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Federal Sector Issues Panel

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With any new Administration come changes in Federal labor relations. Federal unions are hoping for broader bargaining rights and more sympathetic federal labor relations agencies, such as the Federal Labor Relations Authority (FLRA) and the Merit Systems Protection Board (MSPB). But as many long term federal employees know, sometime it is the Republicans who treat them better, providing solid pay increases and keeping a low profile on other labor management issues.

David Vaughn and I will discuss some of the current issues in the federal public sector.

First, I will discuss some random news items of interest in the federal sector to give you a feeling for the fauna and effluvia of the area. Next, I will note some pending bills in Congress that may find some traction. I will also talk about some federal appointments especially at the FLRA and FMCS. Since federal appointments at the FLRA have been held up for so long, little has come out of that agency to resolve the several pending big issues that are always subject to change when a new

administration of the opposing party comes into office, and the status of Bill Clinton's "labor-management Partnership" in the new Obama Administration.

NEWS

First, a sighting of elephants dancing in Washington. Two congressmen are battling out a lawsuit right now in which one claims that the other illegally intercepted a cell phone conversation. The recording of Speaker Gingrich, in 1996, drew a $700,000 award from the DC Circuit, including over $600,000 in attorney's fees. This no doubt led to some serious partying amongst DC attorneys. (**Boehner v. McDermott, 04-7203).**

Second news item: The federal government under President Obama is apparently hoping to reduce the amount of government contracting out. Right now there are 1.9 million federal employees. The White House has asked federal agencies The agencies are to decrease by 3.5 percent their contracts in each of 2010 and 2011 or a total of 7 percent from their contracting budgets by September 30, 2011. They hope to obtain $40 billion in savings from the effort. The White House believes there is an over-reliance on contractors. The Administration wants to "restore the balance", between federal employee and contractor work force. In addition, there is special focus on reducing non-competitive contracts.

Third item. “Telework”, previously called “Work at Home”, and then “Flexiplace,” is perhaps back on track after the last eight stagnant years. This may be particularly important if indeed the President hires 600,000 new federal employees as has been suggested. About 5 percent of the 1.9 million federal employees are now involved in some form of Flexiplace or Telework. However, there are several controversial issues involved with Telework including computer system security and management concerns about productivity, maintaining contact and long-distance dealings.

Fourth news item: the NLRB which was found by the Federal Labor Relations Authority (FLRA) to be guilty of an unfair labor practice, namely, refusing to bargain with its newly certified union. In December 2008, the FLRA had ruled that the Board's unionized workers could consolidate into a single bargaining unit despite the Board's claim that doing so would violate the Labor Management Relations Act. The NLRB was ordered to bargain in good faith with the newly certified union. The tow labor agencies have been going after each other with Granddaddy NLRB clearly not happy with its junior Authority.

Fifth we have the coming battle for representation of Transportation Security Administration (TSA) employees. It looks like AFGE and NTEU will go head to head to represent Transportation Security Officers (TSO’s). The TSA work force has about 50,000 security employees. There is an odd quirk in the law which TSA administrators under George W. Bush had used to prevent TSA employees from organizing at all. That issue is currently going through the courts but it's likely that the new administration

will allow an election to determine representation at TSA to take place. The legislation involving TSA is similar to language used for other agencies where Congress determined that the Agency negotiate pay on their own, outside the General Schedule (GS) that applies to all Federal employees. Once the issue of whether there is a right to representation is concluded in the affirmative, the TSA will have the authority, unlike most other federal agencies, to negotiate pay. The few other federal agencies that do negotiate pay include some of the banking agencies such as the FDIC and the Office of the Controller. The courts have found that since those agency heads had the discretion to set pay, they have an obligation to bargain about pay rates with the unions representing their work forces. At the TSA, like the other pay-bargaining agencies, derives a good percentage of its budget from customer – airline -- fees rather than taxes. This makes it somewhat more tolerable to allow civil servants to negotiate pay rights without making legislative branch decisions about taxpayer money.

The FAA, part of the Department of Transportation (DOT) (unlike TSA, which is under the Department of Homeland Security (DHS) was given authority to bargain over pay. The bargaining resulted in enormous amounts of overtime, in some cases doubling the pay for Air Traffic Controllers (ATCs). That resulted in Congress passing legislation giving itself authority, in the event the parties reached impasse in the next round of bargaining, to choose between management or labor's final offer. This turned out to be an undesirable pill for Congress, which allowed management's final proposal to become the parties' new collective bargaining agreement. Litigation and bad blood was the result for the past three (3) years. In the following round of bargaining, just concluded,

two distinguished members of this Academy Richard Bloch and Dana Eischen, joined former Clinton FAA Administer Jane Garvey, to act as med-arbs and resolved the parties numerous issues peacefully (George Cohen, had also been on the panel prior to his nomination to be Director of FMCS).

NTEU and AFGE are set to conduct an all-out battle to win recognition of TSA employees. In addition, the SEIU, which strongly supported President Obama in the election, has a federal arm called National Association of Government Employees (NAGE), which may also get involved in the TSA election. There is not very much organizing of new large bargaining units in the federal government. The last one was the NTEU's effort in the 1990's to displace AFGE at the Social Security Administration headquarters which cost in excess of $8 million and resulted in AFGE's re-election.

Once there is a petition signed by 30 percent of the employees and filed with the FLRA other unions need only obtain 10 percent of the employees proposed bargaining of the unit to be on the ballot.

The organizational structure of TSA is complicated to say the least. FLRA’s decision to find a nationwide unit, or regional units, as the appropriate scope of the bargaining unit, will give an advantage to one union or another. Another issue is who will be eligible. In addition to TSOs, there are lead TSO's, and supervisory TSO's. The status of the lead TSO’s is the question and the eligibility of “leads” has been subject of challenge at several agencies.

The new administration, it is thought, will begin to set federal labor policies once its new appointees to the federal labor relations agencies get their footings. Ernie DuBester was appointed by the President to be the third member of the FLRA. He joins Republican Thomas Beck, and the Chairman, Carol Waller Pope, a Democrat. I know Ernie quite well since he was a member of the National Mediation Board as I was. He was at the Board from 1993 to 2001. Before that he had been an attorney representing labor unions and he was with the NLRB before that. He has been a mediator at the NMB since 2005. He has great experience and skills for the job.

The President also appointed Julia Clark to be General Counsel of the FLRA, a powerful position often likened to a prosecutor. As General Counsel she decides whether to issue complaints against charged parties in unfair labor practice cases. She had worked in the Justice Department in the Anti-Trust Division and then practiced labor employment law on behalf of unions and employees. She was also General Counsel of the International Federation of Professional and Technical Engineers.

The FLRA has a backlog of over 300 cases – some of them five or six years old. Without the tie-breaking third vote the Authority has been at loggerheads. Now, with a full complement at the Authority, it can move ahead on addressing the backlog of cases and helping to implement new Administration policies.

George Cohen, a long time labor side attorney and a veteran NAA meeting speaker, was nominated by President Obama to be the Director of the FMCS. He has been an effective neutral for the past few years, handling some weighty cases, and he is held in the highest respect by both labor and management.

LEGISLATION

Turning to pending legislation, there are several bills up for consideration involving the federal public sector, some of them certainly with more likely prospects than others.

One pending bill is a paid parental leave for federal employees which was passed by the House but failed to pass the Senate last year. The bill would provide that four (4) of the twelve (12) weeks of parental leave that are allowed for federal employees shall be paid leave. The sponsor of the bill noted that 75% of the Fortune 100 firms in the private sector have paid parental leave. The Republicans on the other hand cite a Bureau of Labor Statistics (BLS) study that shows that benefits have risen much higher for public sector employees than private sector employees in the past several years. Public employees average $13.38 per hour in benefits compared with $7.98 for private sector workers.

Another bill is called the Part Time Re-Employment of Annuitants Act of 2009. That bill would essentially eliminate the annuity salary offset, for federal employees, real boon for retirees who want to return and work for the federal government. Agencies

could rehire, on a limited basis, retirees without offsetting their annuity payments. Some individual agencies, like DHS, already have such authority. One justification for the bill is that it addresses what has been seen as the imminent "retirement tsunami" of federal employees, especially at the supervisor and management levels, resulting in a knowledge and skill gap. Rehiring these recent retirees could fill critical needs. However, many people have questioned the projections of the "retirement tsunami" and instead see just a "retirement ripple." Many retired baby boomers have indeed caused shortages in certain professions and agencies but the numbers are still speculative as to future retirements. The federal unions are not exactly enthusiastic supporters of the bill. They would prefer that agencies hire new permanent full time career employees.

Another pending bill is the Public Safety Employer-Employee Work Cooperation Act. It affords collective bargaining rights to state and local public safety employees. It also makes available interest impasse resolution mechanisms such as fact-finding, mediation, and arbitration. In addition, it calls for the FLRA to determine appropriate units, hold elections and resolve ULPs. There certainly are curiosities with regard to why the bill, which has 207 House sponsors, and 36 Senate sponsors, chose to give this authority to the FLRA rather than the NLRB and, in fact, why a federal agency would trump state agencies in any case.

OBAMA EXECUTIVE ORDER – PARTNERSHIP?

Many people in the federal establishment are waiting for an Obama Executive Order (EO) addressing federal labor relations. Many expect it to look a lot like Bill Clinton's Executive Order over 15 years ago. The Clinton Executive Order mandated a process for negotiation involving labor and management in joint meetings to establish ground rules and for the negotiators to identify and then solve mutual problems through consensus. The concept was to address big divisive labor relations issues, by-passing the traditional negotiations and legal process of bargaining. Instead the parties were to use interest based bargaining (IBB).The FLRA was to train agency management on the process. The idea behind the Partnership Initiative was to reduce conflict and to increase cooperation. However, it got caught up in the battles over bargaining of permissive subjects and other problems. I think the general consensus was that it was helpful in some agencies, but overall, did not fulfill its ambitions.

Of course there was some history of this type of approach in the federal government even before Clinton. John F. Kennedy's Federal Sector Executive Order used the term "cooperation." Then in the 1970s, the "work team" approach was popular in the private sector and spread, to some extent, to the federal sector. But, Clinton's effort at Partnership in the 1990s was the first concerted effort to change union management relationships in the federal government on a philosophical basis. The goal was to improve the workings of government.

If indeed the Obama Administration adopts a form of partnership, it is hoped that it will learn the lessons of earlier partnership efforts and avoid the costs, time

consumption and disappointments of those efforts. There has been some discussion about change in performance systems -- appraisals and pay-for-performance -- in the federal government to fulfill Obama's expressed desire to make government work better. As the President said in his Inaugural Address, "The question we ask today is not whether our government is too big or too small, but whether it works."

The Partnership process was never designed to bring unions into a co-management with agency heads. But many of the labor management Partnerships were successful. Some of the best ones had secured endorsements from the top down and a real dedication to the process and good will by both sides. Facilitation by a neutral was found to be helpful in many successful programs. Initial training in team building was apparently useful as was retraining for new members of the partnership counsels after they changed members.

Such partnerships were permitted by the Civil Service Reform Act of 1978, even before the Clinton Executive Order and were, in fact, still permitted even after the Bush Executive Order, which rescinded the Clinton Executive Order. The possibility of resurrecting Partnerships is a real one, but will no doubt await the confirmation of Obama's FLRA nominations to the Authority.

NEGOTIABILITY

One of the most important issues is that of negotiability. Administration policies and FLRA decisions on negotiability are probably the core controversy in federal sector legal and labor relations.

Many of you may not be familiar with the negotiability controversy. It is different from the NLRA analysis of mandatory versus non-mandatory subjects of bargaining. This is so for a couple of reasons.

First, the FLRA has within it a “management rights” provision. The NLRA obviously does not. The FLRA’s “management rights” clause is somewhat akin to those in private sector collective bargaining agreements. The management rights provision is at 5 USC 7106 (a), which states that:

“subject to section (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency: (1) To determine the mission, budget, organization, number of employees, and internal security practices of the agency; and (2) In accordance with applicable laws.”

(A) To hire, assign, direct, layoff and retain employees in the agency or to suspend, remove…or take other disciplinary action.

(B) To assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted.

(C) With respect to filling positions, to make selections for appointment from.

(i) Among properly ranked and certified candidates for promotion; or

(ii) Any other appropriate source; and

(D) To take whatever actions may be necessary to carry out the agency mission during emergencies. “

This “management rights” provision may be juxtaposed to 5 USC 7106 (b) (the “permissive” section):

“Nothing in this section shall preclude any agency or any labor organization from negotiating –

(1) at the election of the agency, on the numbers, types and grades of employees and positions assigned to any organizational division, work project, or tour of duty, or on the technology, methods, and means of performing work…”

So an agency may, at its discretion, negotiate with the union over these permissive subjects.

It is probably important to look at a little history here. Since the 1979 CSRA, management rights concerns of federal agencies have resulted in literally tens of thousands of declarations of non-negotiability of union proposals and rulings by the FLRA and courts on whether or not agencies were right in doing so. The federal sector dynamic has involved agencies seeking to preserve rights they thought the law gave them and unions seeking to expand the scope of issues they might bargain over within the law.

There has been quite a seesaw in terms of where things have been on the negotiability spectrum, often depending on the composition of the FLRA and the determinations of the courts. Certainly many a lawyer, to say nothing to neutrals, have been housed, fed, their kids college educated and the parent shuffled off to retirement based on the back and forth over these few lines in the federal law. The question really is whether a union's proposal falls within the bounds of the exceptions to the management rights provisions of the law. What is a "permissive" bargaining area is hotly debated. Some say that the 7106b's ("nothing in this section shall preclude any agency from negotiating") provision originally became law for the limited intent of permitting agencies and unions to bargain over safety issues which otherwise would have been nonnegotiable. The idea was that agencies could solve safety problems in a mutually beneficial way without treading on "management rights." But certainly, the language of the permissive section allows for a broader interpretation.

President Clinton, when he came into office, issued an Executive Order which mandated that agencies waive their statutory rights and arguments and bargain over permissive subjects that had been previously negotiated only at the agency's option. This was part of the Partnership approach. But also during the Clinton era, the agencies themselves raised objections to bargaining over permissive subjects despite the President's Order for them to do so. The FLRA refused to enforce the Clinton order and the Federal Service Impasse Panel (FSIP), all Clinton appointees, avoided ruling on these issues almost entirely. So it was somewhat ironic that politically appointed administrative officials, controlling federal agencies, in effect, refused in many instances to enforce the Clinton Executive Order. Of course the Clinton Executive Order was rescinded almost immediately by President George W. Bush, when he assumed office in 2001.

The federal government is the largest organization in the country and no doubt is the most complex. This complexity, and its public mission, leads to a reluctance by federal agencies to cede authority or even bargaining rights to unions over what they consider to be their management rights. Full scale bargaining under the Clinton Executive Order of permissive subjects would, they felt, intrude on their ability to exercise the needed authority in their agencies. The unions, on the other hand, argued that these permissive subjects were just that, permissive and that the agency did not need to cede any authority if it chose not to.

Nonetheless, Management fears if the federal agencies were required to negotiate such things as “numbers, types, and grades in section 7106(b)(1) they might have to bargain to agreement or impasse on proposals impinging on their running of the agencies and administering the laws they are charged with applying.

The agencies complain, for instance about whether they will have to negotiate the number of customs and border control inspectors assigned to any particular port of injury to the U.S. the percentage of contract personnel working for a particular agency or work project; the need for certain personnel or certain numbers of personnel to be used on certain work projects. The term “technology, methods and means of performing work” may also be quite expansive. The Office of Personnel Management (OPM) defines method of work quite broadly and may even require that there be a direct relationship between particular methods or means an agency has choice in the accomplishment of the agency’s mission. Bargaining over technology could involve such issues as whether employees choose the software to be used to accomplish word processing, email, spreadsheets, etcetera; whether government vehicles used by employees shall have automatic transmissions or GPS devices. Of course, many highly technical functions are performed by government contractors in any case. Moreover agency management probably does not have any greater expertise in these areas than their employees, suggesting a benefit to labor input.

Another issue relating to negotiability involves the question of whether, if an agency and a union agree to negotiate and include a particular permissive subject in

their collective bargaining agreement, what obligation there is to continue to abide by it after the contract's expiration, or to negotiate over it in the future. It appears that present law would require that if an Agency and union have addressed a permissive subject in their collective bargaining agreement, that the agency can instantly terminate it when a contract terminates without any bargaining obligation. Rather, the agency only needs to serve notice of its decision to terminate immediately which then ends the practice previously agreed to. It is noteworthy to distinguish this collectively bargained permissible subject from a "condition of employment." The FLRA has ruled that if an employer wants to change a "condition of employment" that would be a permissive subject of bargaining for contract purposes, it must give the union specific advance notice and bargain to completion before changing the practice, outside the collective bargaining agreement, in so-called impact and implementation (I and I) bargaining, required by 5 USC 7106 (b) (2)("appropriate arrangements") and 5 USC7106 (b) (3) (I & I procedures). Thus, the obligation to bargain may be stronger over an Agency's change to condition of employment than its obligation to continue to bargain over a lapsed collective bargaining provision.

Thus it appears that the FLRA's current interpretation of the law gives the union better protection if the agreement is not committed to writing in a collective bargaining agreement. The FLRA's early interpretation of whether a condition of employment established by a collective bargaining agreement remains in place after the contract is terminated was that indeed the provision did continue until renegotiations or negotiations were waived. But later, the FLRA held that "either party may assert its right

not to negotiate with regard to the “permissive” subjective bargaining…once the applicable agreement has expired, or once the parties have elected to bargain over a permissive subject of bargaining and reached agreement, stability in labor management relations could be achieved by requiring both parties to adhere to those terms during life of the party’s agreement while preserving each party’s right to terminate the practice embodied in the agreement upon its expiration…a party’s right to terminate unilaterally a permissive bargaining subject is not impingent on first satisfying a bargaining obligation as to the substance, impact or implementation of the change.”

FSIP

The federal negotiations process involves the parties engaging in direct negotiations followed by mediation through FMCS assistance and then resorting to the Federal Service Impasse Panel (FSIP) which "investigates" the dispute and may make a final and binding decision, tantamount to an interest arbitration decision. The FSIP, the last stage in the process, is a panel composed of seven (7) presidential appointees, who are not subject to Senate confirmation. They are part-time employees and, in fact, share only a single Full-Time Equivalent (FTE) position among the seven. There are various term lengths of the appointees from one year to three years to five years. Any panel member can be removed by the President at any time. They are paid at a rate which is equal to the daily equivalent rate of the highest paid GS employee in the government (about $500).

The federal negotiations process can take a long time. Parties in direct negotiations can remain there until one party seeks FMCS assistance. The FMCS then steps in to help the parties reach an agreement. When one party files a petition asking for the FSIP's assistance, an FSIP staff member will investigate to determine whether the negotiations are "Panel-worthy." This can take a few weeks more. The panel then meets to determine whether to take a case. If it decides to take a case, its designee meets with the parties at a fairly formal hearing-like procedure, and post-hearing briefs are submitted. The designee will draft a recommended resolution and then wait for another panel meeting for a final decision to issue.

The FSIP has been criticized for its "once over lightly approach" to interest arbitration. Its designee meets with the parties for only a day or two and written submissions are not necessarily the best way to enlighten the panel. The panel only meets about once a month, so a lot of time passes without movement at the several stages of FSIP involvement in agency-union collective bargaining.

Moreover, if one party insists that it is not obligated to bargain over a particular issue, for instance because it argues that the subject is already "covered by" a regulation or outside the scope of bargaining, the panel does not even hear the matter. Rather the matter may go to another forum, most likely either the FLRA, or its General Counsel, an arbitrator or a court of appeals, further delaying the process.

It should be noted that the Panel has an internal rule that prohibits panel members from doing federal sector arbitration work while on the panel. As a result experienced federal sector arbitrators would have to sacrifice a great many cases and permanent panels if they wish to be a member of the FSIP.

An alternative to the FSIP process is for the parties to seek assistance upon impasse from a private mediator/arbitrator. Frank Ferris, who has lead NTEU negotiations for years, is a strong advocate of the process. The parties under private med-arb can hire any neutral they may want. The neutral can then act effectively as a mediator before turning to arbitration. This saves an enormous amount of time in the process. The med-arb parties can and do empower the neutral to settle any related ULPs, information disputes, procedural questions, and mandatory bargaining issues. The neutral, having the power to finally decide the dispute as an arbitrator, rather than a seven person FSIP, who the parties never get to see or address directly, has a much better likelihood of helping the parties reach an agreement. Skilled neutrals can identify disputes that are holding up or blocking everything else. They can remedy illegal actions on the spot, for instance by ordering a party to produce information or to lose the argument through an adverse inference.

NTEU and IRS have used private med-arb to settle their last ten contracts, back to 1982. They just concluded a new term agreement, with the assistance of my co-panelist David Vaughn, which binds them to use private med-arb for all bargaining disputes, term and mid-term. Technically, either party can reject the neutral's

recommended decision and appeal to the Panel for a legally final and binding decision. However there are plenty of disincentives for rejecting a recommendation.

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