive representative to communicate with the people it represents. This is essential to good representation."

¹³⁷ See 1 PERB ¶ 1-514 (Jan. 22, 1967) (opinion of counsel). This is in contrast to a negotiated paid-leave for attendance at the state convention of the exclusive teacher representative; denial of a similar privilege to attend the minority teacher union's convention constitutes discrimination unrelated to the employment relationship and the obligation of the exclusive bargaining representative to serve the interests of all the employees. See Raymond Kovala, Decision No. 8708-B (W.E.R.C. May 14, 1969), *discussed in* BNA GOV'T EMPLOYEE REL. REP. No. 298, B-7 (May 26, 1969). However, there

ficial of a minority union would not *unlawfully* discriminate for the prohibited purpose of discouraging union membership under statutes protecting the right of public employees to form and join labor organizations¹³⁸ or to refrain from such activity.¹³⁹

The analysis concerning provision for the right to process grievances or the use of facilities to perform the bargaining function should also serve as a standard governing the exclusive representative in its performance of other services on behalf of the public employees in the bargaining unit. Thus, permission to conduct a membership meeting on the work premises cannot be considered as falling within the area of the protected privilege of exclusivity if the meeting concerns the internal affairs of the union. If the meeting is called in order to develop bargaining demands and strategy, however, the majority union is entitled to the exclusive use of the premises. The exclusive use of bulletin boards and the internal mail system for purposes unrelated to the majority union's function as the bargaining representative of all the employees in the unit could likewise be considered unlawful discrimination not properly within the privilege of exclusivity.¹⁴⁰

The approach suggested regarding exclusive access to facilities may not apply to a related area—access to information and records concerning the public employer and the public employees. In private employment, where there is an enforceable duty upon the employer to bargain with the majority representative, the employer has a duty to furnish to the representative, upon request, pertinent data with respect to the identity of employees in the appropriate bargaining unit,¹⁴¹ as well as data relating to wages, hours, and conditions of

may be no obligation to grant teachers time off to attend a minority union convention on days other than those established in the school calendar by the public employer and the exclusive representative. See *Kenosha Teachers Union*, Decision No. 8120 (W.E.R.C. Aug. 3, 1967); *Wisconsin Fed'n of Teachers (Joint School Dist. No. 8)*, Decision No. 7910-B (W.E.R.C. Aug. 3, 1967); *Wisconsin Fed'n of Teachers (Milwaukee Bd. of School Dirs.)*, Decision No. 7906-B (W.E.R.C. Aug. 3, 1967).

¹³⁸ See *City of Detroit (Detroit City Hosp. Employees)*, 1968 Mich. L.M.B. Ops. 798, 806 (trial examiner's opinion) (construing MICH. STAT. ANN. §§ 17.455(9), (10)(a), (10)(c) (1968)).

¹³⁹ Compare N.Y. CIV. SERV. LAW §§ 202, 209-a(1), (2) (McKinney Supp. 1969), with 1 PERB ¶ 1-514 (Jan. 22, 1967) (opinion of counsel).

¹⁴⁰ See *Milwaukee Teachers Union (Milwaukee Bd. of School Dirs.)*, Decision No. 9258, at 3-4 (W.E.R.C. Oct. 8, 1969) (this case is the most recent WERC pronouncement on this subject; letter to the author from H. Bellman, WERC Mediator, March 6, 1970) (on file, *Cornell Law Review*); U.S. Civil Service Comm'n, Federal Personnel Manual, System Letter No. 711-6 (Dec. 4, 1966), in *LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE*, *supra* note 101, at 156.

¹⁴¹ Cf. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767-69 (1969).

employment.¹⁴² The majority representative in the private sector has the right to such information in order to carry out its duties as the exclusive bargaining representative.

In public employment, on the other hand, the names, addresses, salaries, and working conditions of public employees are, for the most part, a matter of public record.¹⁴³ Under such conditions, a public employer appears obligated to grant a union representing the interests of a minority of the public employees in an appropriate unit access to public records.¹⁴⁴ However, if certain information is not otherwise available for public inspection, the majority union should have exclusive access to such information or lists of employees when necessary in the performance of its function as designated collective bargaining representative.¹⁴⁵

CONCLUSION

Exclusive recognition for a majority union is compatible with the existence of minority unions in public employment; however, the special public environment within which these opposing organizations act makes it necessary to stress the rights of the union representing a minority of the employees in a public unit. To protect the organizational integrity of the minority union it becomes necessary

¹⁴² See *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *Whitin Mach. Works*, 108 N.L.R.B. 1537, 1538 (1954). Cf. *Cox, The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1427 (1958).

¹⁴³ See, e.g., WIS. STAT. ANN. § 18.01 (1967).

¹⁴⁴ *Board of School Dirs. v. WERC*, 42 Wis. 2d 637, 655 & n.6, 168 N.W.2d 92, 101 & n.5 (1969).

¹⁴⁵ *Id.* at 655-56, 168 N.W.2d at 100-01. *But cf.* LOS ANGELES COUNTY, CAL., EMPLOYEE RELATIONS ORDINANCE § 9 (BNA GOV'T EMPLOYEE REL. REP. No. 261, F-5 (Sept. 9, 1968)) (guaranteeing the right of minority organizations to certain information necessary in challenging the exclusive representative's majority status); U.S. Civil Service Comm'n, Federal Personnel Manual, System Letter No. 711-8 (Aug. 2, 1967), in LABOR-MANAGEMENT RELATIONS IN THE PUBLIC SERVICE, *supra* note 101, at 160.

Related to the issues of access to facilities and information is the problem of solicitation on the employment premises of membership or dues. Those statutes, regulations, and cases dealing with the subject have recognized the equal rights of the exclusive and minority unions in this regard so long as such solicitation is done during the non-duty hours of the employees concerned and in such a way that there is no interference with the work of the public employer. See *Exec. Order No. 11491*, § 20, 34 Fed. Reg. 17614 (1969); *DEL. CODE ANN. tit. 15, § 4009* (BNA GOV'T EMPLOYEE REL. REP. No. 322, F-3 (Nov. 10, 1969)); *BALTIMORE, MD., CITY CODE art. 1, § 123* (BNA GOV'T EMPLOYEE REL. REP. No. 266, E-7 (Oct. 14, 1968)). See also *Bloomfield Hills Bd. of Educ.*, 1968 Mich. L.M.B. Ops. 591, 604-05; *Avondale School Dist. Bd. of Educ.*, 1968 Mich. L.M.B. Ops. 518, 519. *But see* *New Haven Fed'n of Teachers v. New Haven Bd. of Educ.*, 27 Conn. Supp. 298, 237 A.2d 373 (Super. Ct. 1967).

to circumscribe the powers or benefits enjoyed by the exclusively recognized union within the context of its duty to act as representative of all the employees for the purposes of collective bargaining and contract administration. Beyond the right to negotiate and reach final agreement afforded the exclusive representative by the applicable bargaining statute, a minority organization should receive treatment equal to that accorded the exclusive union.

Protection of the rights of minority unions outside the exclusive bargaining relationship may not, however, ensure a viable minority union movement in public employment. Although there is evidence that keen competition may result between the exclusive and minority organizations where there are adequate protections,¹⁴⁶ institutional pressures¹⁴⁷ may force competing public employee organizations to merge their efforts and resources.¹⁴⁸

A trend toward the merger of rival majority and minority unions of public employees appears to be in its early stages but is, as yet, insignificant.¹⁴⁹ The merger movement does represent a recognition on

¹⁴⁶ See BNA GOV'T EMPLOYEE REL. REP. NO. 322, B-3 (Nov. 10, 1969).

¹⁴⁷ One such pressure, besides the self-perpetuating power that the exclusive representative benefits from, inheres in various statutory "bars" to certification elections in units of public employees. Executive Order No. 11491, § 7(c), 34 Fed. Reg. 17608 (1969), for example, precludes a new election in a federal unit for a 12 month period. See also the proposed regulations under Exec. Order No. 11491, in BNA GOV'T EMPLOYEE REL. REP. NO. 328, E-1 (Dec. 22, 1969); *id.* No. 338, A-7 to -8 (March 2, 1970).

State statutes, and regulations established thereunder, also provide more sophisticated contract "bars" reflecting problems peculiar to public employment. See *City of Grand Rapids (Michigan Nurses Ass'n)*, 1968 Mich. L.M.B. Ops. 194, 199-200 (the statutory bar to an election where there is in force and effect a valid collective bargaining agreement was expanded to preclude circulation of an election petition for a 30-day period pending action by a legislative body on a complete, written negotiated agreement.) New York State operates under a unique "bar" formula—incorporating a statutory certification bar with a contract bar—that is primarily dependent upon the budgetary submission dates of the particular public employer. N.Y. CIV. SERV. LAW § 208(c) (McKinney Supp. 1969). See 2 PERB ¶ 2-5005 (1969) (comment with respect to unchallenged representation status under § 208(c)).

Although such absolute "bars" to representation or decertification elections help entrench the majority union and present formidable obstacles to rival union efforts at displacing the exclusive representative, one regulatory body has suspended the statutory contract bar where there was substantial evidence of employee unrest and dissatisfaction with the bargaining representative. See *City of Springfield (Springfield Educ. Ass'n)* (Mass. L.R.C. Jan. 30, 1970), discussed in BNA GOV'T EMPLOYEE REL. REP. NO. 338, B-6 to -7 (March 2, 1970) (decision was based on qualifying language of MASS. ANN. LAWS ch. 149, § 178H(3) (Supp. 1969), providing for no election during term of contract except for "good cause.") But see R. DOHERTY & W. OBERER, *supra* note 11, at 79, 80 (supporting a strict two-year certification bar and one-year election bar).

¹⁴⁸ See Oberer, *supra* note 11, at 782.

¹⁴⁹ See BNA GOV'T EMPLOYEE REL. REP. NO. 335, B-11 (Feb. 9, 1970) (reporting

the part of the minority and majority unions that a stronger and more unified front is needed in order to better represent the interests of the public employee before the government employer. Moreover, it reflects the interests of the minority union in securing a greater degree of representational rights within the exclusive relationship. Inasmuch as the merger trend will not affect the existing representational scheme for some time, however, a "bargaining relationship" standard should be deferred to in assessing the relative rights of the exclusive and minority unions.*

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merger of civil service unions in New Jersey); *id.* No. 334, B-8 (Feb. 2, 1970) (reporting merger of teacher organizations in Los Angeles); *id.* No. 319, B-12 (Oct. 20, 1969) (reporting the merger of two local affiliates of rival national teacher unions in Flint, Michigan). *But see id.* No. 337, B-14 (Feb. 23, 1970) (reporting recent merger activity by teacher groups, especially by the rival national organizations, and the ban imposed by the American Federation of Teachers on further local mergers with affiliates of the National Education Association).

* In addition to the jurisdictions already providing for exclusive representation (note 2 *supra*), Idaho and Kansas have recently made commitments to the principle. Ch. 138, § 3, [1970] Idaho Laws (BNA GOV'T EMPLOYEE REL. REP. No. 343, F-2 (April 6, 1970)) (firefighters); KANSAS STAT. ANN. § 72-5411, *as amended in* BNA GOV'T EMPLOYEE REL. REP. No. 343, G-1 (April 6, 1970) (teachers). One additional state merely requires the employer to recognize the majority union as representative of the employment interests of all unit employees. ALASKA STAT. § 14.20.560(a) (BNA GOV'T EMPLOYEE REL. REP. No. 345, G-1 (April 20, 1970)) (teachers). Of the recent statutes only Kansas's mentions the rights of public employees to join, form, or assist a labor organization, or to refrain from such activities. See the discussion of the relevance of these guarantees, text at notes 21-25, 63 *supra*.

With regard to the presentation of grievances, the Alaska and Kansas statutes specifically guarantee no more than the Federal Constitution. See text at note 66 *supra*. The Kansas statute enables the individual teacher to present grievances and proposals to the board of education or its executives. The Alaska law merely reserves this right for the individual teacher. See notes 67-70 and accompanying text *supra*. Moreover, the posture of the Alaska law is similar to that of the Wisconsin Supreme Court in *Board of School Directors v. Wisconsin Employment Relations Commission*—the individual teacher, only acting in his individual capacity, may address the school board. See text at notes 47-64 *supra*.