

AGENCY SHOP FOR BALTIMORE COUNTY:  
NO MORE FREE LUNCH?

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ABSTRACT

This article discusses the judicial and legislative problems posed by permitting agency shops to exist in the public sector. It also describes efforts made by the Baltimore County, Maryland, teachers' union to obtain an agency shop. After the union had lobbied for an agency-shop provision for ten years, enabling legislation was passed in 1997. However, to date, this arrangement has not been written into any labor contracts in that county.

Two common expressions in American English are "there is an exception to every rule" and "there is no such thing as a free lunch." Apparently, the exception to the second is an open-shop arrangement in a unionized setting, since in an open shop, no employee is required to join a union as a condition of continued employment, although the union is legally compelled to represent all employees in the bargaining unit regardless of their membership status. The nonunion members of the bargaining unit are commonly called "free riders," referring to their receiving union services such as contract negotiations and grievance representation without paying dues.

Naturally, an open-shop arrangement is not the first choice of unions. At the other end of the extreme in union security is the closed shop. Closed shops, where employees are required to be union members prior to employment, were made illegal in the private sector by the Taft-Hartley Act of 1947. As a result, the highest level of union security legally available to unions with employees in private companies is a union shop, an arrangement whereby employees are

compelled to become union members as a condition of continued employment after a probationary period (seven days in the construction sector, thirty days for all other private employment). Another union security provision, an agency shop, also exists between a union shop and an open shop. Although employees in an agency shop do not have to become members of the union to continue their employment, they must pay a fee to the union to defray costs associated with collective bargaining and contract administration. It is this third option that is the focus of this article.

Both union shops and agency shops are legal union security arrangements in the private sector. However, the public sector presents additional challenges to union security. For example, unions representing federal employees are banned from negotiating either of these security provisions into their contracts under the Civil Service Reform Act (1978) and the Postal Reorganization Act. This is not the case for individual states, which can be more flexible in their labor laws. Some states have allowed agency-shop clauses to be negotiated with unions representing state or local employees.

The use of agency-shop clauses in the public sector is not without controversy. Both the judicial and legislative branches have played interesting roles in shaping agency-shop provisions in the public sector. Initially, we examine Supreme Court decisions that have directly and indirectly influenced public sector union security. The second section uses the case of the Teachers' Association of Baltimore County (TABCO) to illustrate how the Maryland legislature has attempted to balance judicial findings with its intent to provide greater union security in its public sector.

## RELEVANT JUDICIAL FINDINGS

### First Amendment Protection versus Government Interest

The first U.S. Supreme Court decision to directly deal with the issue of an agency shop in the public sector was *Abood v. Detroit Board of Education* in 1977 [1]. In this case, a Michigan statute authorized unions representing local governmental employees to negotiate agency-shop clauses into public sector contracts. Under this statute, agency-shop clauses could require that all nonunion members of the bargaining unit pay a service charge to the union equal to the union dues as a condition of continued employment. The Detroit Board of Education and the Detroit Federation of Teachers negotiated such an agency-shop clause into their 1967-1969 collective bargaining agreement. In 1969, a group of teachers opposed to the union filed a class-action suit against the school board, the union, and several union officials. The group members claimed the agency-shop clause allowed by the Michigan statute and subsequently negotiated into their contract violated their First and Fourteenth amendment rights [1].

Although the Supreme Court had already found the more strict union-shop provisions constitutional in *Railway Employees' Department v. Hanson* (when service charges are used for collective bargaining, contract administration, and grievance adjustment purposes) [2], *Abood* was the first time union security provisions were tested in the public sector. The dissident teachers claimed the very act of collective bargaining in the public sector was a political act they did not condone. Thus, by compelling them to finance the union, the agency-shop provision effectively put the state of Michigan in the position of dictating political ideology as a condition of public sector employment. Furthermore, the dissident teachers claimed the union was using their service fee to finance, not only collective bargaining activities, but also the union's political agenda. In deciding the case, the Supreme Court found public employees do not have more First Amendment rights than private employees. That is to say, the Court, having found the union-shop provision constitutional in *Hanson*, also found an agency-shop clause in the public sector can be constitutional. The Court acknowledged the teachers' view that public sector bargaining differed from the private sector version and that public sector bargaining was political. However, the Court found Michigan's interest in fostering peaceful labor relations and avoiding the acrimony created by "free-riders" constituted sufficient government interest to outweigh the relatively small infringement on the teachers' First Amendment rights. The Court also noted that public employees are still free to express their political views, even while paying agency-shop fees:

A public employee who believes that a union representing him is urging a course that is unwise as a matter of public policy is not barred from expressing his viewpoint, but, besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing, and, with some exceptions not pertinent here, is free to participate in the full range of political and ideological activities open to other citizens [1, at 210].

The Court did agree with the dissident teachers' second complaint: that the agency-shop fee was applied to political activities beyond collective bargaining. The Court found the state could not, as a condition of employment, compel teachers to contribute to political causes of which they do not approve. The First Amendment violation in this situation could not be balanced by any overriding government interest. Therefore, the Court found that to be constitutional, the agency-shop fees charged to nonmembers could not be used to support political and ideological agendas to which the nonmembers were opposed. Rather, the opposing nonmembers' fees could be used only for activities germane to the union's duties as the collective bargaining representative. The Court established the following guidelines for activities financed with agency-shop fees: the activities must be germane to collective bargaining activity, be justified by the govern-

ment's interest in labor peace and avoiding "free riders," and not add significantly to the inherent infringement of First Amendment rights under a union- or agency-shop.

The Court's decision to allow agency-shop provisions as long as the nonmember fees were not used for political activities needed further clarification. Although this standard is relatively easy to apply in private sector bargaining, the line between collective bargaining representation and political activities in the public sector is more muddled. In private sector collective bargaining, negotiations are finalized by management, and the union and the government do not need to approve the agreement. In public sector collective bargaining, however, not only are management officials government agents, but the negotiated agreement often must be approved by still-higher government officials or a state, county, or municipal legislature. Consequently, political activities such as lobbying, which are clearly outside the realm of private sector collective bargaining representation, may or may not be necessary for a public sector union to carry out its representational duties. This issue was raised in *Lehnert v. Ferris Faculty Association* [3].

In *Lehnert*, teachers who were subject to an agency-shop clause in their labor agreement at Michigan's Ferris State College, contended their representative union, FFA, was using their fees for activities outside of the FFA's representational duties. The teachers listed specific activities they felt were beyond the FFA's duties. The challenged activities in *Lehnert* fell under two general categories: lobbying activities and nonpolitical expenses not undertaken directly on behalf of FFA members.

The Court found that lobbying activities outside of those necessary to ratify the union's negotiated agreement were disallowed. Compelling nonmembers to finance other lobbying activities would unduly infringe on their First Amendment rights with no offsetting vital government interest. However, the Court ruled nonpolitical expenses could be charged to nonmembers. Included in the nonpolitical expenses were publishing those portions of the union's newsletter that pertain to education in general (not litigation), the union's fees to its state and national affiliations, and the cost of attending its national convention. In so doing, the Court recognized that many unions operate in a unified manner. For example, membership and participation in national unions can be of use to local unions in negotiations. The *Lehnert* decision, therefore, reaffirmed the Court's finding in *Abood* and clarified *Abood's* guidelines by illustrating items to be allowed and disallowed in the calculation of agency-shop fees.

The courts have recognized the difficulty of calculating the various costs of allowable and disallowable expenditures. To keep from placing an undue burden on the dissenting employees, the courts have ruled that unions have a responsibility to provide an independent auditor to calculate the costs. Furthermore, the union must provide nonmembers with information about the basis on which the fees are calculated. The fees must be held in escrow while a neutral party decides

any challenges the nonmembers have over the calculation or use of their fees. These rules were set forth under *Chicago Teachers' Union, Local No. 1 v. Hudson* [4] and *Dashiell v. Montgomery County* [5].

### Other Relevant Court Decisions

Other court decisions, not always specific to public sector union security, are relevant to the shaping of public sector agency-shop legislation. Two areas of concern are indemnity clauses and “grandfather” clauses. The first area is indemnity. The Supreme Court issued a ruling that at first would seem to invalidate indemnity clauses in labor contracts. In *Hudson*, the Supreme Court found such clauses were unconstitutional because it is the employer’s responsibility, not the union’s, to ensure that the contract is constitutional [4]. Requiring the union to indemnify the employer would remove the employer’s incentive to uphold that responsibility. The issue in *Hudson* was the indemnification of the employer against sex discrimination, a facially discriminatory policy [4].

However, several subsequent court decisions have upheld indemnity clauses in regard to public sector agency shops. State law that allows for the negotiation of an agency-shop clause constitutes setting public policy. Therefore, the indemnity clause would not be covering a facially discriminatory policy, but a state statute. This argument was upheld in *Mitchell v. Los Angeles Unified School District* [6]. Also, in *Hohe v. Casey*, an indemnity clause was upheld, stating the employer could be enjoined if not in compliance with the Constitution [7]. These cases that allow indemnity clauses in public sector agency-shop provisions have not been overturned by the Supreme Court.

“Grandfather” clauses are another provision often seen in public sector agency-shop agreements. These clauses are intended to protect employees working under the existing law from changes imposed in the new statute. The Supreme Court has reviewed several cases concerning such clauses and has established the “rational basis” standard [8]. Only statutes that interfere with an individual’s fundamental rights or discriminate against a particular class require a higher standard [9]. As already noted, the Supreme Court does not find agency-shop provisions an adequate assault on the First Amendment. Consequently, agency-shop provisions would not require a higher standard than the rational basis due to any impingement on employees’ fundamental rights.

Further, in *Nordlinger v. Hahn*, the Supreme Court affirmed a statute that sought to maintain the status quo for current homeowners while increasing the property tax for new buyers [10]. The Court concluded the practice of “grandfathering” the current owners was not unconstitutional; it did not violate the Equal Protection Clause of the Fourteenth Amendment [10]. In a case specifically involving changes in benefits and qualifications for public employees, *United States Railroad Retirement Board v. Fritz*, the Court upheld a version of the grandfather clause as passing the rational basis standard [11]. One can then

conclude that a grandfather clause in an agency-shop provision would need to pass the rational basis standard only if it does not interfere with a fundamental right or discriminate against a particular class.

## LEGISLATIVE EXAMPLE—TABCO

### Background

The Teachers' Association of Baltimore County (TABCO) is affiliated with the Maryland State Teachers' Association (MSTA) and the National Education Association (NEA). TABCO, which has 6,000 current members, is the exclusive bargaining representative for public school teachers in Baltimore County, Maryland, and has held that position for eighty years [12]. TABCO has never been challenged by another teachers' union, nor has it ever faced a decertification election.

Although TABCO has been successful at retaining members, it still wanted to establish an agency-shop provision in its labor contract. To begin negotiating for such a clause, TABCO had to seek authorization from the Maryland State Legislature. TABCO's lobbying efforts were unsuccessful in 1987, 1988, and from 1990 to 1995—when legislation was defeated. No legislation was introduced in 1989 and 1996 [13]. The permission for TABCO to negotiate an agency-shop provision with the Baltimore County Board of Education (the board) was finally granted by the Maryland State Legislature with the passage of House Bill 1014 (and its subsequent Senate version) in 1997.

### Arguments For and Against House Bill (HB) 1014

Ray Suarez, then president of TABCO, testified before the Baltimore County delegation on February 21, 1997. In his testimony, he stressed that HB 1014 only allowed an agency-shop clause to be *negotiated* between TABCO and the board; it did not establish an agency shop. Suarez argued that the parties involved in negotiations should have all tools available to them to come to the best possible agreement. Furthermore, he argued, since TABCO was required under Maryland law to represent all teachers in the bargaining unit, all teachers should share the costs of the representation. Mark Beytin, the current president, stated cost sharing was the primary reason TABCO had lobbied for agency shop. He emphasized that the union not only dealt with negotiating and administering the labor contract, but also absorbed the often-high cost of representing employees through the grievance/arbitration process and appeals to the board of education [12].

In his testimony, Suarez also addressed concerns that had arisen over misperceptions of HB 1014 and its consequences [14]. He used the examples of two other Maryland counties, Montgomery and Prince Georges, whose teachers' unions had already received permission from the legislature to negotiate for

agency shops and had subsequently been successful in including the clause in their labor agreements. Those counties had not experienced a decline in the number of qualified applicants seeking to fill teaching vacancies, nor had the agency-shop clause “spilled over” into other bargaining units in the counties [14, p. 2]. Finally, Suarez pointed out that HB 1014 contained provisions for teachers whose religious beliefs preclude them from supporting organizations such as labor unions [14, p. 1].

The Baltimore County Board of Education was opposed to HB 1014. Anthony Marchione, superintendent, spoke on its behalf at the February 21, 1997 hearing before the Baltimore County delegation. The board opposed an agency-shop clause for four reasons: violation of employees’ right to choose, creating a disincentive for union responsiveness, diminishing the opportunity of competing unions, and hindering the county’s ability to recruit new teachers. His first objection, violation of the employees’ right to choose, was clearly articulated. Marchione argued that conditioning employment on the employee’s payment of a union service fee infringed on the employees’ right to choose. He reiterated the board’s commitment to Maryland’s Teacher Negotiations Law, which gave teachers the right to join or to refuse to join the association elected as the exclusive bargaining representative [15, p. 1].

Marchione was also concerned that an agency-shop provision would give TABCO a permanent income not dependent on only those employees who supported the union through membership. He feared this income would serve as a disincentive in two ways. First, it could cause TABCO to take a more militant stance during negotiations, as the union would no longer have to worry about pleasing a majority of its members to keep their dues. In addition, Marchione said both MSTA and TABCO representatives had told him that “the best way to gain a new dues-paying member is to represent the non-member in their time of need” [15, p. 2]. With a guaranteed income provided by the agency-shop fee, Marchione suggested TABCO would no longer have such an incentive to provide the best possible representation [15, p. 2].

Marchione’s third objection to allowing an agency shop stemmed from what the board saw as its potential to squelch future competition from other unions. Current Maryland law requires that at least 10 percent of employees in the bargaining unit belong to the challenging union before that union can petition the board for an election [15, p. 2]. Requiring that all bargaining unit employees pay a service fee to TABCO could make it cost-prohibitive for 10 percent of the employees to also be dues-paying members of another union. This would make it extremely difficult for any other union to be in a position to challenge TABCO.

Finally, the board worried that imposing a service fee on teachers would inhibit the board’s ability to recruit additional teachers. Although Suarez had testified that the agency-shop provision in other Maryland counties had not dissuaded qualified applicants from applying for teaching vacancies, Marchione

argued the counties were not equivalent. He stated that Baltimore County already ranked eleventh in the state for starting salaries and that imposing a service fee would serve to decrease that standing to an unacceptable degree for new hires [15, p. 3]. George Poff, assistant to the superintendent for staff, government relations, and law, argued that not only were the salaries of the other counties not comparable to Baltimore County, but the location of the two counties played an important role [16]. Both Montgomery County and Prince Georges County (the two counties in Maryland in which unions could then negotiate for an agency shop in the public schools) border Washington, D.C. According to Poff, these counties are disproportionately populated by federal workers who have a familiarity with and acceptance of unions not found in Baltimore County. Consequently, allowing an agency shop in Baltimore County would have more of an adverse effect than in the other counties [16].

In addition to Marchione's objections, Poff stressed the importance of the board's knowledge that the union had strong support among bargaining unit employees. He maintained that for the negotiations to continue in a climate of trust, the board must be assured the union actually represented the majority of teachers' desires. By decreasing the union's financial incentive to bring a majority-favored proposal to the table, not only could a militant union stance emerge, but the board could not be sure that any agreement reached would satisfy the workforce [16].

#### House Bill 1014

As discussed earlier, 1997 was not the first year TABCO had lobbied the Maryland State Legislature for the right to negotiate an agency-shop arrangement for public school teachers in Baltimore County. However, 1997 was the first year their lobbying efforts succeeded. The primary reason for the successful passage of HB 1014 in 1997 was the addition of several amendments. The text of the bill and its amendments were influenced by the Supreme Court decisions discussed above. J. Joseph Curran, attorney general of Maryland, wrote about the applicability of the Supreme Court decisions to HB 1014 in a letter to Governor Parris Glendening [8, pp. 1-4].

HB 1014 originally (that is, without amendments) read:

For the purpose of authorizing the Board of Education of Baltimore County to negotiate with a certain employee organization a fee to be charged to certain nonmembers for certain services; making stylistic changes; and generally relating to certificated public school employees in Baltimore County [17, p. 1, ll. 3-15].

HB 1014 was intended to repeal and reenact Section 6-407c of the Annotated Code of Maryland. This would have included Baltimore County in the list of



counties where an agency-shop provision would be allowable in negotiations with teachers' unions. Already in the existing law were the following requirements: the service fee would be charged for representation in negotiations, contract administration, including grievances, and other required activities; the service fee would not exceed the dues of members; short-term employees (substitute teachers and day-to-day workers) would not be required to pay the service fee; and employees whose religious beliefs prevented their paying the union would contribute an amount equal to the service fee to a nonreligious, nonunion charity [17, p. 2, ll. 10-21].

The text, without amendments, did not go far enough to ensure the constitutionality of the statute. Although the Court's decision in *Abood* allowed for the possibility of an agency shop in the public sector, there were no explicit provisions in the statute as amended by HB 1014 to exclude costs of the union's political activity from the service fee. That exclusion had been established in *Abood* and restated in *Lehnert*. To rectify this situation, HB 1014 was amended to include this sentence: "Any political activities of the employee organization designated as the exclusive representative may not be financed by the funds collected from the agency or representation fee" [17, p. 3, ll. 11-14].

The other provision omitted from the original legislation that could have caused the statute to be ruled unconstitutional was the requirement to explain the origin of the service fee. As discussed earlier, the Court found in *Hudson* and in *Dashiell* that it is the unions' responsibility to explain how the service fee is calculated. To rectify this oversight, HB 1014 was amended to include:

The employee organization designated as the exclusive representative shall submit to "the Board an annual audit from an external auditor that reflects the operational expenses of the employee organization and explains how the representation fee is calculated based on the audit [17, p. 3, ll. 1-5].

With the addition of the two amendments, HB 1014 and, consequently, the Annotated Code of Maryland would meet the standard of constitutionality as defined by the Supreme Court. The legislature, however, went even farther. HB 1014 was also amended to include an indemnification clause. The representational union must indemnify the board against any liability that arises as a result of deducting a service fee from employees. Furthermore, the union must pay for a lawyer retained by the board to deal with any resulting liabilities. As shown previously in this article, such clauses have been allowed by court decisions. The last amendment added a "grandfather clause" protecting current non-TABCO teachers from paying a service fee, thereby making the bill more

politically acceptable. In 1997, more than two thousand teachers in Baltimore County were not members of TABCO [15, p. 3]. The amendment to HB 1014 would apply the service fee only to employees hired on or after July 1, 1997 [17, p. 2, ll. 22-24]. Thus, current teachers who were not members of TABCO would not have to pay a service fee in the event an agency-shop provision was negotiated into their labor agreement. As discussed above, “grandfather” clauses are constitutional as long as they serve a rational purpose and do not infringe on fundamental rights or discriminate against a particular class. Allowing current employees to continue under the status quo does not discriminate (*Nordlinger* [10]) nor does allowing an agency shop in the public sector (with limitations, *Abood* [1]). With these additions, HB 1014 appeared to meet, in all aspects, both in text and in amendments, the constitutional standards set forth by applicable judicial rulings.

Although HB 1014 and its Senate version were passed, TABCO was unable to gain an agency-shop arrangement for its bargaining unit in 1997, but tried again in fall, 1998 [12]. In regard to the union’s inability to negotiate an agency shop in 1997, the school board blamed this on TABCO itself: “They simply haven’t been willing to trade anything for it” [16].

## CONCLUSIONS

Allowing agency-shop arrangements in the public sector poses a unique challenge to both the judiciary and legislative branches. The judiciary has been walking a fine line in balancing employees’ First Amendment rights and government interests. This line may very well change as the Court changes. Even now, some justices are less convinced than others that the possible infringement on nonmember employees’ rights is negligible. Although concurring with the majority to allow the agency shop in the public sector, Justice Rehnquist was clearly uneasy with the concept when he wrote:

. . . the positions taken by public employees’ unions in connection with their collective bargaining activities inevitably touch upon political concern if the word “political” be taken in its normal meaning . . . I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, . . . and a similar requirement that a public employee contribute to the collective bargaining expenses of a labor union [1, at 243].

Just as the judicial branch must find some balance in deciding agency-shop constitutionality, so must the legislative branch balance labor peace and the public interest. The Maryland legislature crafted a piece of legislation that tried to consider all the parties involved. HB 1014 offered the union a chance at a

higher level of security while attempting to protect the board from liability and current teachers from a change in the status quo. As noted earlier, TABCO has thus far been unsuccessful at obtaining an agency shop. The legislature will have to postpone passing judgment on its balancing act until an agency shop is obtained and its effects on applications of qualified teachers are studied. Only then will they know whether labor peace was purchased at the price of the children's education, as Marchione and Poff had feared. After all, there is no such thing as a free lunch.

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## REFERENCES

1. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).
2. *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956).
3. *Lehnert v. Ferris Faculty Association*, 500 U.S. 507 (1991).
4. *Chicago Teachers' Union, Local 1 v. Hudson*, 475 U.S. 293 (1986).
5. *Dashiell v. Montgomery County*, 925 F.2d 750 (4th Cir. 1991).
6. *Mitchell v. Los Angeles Unified School District*, 744 F.Supp. 938 (C.D. Cal., 1990).
7. *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992).
8. J. Joseph Curran, Jr., attorney general of Maryland, letter to Governor Parris N. Glendening, "Re: House Bill 1014." April 28, 1997, p. 4.
9. *Kadrmas v. Dickinson Public Schools*, 478 U.S. 450 (1988).
10. *Nordlinger v. Hahn*, 505 U.S. 1 (1992).
11. *US Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).
12. Mark Beytin, president of TABCO, Telephone interview conducted October 2, 1998 by Kate Masters.
13. Laura Lodge, delegation counsel, "Baltimore County Delegation 1997 Session Bill Analysis House Bill 1014," February 20, 1997, p. 1.
14. Ray Suarez, former president of TABCO, "Testimony on HB 1014," delivered to Baltimore County Delegation on February 21, 1997.
15. Anthony Marchione, superintendent, Baltimore County Public Schools. "House Bill 1014—Agency Shop: Statement in Opposition," delivered to Baltimore County Delegation on February 21, 1997.

16. George Poff, assistant to the superintendent (Baltimore County Public Schools) for staff, government relations, and law. Telephone interview conducted October 2, 1998 by Kate Masters.
17. Maryland House of Representatives, Bill No. 1014.

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