

Collective bargaining is no bargain

By David Y. Denholm, guest writer

Congress is considering legislation, HR 980, the Public Safety Employer-Employee Cooperation Act, which would use the power of the federal government to impose unionism and collective bargaining on state and local public safety departments—police, fire and rescue—in states, like Arkansas, that have had the good sense to not give public sector unions monopoly bargaining powers.

The proposal has several problems. First, it is most likely an unconstitutional abuse of federal power. Secondly, it is an unfunded mandate of enormous proportions. And, more importantly, it ignores the anti public interest nature of laws giving unions of government employees monopoly bargaining powers.

Public sector bargaining proponents like to pretend that there is no reasoned argument against it. This is far from the case. Many qualified scholars have articulated these arguments. Unfortunately, they haven't had the political power of the public sector unions, so their arguments have been all too often ignored.

Unionism and collective bargaining as we know it is a private sector institution based on qualities unique to the private sector and not present in the public. The national labor policy, the National Labor Relations Act (NLRA), was designed for the private sector and specifically excludes government employment from its coverage. Yet, virtually every public sector bargaining law is modeled after the NLRA.

In order for public officials to present a case against the imposition of unionism and collective bargaining on the employer-employee relationship, both to public employees and to the general public, it is important to understand those essential differences.

The public sector—government—is by nature a monopoly. There is but one police department and one fire department. A developer who is dissatisfied with the response to a request for a zoning variance can't shop the competition.

The private sector is by nature competitive. There are many suppliers of goods and services.

Government provides services that are essential to all citizens. The private sector provides non-essential services. Gray areas do exist, obviously. Some might argue that government provides non-essential services. This may be an argument against government involvement. Some private sector goods and services, such as food, are essential. Governments have developed programs for dealing with this without attempting to become the sole provider.

Government is politically motivated. The bottom line is for votes. The private sector is economically driven. Profit is the bottom line. No matter how politically popular a business decision, if it results in losses, the business will fail.

Government is sovereign. It has the power to use force. Only government has that power. This is most obvious in law enforcement, but is just as much a part of tax collection and issues concerning eminent domain. A non-sovereign government is a contradiction in terms.

All activity in the private sector is governed by free contract. When contracts are not honored, private entities don't take the law into their own hands. They rely on the power of government to enforce them.

These essential qualities of government are in direct conflict with the unionization of public employees.

On its surface, the Public Safety Employer-Employee Cooperation Act is quite simple. Congress enacts standards for unionism and collective bargaining in public safety departments. The Federal Labor Relations Authority (FLRA) has 180 days to determine whether state laws "substantially provide" similar union privileges, in which case those states are exempt. The FLRA then has one year to issue regulations covering the remainder of the states and the states have a year, or until the end of the first regular

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legislative session after the date of enactment to enact laws complying with the federal mandate. Failure to do so will result in the FLRA administering the unionization of public safety departments in those states.

A major problem with the collective bargaining process in public employment is revealed in the language of HR 980. It says in the declaration of purpose and policy that "it is the union that provides the institutional stability as elected leaders and appointees come and go."

Some might think this to be an advantage, but consider a situation where, for one reason or another, elected leaders have been too generous in negotiating a union contract. When the public elects new leaders to correct the situation, since the contract is a legally binding document, they are powerless to reverse the mistakes of their predecessors. That sort of "institutional stability" is completely destructive of our democratic form of government.

There is an element of deception in the proponents' arguments for the bill. In testimony to a Congressional hearing on the bill, the bill's author, U.S. Rep. Dale Kildee, D-Mich., said that its purpose was to "enable public safety employees to discuss work conditions with their employers." This ignores the fact that there is a vast difference between being able to discuss something and negotiating a legally binding contract.

The language of the bill itself continues this pattern. In its findings it says that the interests of employees "may be furthered" through collective bargaining and that the federal government is in a position to "encourage" conciliation. Those words are the velvet glove covering the iron fist of the bill's provisions, which are entirely mandatory.

The proponents have also promoted the idea that the bill exempts political subdivisions with less than 5,000 population or fewer than 25 full-time employees. Putting aside the question of whether such a subdivision is likely to have a professional police and fire department, the bill doesn't contain such an exemption. What it does contain is an exemption for state laws that contain such an exemption. In short, the federal regulations will apply to these subdivisions and the only way a state can escape federal regulation is to enact a law that "substantially pro-

vides" the powers given to unions by the federal law.

In addition to Arkansas, there are at least 13 states without laws mandating public sector collective bargaining and granting government unions monopoly bargaining powers that would feel an immediate, substantial negative impact from passage of this legislation. There are also several states with public sector bargaining laws that would clearly not qualify for an exemption from federal regulation.

Ironically, the bill would give unions at the state and local government level far greater powers than Congress has given to federal employee unions.

There is no question that this legislation is an unfunded mandate of enormous proportions. It is impossible at this point to determine the amount. There is no question that collective bargaining, impasse resolution and contract enforcement are expensive processes. Some of the cost and the way it is calculated will depend on whether states submit to the federal blackmail by enacting their own laws or decide to follow the FLRA's regulations.

A major difficulty in estimating the cost is not knowing which state laws would be declared to "substantially provide" the union privileges of the federal law. Some states may be complacent now but find out later that they either have to make substantial amendments to their laws or fall under the federal mandate.

Needless to say that it would take hundreds, perhaps thousands of bargaining units at the state, county, municipal and even special district levels, each one with its own contract and costs.

The U.S. House of Representatives approved HR 980 on July 17, 2007, by a vote of 314 to 97. When it reached the Senate it was expeditiously put on the General Calendar from which it can be brought up at any time. The Senate version of the bill, SB 2123, is authored by Republican Senator Judd Gregg of New Hampshire and has 36 cosponsors, including Sens. Blanche Lincoln and Mark Pryor of Arkansas.

One possible explanation for the level of support the bill has received may be that Sept. 11, 2001, created a kind of "halo effect" for public safety personnel. The International Association of Fire Fighters has gone to great lengths to convince Congress that the union's interests and the firefighters' are the same.

There is simply no doubt that there is something heroic about a willingness to enter a burning building to save lives. It is worth noting, however, that the vast majority—almost 75 percent—of firefighters are volunteers. Admiring courage has little or nothing to do with undermining democratic government.

A second consideration is that the bill is almost certainly unconstitutional and members of Congress can gain the advantage of having voted for a bill supported by labor unions with a fair certainty that their constituents will never feel the negative consequences.

Beginning with passage of the Wagner Act in 1935, Congress has recognized that relations between state and local governments and their employees is properly the prerogative of the states.

The question of the bill's constitutionality was an issue on both sides of congressional testimony. Testifying in favor of the bill, William Banks, professor of law at Syracuse University, concluded that the bill would not violate the 10th Amendment because it did not "commandeer" state or local regulatory processes. He went on to explain, seemingly contradicting himself, "The bill does not require state or local governments to enact or implement a federal regulatory program. Instead HR 980 places the onus on federal implementation through the Federal Labor Relations Authority. If a state chooses not to enact a program that meets federal requirements, the FLRA steps in."

On the other hand, noted labor lawyer R. Theodore Clark Jr., representing the National Public Employer Labor Relations Association, says that "There is absolutely no doubt in my mind that the Supreme Court today would hold Congress does not have the constitutional authority under the Commerce Clause to enact HR 980 vis-à-vis states and thereby

abrogate their 11th Amendment immunity."

In discussing the 14th Amendment implications of the bill, Clark goes on to note, "The right of public employees to be represented for the purpose of bargaining collectively with their public employers, however, has never been recognized as a constitutional right. To the contrary, the courts have uniformly held that it is not a violation of the constitutional rights of public employees for public employers to refuse to engage in collective bargaining."

The bottom line for elected officials, whether at the federal, state or local level, ought to be whether granting public sector unions monopoly bargaining privileges is in the public interest.

This question was dealt with most eloquently in a 1974 federal court case challenging North Carolina's law prohibiting contracts between labor unions and government. The decision says, in part:

"Moreover, to the extent that public employees gain power through recognition and collective bargaining, other interest groups with a right to a voice in the running of the government may be left out of vital political decisions. Thus, the granting of collective bargaining rights to public employees involves important matters fundamental to our democratic form of government. The setting of goals and making policy decisions are rights inuring to each citizen. All citizens have the right to associate in groups to advocate their special interests to the government. It is something entirely different to grant any one interest group special status and access to the decision-making process."

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