



## BACKGROUND (FEBRUARY 2015)

*Americans for Fair Treatment v. Philadelphia Federation of Teachers & School District of Philadelphia*

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### THE EXECUTIVE SUMMARY

The Fairness Center represents Americans for Fair Treatment in a suit challenging “union work on school time”—Philadelphia Federation of Teachers’ (“PFT’s”) longstanding practice of taking school teachers and other school employees out of Philadelphia’s schools to perform full-time work for PFT.

The School District of Philadelphia (“District”) and PFT agreed, in their collective bargaining agreement (“CBA”), that the District must allow its employees to be “elected or appointed to full-time positions” with PFT and placed on “leaves of absences” by the District while holding those full-time PFT positions. Under the terms of the CBA, these employees continue to receive a District salary, retain District-provided insurance and benefits, accrue seniority as if they were employed by the District, and receive credit toward their pensions. PFT is not required under the CBA to reimburse the District for its expenses.

Currently, up to 63 District employees may perform union work on school time, and most of those employees working for PFT have been out of the classroom for *at least 15 years*.

Surprisingly, these full-time union work arrangements—sometimes called “release time” or “official time” provisions—are not uncommon among public-sector CBAs. Public employees on leave are used to staff public-sector union offices, to lobby for unions’ political causes and candidates, and to promote union membership at the workplace.

But just because these arrangements are common does not mean that they are legal. The Fairness Center is filing suit to expose Philadelphia’s union leave practices and to have this CBA provision declared illegal under Pennsylvania law.

### THE PROBLEM

Under a CBA provision entitled “Union Representatives – Leaves,” the District is required to give salary, insurance, “other benefits,” and pensions to certain District employees, even though the employees are working full-time for PFT.<sup>1</sup> According to records obtained from the District, most of

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<sup>1</sup> CBA between PFT and the District, Sept. 1, 2009 to Aug. 31, 2002, available at [http://www.pft.org/docs/28102\\_PFT\\_v6%20-%20Final.pdf](http://www.pft.org/docs/28102_PFT_v6%20-%20Final.pdf).

those school employees doing full-time union work have held those positions for at least 15 years. District employees on union “leave” have either been elected or appointed to a full-time position within PFT, and their leave is personally requested by the PFT President. Once the PFT President requests that these employees serve PFT full-time, the District has *no choice* but allow its employees—trained educators who ought to be teaching Philadelphia schoolchildren—to go work for PFT. In fact, the PFT President even tells the District *how much* to pay the employee while on “leave.”

From the CBA:<sup>2</sup>

Employees who are elected or appointed to full time positions with the Federation or any organization with which it is affiliated will, upon proper application, be granted leaves of absence for the purpose of accepting those positions. Authorized Federation leaves shall be requested in writing by the President of the Federation only. Employees granted such leaves of absence shall retain all insurance and other benefits and shall continue to accrue seniority as though they were in regular service. Annually, the President of the Federation shall inform the School District of the salary to be paid to each employee on approved leave with the Federation. *The School District shall adjust each employee's salary accordingly.*

Under this CBA provision, PFT staffs a total of 63<sup>3</sup> potential full-time positions on school time, including 35 teachers, 2 substitute teachers, 4 teacher’s aides, 4 secretaries, 3 non-teaching assistants,<sup>4</sup> 4 Comprehensive Early Learning Center employees, 3 food service managers, 3 Head Start employees, 5 professional-technical employees, and 10 unspecified employees.

## Staffing

Philadelphia public school staffing has been a source of much debate. The common plea, both from PFT and the District, is for more staff, more money.<sup>5</sup> Yet PFT is taking active teachers out of the classroom in a district where they are sorely needed. And the provision of resources to teachers doing union work on school time hurts the District’s ability to keep teachers and add new teachers.

Teacher vacancies are on the rise compared to previous years; since October 2014, the District has been scrambling to fill a total of 217 vacancies across the District.<sup>6</sup>

But even if the District were to instantly fill those vacancies, it is not clear that it would be able to pay incoming teachers. The majority of a Philadelphia school’s budget is devoted to employees’

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<sup>2</sup> CBA, article III, sec. B.1.

<sup>3</sup> The CBA creates 10 additional positions within the PFT Health & Welfare Fund, Article XIII, F.

<sup>4</sup> Non-teaching assistants are tasked with “maintaining discipline, surveillance, and control over the non-instructional activities of students.”

<sup>5</sup> Claudio Sanchez, *Philadelphia Schools: Another Year, Another Budget Crisis*, NATIONAL PUBLIC RADIO (Nov. 4, 2014), [http://www.npr.org/blogs/ed/2014/11/04/360146623/philadelphiaschools-another-year-another-budget-crisis?utm\\_medium=RSS&utm\\_campaign=claudiosanchez](http://www.npr.org/blogs/ed/2014/11/04/360146623/philadelphiaschools-another-year-another-budget-crisis?utm_medium=RSS&utm_campaign=claudiosanchez)

<sup>6</sup> Shannon Nolan, *Many More Teacher Vacancies to Fill Than in Previous Years, Says District*, THE PHILADELPHIA PUBLIC SCHOOL NOTEBOOK, <http://thenotebook.org/blog/158190/many-more-teacher-vacancies-than-previous-years>.

salary and benefits.<sup>7</sup> This year, the District calculates that the average Philadelphia public school teacher will earn approximately \$70,000 in salary and over \$40,000 in benefits,<sup>8</sup> including about \$14,000 in pension payments.<sup>9</sup>

Back in July 2014, the District laid off 342 school employees, citing shortfalls in individual school budgets.<sup>10</sup> But even a year before that, the District unilaterally abandoned the system of giving automatic raises based on seniority and education level, meaning that teachers who had obtained advanced degrees “found they would not be compensated for them.”<sup>11</sup>

According to some observers, more layoffs are possible, with many of those layoffs affecting teachers.<sup>12</sup>

## Seniority Preferences

When layoffs affect the District’s teachers, many of the union workers on school time will keep their jobs while the hard-working classroom teachers lose theirs.

Because the CBA extends seniority protection to union workers on school time, sending District employees to work full-time for PFT unfairly distorts the seniority preferences<sup>13</sup> for District employees, who are subject to a “last in, first-out” (“LIFO”) policy.<sup>14</sup> District employees working for PFT “earn” the protection against layoffs and the rights to be transferred or recalled before other employees.

## Pensions

Because union workers on school time continue to earn credit toward their public pensions, the arrangement unfairly increases the pension obligations for the District and the Commonwealth.

According to the District, just 36 cents out of every dollar actually make it to the classroom.<sup>15</sup> One

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<sup>7</sup> Mike Masch, former CFO for the District, *Questions & Answers, Public Education in Philadelphia & Pennsylvania*, JSPAN (Jan. 22, 2014), [http://jspan.org/sites/default/files/uploaded\\_files/masch2.pdf](http://jspan.org/sites/default/files/uploaded_files/masch2.pdf).

<sup>8</sup> *The School District of Philadelphia, Guide to School Budgets 2014-2015*, THE SCHOOL DISTRICT OF PHILADELPHIA, [http://webgui.phila.k12.pa.us/uploads/3Y/4a/3Y4aEIuayH\\_zhBXjdVzTxg/Guide-to-School-Budgets-FY15\\_FINAL.pdf](http://webgui.phila.k12.pa.us/uploads/3Y/4a/3Y4aEIuayH_zhBXjdVzTxg/Guide-to-School-Budgets-FY15_FINAL.pdf).

<sup>9</sup> See *supra* at n.5.

<sup>10</sup> Kristen A. Graham, *342 Phila. School District Workers Laid Off*, PHILADELPHIA INQUIRER (July 12, 2014), [http://articles.philly.com/2014-07-12/news/51361062\\_1\\_layoffs-philadelphia-school-district-cigarette-tax](http://articles.philly.com/2014-07-12/news/51361062_1_layoffs-philadelphia-school-district-cigarette-tax).

<sup>11</sup> Dale Mezzacappa, *With Talks Paused, Weingarten Tells Teachers to Work to Defeat Corbett*, THE PHILADELPHIA PUBLIC SCHOOL NOTEBOOK, [http://www.philasocialinnovations.org/site/index.php?option=com\\_content&view=article&id=261%3Aredesigning-the-role-of-teachersand-their-unions-in-reform-efforts&catid=19%3A disruptive-innovations&Itemid=30&limitstart=4](http://www.philasocialinnovations.org/site/index.php?option=com_content&view=article&id=261%3Aredesigning-the-role-of-teachersand-their-unions-in-reform-efforts&catid=19%3A disruptive-innovations&Itemid=30&limitstart=4).

<sup>12</sup> *Update on the School Funding Crisis*, THE PHILADELPHIA PUBLIC SCHOOL NOTEBOOK (Aug. 7, 2014), <http://thenotebook.org/sites/default/files/One-pager>.

<sup>13</sup> These seniority preferences formed the subject of recent litigation between PFT and the State’s School Reform Commission. See Solomon Leach, *SRC Seeks to Eliminate Seniority, Impose Other Changes on Teachers*, PHILADELPHIA INQUIRER (March 25, 2014), [http://articles.philly.com/2014-03-26/news/48563455\\_1\\_substitute-teachers-teachersunion-teacher-seniority](http://articles.philly.com/2014-03-26/news/48563455_1_substitute-teachers-teachersunion-teacher-seniority).

<sup>14</sup> *LIFO Comes in Many Varieties, But PFT Itself Uses the Term to Describe Its Current Contractual Arrangement*, PHILADELPHIA FEDERATION OF TEACHERS (Sept. 23, 2011), <http://www.pft.org/blog.aspx?id=73>.

<sup>15</sup> See *supra* at n.5.

reason for that is that the teachers' pension fund takes a "big bite out of the budget," roughly \$14,000 a year for each teacher making \$70,000.<sup>16</sup>

The Commonwealth is not reimbursed for the cost of providing pension to union workers on school time. Although documents obtained from the District show that PFT is reimbursing at least a portion of the District's pension costs, there is no contractual obligation requiring reimbursement.

This is a significant part of an even bigger problem. According to the Commonwealth Foundation, pension costs for the Public School Employees' Retirement System will rise from about \$101 million in 2012-13 to about \$175 million in 2014-15.<sup>17</sup> Total pension obligations are projected to reach \$349 million by 2020.<sup>18</sup>

### **Lack of Oversight**

Despite the significant sacrifice required of the District to allow its employees to leave the schools, the District does not have any policies concerning PFT's use of District employees or the District employees' use of their own time.

In fact, according to the District, it has *no records* to show what positions union workers hold with PFT, their job description, or the number of hours worked. Neither does the District require PFT to account for use of the District's employees or conduct regular audits of PFT on this subject.

Worse, the CBA places no restrictions on the length of time union workers on school time can hold their positions with PFT. PFT has taken full advantage, as most of its workers on school time have held those positions for more than 15 years.

Finally, the District does not have any general authority to determine *which* school employees are placed on "leave." Under the CBA, District employees are "elected or appointed" by the PFT "to hold full-time positions with the Federation." Although leaves are "requested" in writing by the president of PFT, the District has little or no authority to reject the "request."

### **THE LAW**

There is no explicit prohibition on sending District employees to work full-time for PFT. But outside of the pension laws, where full-time union work is permitted to count toward pension accrual, there is also no clear authorization for the arrangement. In fact, there are significant limitations on public employee unions and public employers that arguably prohibit the arrangement.

At least one court, in Arizona, has determined that a "release time" arrangement was invalid under its state constitution.<sup>19</sup>

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<sup>16</sup> *See id.*

<sup>17</sup> James Paul, *Pension Costs Forcing Teacher Layoffs*, COMMONWEALTH FOUNDATION POLICY BLOG (Aug. 20, 2014), <http://www.commonwealthfoundation.org/policyblog/detail/pension-costs-forcing-teacher-layoffs>.

<sup>18</sup> Robert Costrell and Larry Maloney, *The Big Squeeze: Retirement Costs and School District Budgets, Paying the Pension Price in Philadelphia* (June 2013), [http://edex.s3-us-west2.amazonaws.com/publication/pdfs/20130606-paying-the-pension-price-in-philadelphia-FINAL\\_7.pdf](http://edex.s3-us-west2.amazonaws.com/publication/pdfs/20130606-paying-the-pension-price-in-philadelphia-FINAL_7.pdf).

<sup>19</sup> *Cheatham v. Gordon*, No. CV-2011-021634 (Superior Ct. Ariz. Jan. 24, 2014), available at [http://goldwaterinstitute.org/sites/default/files/m6145560%20%28Goldwater%20Release%20Time%20Ruling%29\\_0.pdf](http://goldwaterinstitute.org/sites/default/files/m6145560%20%28Goldwater%20Release%20Time%20Ruling%29_0.pdf).

## **Statutorily Limited Authority**

The District and PFT are operating outside of their authority, for at least two reasons.

First, the Pennsylvania Public Employee Relations Act (“PERA”) grants specific authority to public-sector unions, including PFT, to act as public employee unions. Under PERA, PFT has *only* the authority to act as exclusive representative for “public employees” within the scope of their “public employment” under a “public employer.”<sup>20</sup>

But union work on school time involves supposedly-District employees working for a *non*-public employer and doing work outside of the scope of *public* employment. There is no statutory basis for allowing PFT and the District to bargain collectively for the terms of employees doing work for private entities.

Second, cases interpreting PERA specifically limit a public employer’s ability to “bargain away” control over public employees. These cases recognize the danger for the state and local governments of giving the union the sole discretion to judge employees’ duties and fitness for public work.

Here, the District’s and the PFT’s arrangement demonstrates a total lack of institutional control. Their union work on school time arrangement takes away any meaningful opportunity for the District to determine the functions or judge the fitness of supposedly-public employees.

## **Public Purpose Principles**

There are also state constitutional and common law principles that mandate a “public purpose” for expenditures by the state and local government. Because here, the District and the Commonwealth are spending money to directly benefit PFT, a private entity, with no return on their investment, the arrangement violates these public purpose principles.

## **THE CASE LOGISTICS**

### **Plaintiff**

Americans for Fair Treatment equips and empowers Americans to receive fair treatment from government unions. Founded in 2014, Americans for Fair Treatment is a 501(c)(3) nonprofit membership organization.

### **Defendants**

- Philadelphia Federation of Teachers
- School District of Philadelphia

### **Court**

The Court of Common Pleas of Philadelphia County

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<sup>20</sup> 43 P.S. § 1101.701.

**Judge**

TBD

**Relief Sought**

Americans for Fair Treatment will request that the Court enjoin the provision of the CBA allowing for the “leaves of absence.”

**Date Filed**

February 25, 2015

**THE LEGAL TEAM**

**David R. Osborne** is General Counsel at the Fairness Center, where he provides advice and counsel to clients, directs the Fairness Center’s legal strategy, and oversees all litigation efforts. Before joining the Fairness Center, David litigated on behalf of healthcare providers and conducted organizational and lobbying efforts for a national trade association. He previously worked as a judicial clerk to a Florida Supreme Court justice and served as official staff to a member of Congress. David graduated from the Florida State University College of Law.

**Nathan R. Bohlander** is Assistant General Counsel at the Fairness Center, where he focuses on client interaction and litigation activities. Before joining the Fairness Center, Nathan clerked for a judge in the Philadelphia Court of Common Pleas and maintained a solo practice. He has also previously worked for a nonprofit school choice organization, a Pennsylvania State Senator, and a member of Congress. Nathan graduated from the Pennsylvania State University Dickinson School of Law.