The Federal Service Labor-Management and Employee Relations Act--Its meaning and its impact

Author: David P. Twomey

Published in *North Atlantic Regional Business Law Review*, vol. 16, pp. 66-72, Spring 1983

SPRING 1983
VOL. 16

North Atlantic Regional

Business Law Review

THE OFFICIAL PUBLICATION
OF THE NORTH ATLANTIC REGIONAL BUSINESS LAW ASSOCIATION

THE FEDERAL SERVICE LABOR-MANAGEMENT AND EMPLOYEE RELATIONS ACT--ITS MEANING AND ITS IMPACT

by

David P. Twomey*

Introduction

The legal structure underlying collective activities of federal government employees has developed slowly compared to that regulating nongovernment unionization and bargaining.

In the early part of the twentieth century, the executive power of the President was used to prevent lobbying activities by federal employee representatives. President Theodore Roosevelt issued executive orders to prevent lobbying efforts of federal employees by prohibiting federal officers, employees or their associations from soliciting pay increases in Congress under the penalty of dismissal. In the next administration President William Howard Taft repeated these retrictive executive orders. Congress moderated this restraint as to postal employees by enacting the Lloyd-LaFollette Act of 1912 to allow unaffiliated organizations to present their grievances to Congress without retaliation. The National Labor Relations Act of 1935 explicitly excluded all government agencies and their employees from coverage.

Executive Order 10988

Soon after John F. Kennedy became President in 1961, a task force on employer-employee relations in the federal service was appointed to investigate labor relations in the federal government. The task force proposed that the government should respond affirmatively to organization by any considerable group of employees for "collective dealing." The recommendations resulted in the signing of Executive Order 10988 on January 17, 1962 by President Kennedy. The Order provided that most civilian employees could organize and that organized employee groups in appropriate units would be recognized.

Each agency's management was itself responsible for determining appropriate bargaining units, and also deciding whether a majority of the employees in such a unit had designated a

---

*Professor, School of Management, Boston College, Chestnut Hill, Massachusetts.

labor organization as their representative. A panel of qualified arbitrators was made available, for assisting in resolving disputes by investigating the facts and then rendering advisory opinions, subject to management's acceptance or rejection. Pursuant to Executive Order 10988 a Code of Fair Labor Practices was adopted in 1963.

Executive Order 11491

To improve the program, President Nixon in 1969 signed Executive Order 11491, clarifying the responsibilities of employees, their representatives, and government officials. Under this system final authority no longer rested with the department concerned, since a permanent Federal Labor Relations Council was created to interpret the Executive Order, to make major policy decisions, and to hear appeals on various matters. Under the Executive Order, arbitration of grievances were allowed, subject to certain exceptions that could be reviewed by the Federal Labor Relations Council. Also, the Federal Service Impasses Panel, an agency within the Council, was authorized by the Order "to take any action it considers necessary to settle an impasse."

Postal Service Employees

The Postal Reorganization Act[1] created the U.S. Postal Service as an independent agency within the executive branch of the federal government. The underlying policy of that Act is that performance not politics is to determine promotion and tenure of Postal Service employees.

Under the Postal Reorganization Act, the National Labor Relations Board is authorized to determine appropriate bargaining units, supervise representation elections and enforce the unfair labor practice provisions of the NLRA. Also wages, hours and working conditions are determined through collective bargaining between the appropriate postal unions and the Postal Service. Since postal employees do not have the right to strike the Postal Reorganization Act provides for fact finding procedures and then binding arbitration if a bargaining impasse exists after 180 days from the start of negotiations.

Supervisory and managerial employees of the Postal Service, like their counterparts in the private sector, do not have collective bargaining rights, however they are assured pay differentials over those who they supervise.

Federal Service Labor-Management and Employee Relations Act

On January 11, 1979, the Federal Service Labor-Management and Employee Relations Act of 1978 became effective.[2] This Act

provides a permanent legislative basis for labor-management relations in the federal sector, as opposed to the impermanent structure which existed under the presidential executive orders.

The Act is clearly modeled on the National Labor Relations Act, with the establishment of a three member Federal Labor Relations Authority (FLRA) to administer the program; and the creation of a General Counsel with authority to investigate and prosecute unfair labor practice cases. The Act also provides for judicial review and enforcement of most cases.

Coverage

The Act covers all executive agencies, the Library of Congress, and the United States Government Printing Office. Specifically excluded agencies include the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, and the Tennessee Valley Authority.[3] In addition, the statute empowers the President to issue an executive order excluding any agency or subdivision from ocverage under the program if that agency or subdivision is primarily engaged in intelligence, counter-intelligence, investigative, or national security work, and the provisions of the statute cannot be applied to it in a manner consistent with national security requirements and consideration.

Administration

The principal agency charged with administering the Act is the Federal Labor Relations Authority. The Authority is an independent agency consisting of three members appointed by the President for five year terms. The Authority has responsibility to: determine the appropriateness of bargaining units; supervise and conduct elections to select an exclusive representative; resolve negotiability disputes; conduct hearings and resolve complaints of unfair labor practices; and resolve exceptions to arbitrators' awards.[4] Like the NLRB, the Authority may delegate to regional directors the authority to determine whether a group of employees is an appropriate bargaining unit, as well as the supervision and conducting of elections. Also the Authority may delegate to administrative law judges its authority to determine if any person is engaged in an unfair labor practice. Decisions by the regional directors and administrative law judges are appealable to the FLRA.

Final decisions of the Authority are appealable to the United States Court of Appeals, except for unit determination case decisions. The Authority also has the power to petition any United States Court of Appeals for enforcement of its

orders and for appropriate temporary relief or restraining orders.[5]

The Act establishes the office of General Counsel of the Authority. The General Counsel is appointed by the President for a five year term, but may be removed at any time by the President. The General Counsel is empowered to investigate and prosecute unfair labor practice cases.[6]

The statute continues the Federal Service Impasses Panel essentially unchanged from Executive Order 11491. The Panel's primary function is to assist parties in resolving bargaining impasses and to take necessary actions consistent with the law to resolve such impasses.[7]

Employee Rights

Under Section 7102 of the Act, federal employees have the right "to form, join, or assist a labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal."

Collective Bargaining

Agencies and exclusive representatives have an obligation under the statute to "meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to conditions of employment." The Act defines "conditions of employment" as "personnel policies, practices, and matters whether established by rule, regulation, or otherwise, affecting working conditions. . . ."[8] It should be noted that the parties do not bargain over wages. Wages for "blue collar" employees are set according to a Coordinated Federal Wage System, under which blue collar workers are paid wages comparable to those paid in private industry for similar types of work. Thus a federal employee working as an electrician would be paid a comparable rate of pay to an electrician working in the private sector.[9] The General Schedule, the symbol for which is "GS," is the basic pay schedule for so-called "white collar" federal employees. Pay increases for employees covered by this schedule are ultimately up to the President, who reviews recommended pay increases in the context of "economic conditions affecting the general public."[10]

The duty to negotiate in good faith is set forth in Section 7114(b) of the Act. It includes the duty of approaching negotiations with a "sincere resolve" to reach agreement, having negotiators with necessary authority, meeting at reasonable times and places, and executing a written document to reflect agreement. The statute also requires that the agency furnish the exclusive representative with available and

necessary information normally maintained by the agency in order for the union to bargain intelligently. The Act contains a strong "Managment rights" clause.[11]

Under the Act, all labor-management relations agreements must include a grievance procedure with binding arbitration as the final step.[12] In general, nearly all matters related to an employee's employment are encompassed within the expanded grievance procedure, unless the parties agree to exclude them as a result of their negotiations.

Employees with grievances against an agency alleging discrimination based on race, color, creed, national origin, sex, age or physical handicap may choose to bring a complaint either under the separate statutory equal employment opportunity procedure, or the negotiated grievance-arbitration procedure, but not under both.[13] Either party has the right to file an exception with the Authority to an arbitrator's award on grounds similar to those applied by federal courts to private sector awards; and if no exception is taken after 30 days, the award is final and binding on the parties.[14]

Agency Unfair Labor Practices

Section 7116(a) of the Act sets forth eight management unfair labor practices. It parallels in part the National Labor Relations Act, prohibiting agency management from engaging in the unfair labor practice prohibited for private management under the NLRA. It is, for example, an unfair labor practice for agency management to interfere with the exercise of employee rights or to discipline or discriminate against an employee because the employee engaged in union activity, or filed a complaint or petition under the Act. Also, it is an unfair labor practice to refuse to negotiate in good faith with a labor organization or to refuse to cooperate in impasse procedures. Further, it is an unfair labor practice for an agency to enforce a regulation which is in conflict with any prior collective bargaining agreement, or to otherwise fail to comply with the Act.

Union Unfair Labor Practices

Section 7116(b) of the Act sets forth eight union unfair labor practices. As under the NLRA, labor organizations in the federal sector are prohibited from interfering with employee rights or attempting to cause an agency to discriminate against an employee because of the exercise of rights under the Act by the employee. Federal sector unions must negotiate in good faith and cooperate in impasse procedures and decisions.

It is an unfair labor practice under Section 7116(b)(4) for a federal sector union to discriminate against an employee

on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapped condition.

Finally, it is an unfair labor practice under Section 7116 (b)(7) for a union to call or condone a strike, or work slowdown. Picketing which interferes with an agency's operations is also prohibited under this section. However, informational picketing which does not interfere with operations is expressly allowed.

Remedies for Unfair Labor Practices

When the Authority determines that an unfair labor practice has occurred, an appropriate remedy could include an order to: (1) cease and desist (2) a requirement to renegotiate with retroactive effect (3) or the reinstatement of an employee with back pay.[15] The Act also authorizes the award of attorney's fees in certain unfair labor practice and grievances cases where an employee has suffered an unwarranted or unjustified personnel action resulting in the loss of all or part of his or her pay.[16]

Impact of the Law

In the private sector bargaining over "wage" issues is considered by the parties to be the most important part of the negotiation process. Unions make demands and submit supporting data for wages and other economic benefits based on the union's economic analysis of the company's ability to pay the increased wages. Companies present information and arguments based on their competitive position and their ability to pay. In the negotiation process wage proposals are made over a period of time, which may include a strike or lock out, until new wage rates are agreed upon. Reaching agreement on wage issues is almost always the most difficult part of negotiating a collective bargaining contract. And the non-economic issues concerning hours and working conditions, in the setting of intensive negotiation over the economic issues, have a way of being resolved quickly by the parties, by tying a final offer or acceptance on the economic issues to acceptance or withdrawal of important non-economic issues. In the federal sector the agencies and exclusive representatives do not bargain over wages and are limited to bargaining over "conditions of employment," which consist of personnel policies, practices and matters affecting working conditions. Personnel policies and practices are indeed most important to employees working in the federal sector. However, with wages not a component of bargaining, the impact of the Federal Service Labor-Management Relations Act is not comparable to impact of the LMRA or state and local government collective bargaining laws.

FOOTNOTES

1. 39 U.S.C. §1200 et seq.

2. Public Law No. 95-454, 5 U.S.C. §7101 et seq., 92 Stat. 1191. This law was enacted as Title VII of the Civil Service Reform Act of 1978, Public Law No. 95-454, 92 Stat. 1111.

3. 5 U.S.C. §7103(a)(d).

4. 5 U.S.C. §7105.

5. 5 U.S.C. §7123.

6. 5 U.S.C. §7104(f)(2).

7. 5 U.S.C. §7119(c).

8. 5 U.S.C. §7103(a)(14).

9. Blue collar employees include most recognized trades, crafts and skilled and unskilled manual labor employees outside the postal service. Union members do participate in Local Wage Survey Committees, which do the survey work in collaboration with the Bureau of Labor Statistics to establish the job comparability wage data of private sector jobs to government jobs.

10. The Federal Pay Comparability Act, 5 U.S.C. §5305 (1971) covers 1.3 million white collar workers under the General Schedule. The prime objective of the Act provides comparable pay with private industry. A Federal Employees Pay Council consisting of union representatives was created by the Act, but it has essentially an advisory role. Ultimately it is the President who issues final executive orders adjusting pay for white collar federal employees.

11. 5 U.S.C. §7106.

12. 5 U.S.C. §7121.

13. 5 U.S.C. §7121(d).

14. 5 U.S.C. §7122.

15. 5 U.S.C. §7118(a)(7).

16. 5 U.S.C. §5596(b)(1)(A)(i).