Fixing Federal Labor Relations

Getting a Handle on A Program that Impedes Government Efficiency and Effectiveness

White Paper

By Bob Gilson
FedSmith.com

bob.gilson@fedsmith.com

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Section 1

Executive Summary

Federal labor relations suffers from at least 10 major problems from a perspective of good government. Each is listed below and possible solutions follow. For more detail on problems and solutions, see Sections 3 and 4 of this paper.

Problems

1. The operating funds of federal employee unions, other than official time use, are entirely subsidized by taxpayer funds. This data is not collected but could easily be millions of dollars.
2. In addition to No. 1. above, no one in government has a handle on how much "official time" Federal employees get to perform union activity. OPM estimates $130,000,000.00. The real figure is probably twice that or more.
3. In the development of its case law, the Federal Labor Relations Authority and its General Counsel have impermissibly sought to limit management rights and expand the scope of bargaining beyond the limits of the law.
4. FLRA interpretation of the statute has virtually frozen any Agency initiative with which the unions disagree, because:
    - The current statutory language allows a union to hold up any Agency initiated change for an indefinite period while it uses time consuming legalistic procedures to create leverage.
    - The Federal Service Impasses Panel (FSIP) has a policy that an Agency wishing to change a collective bargaining agreement provision or any matter affecting a working condition must prove to a high standard its need to do so.
5. Because statutory language is perceived as ambiguous, the FLRA's decisions swing like a pendulum from administration to administration leaving only the courts to develop a consistent approach which they have no mandate to do.
6. A Federal employee union's bargaining power is entirely based on the enforcement authority of the (FLRA), the Federal Service Impasses Panel and FLRA's General Counsel not on membership or other factor.
7. Federal employee union membership is frequently less than 20 % or even 10% of employees represented while under the labor law their rights are identical to units with 90% or more members.
8. Many, if not all federal Agency representatives believe the FLRA's General Counsel has become a union advocate.
9. Since the legal limits of bargaining have been reached, union-friendly administrations like the current one use Executive Orders to insert unions into line management decision making processes creating further delays in decision making and encouraging inertia within agencies.

10. No central management office for labor relations exists to coordinate Agency labor relations decisions.

Solution Options

1. Eliminate the bargaining obligation of an Agency to fund the day to day operations of a federal labor union including such things as free office space, furniture, phones, computers and internet access and the like.
2. Limit the amount of "official time" any employee union representative can spend on union duties and require that at least 75% of their work day must be spent performing official duties. Require the union to pay for the training of its representatives and any travel costs incurred in such an effort.
3. Encourage innovation by eliminating 5 USC 7106(b) and prohibiting an agency from bargaining a matter which directly effects its exercise of a management right.
4. Create a "you want a union, you pay for it" system by requiring new elections in which 51% of employees in a bargaining unit must vote to continue union representation and under such recognition, each employee must pay a fee to cover union costs.
5. Require bargaining units to recertify every 10 years. In such elections, 51% of employees in the unit should have to vote to continue union recognition.
6. Eliminate the FLRA General Counsel and require unions to charge Agencies with unfair labor practices in an adversary proceeding before an Administrative Law Judge. Each party becoming responsible for its own representation.
7. Eliminate the Federal Labor Relations Authority and transfer any functions to a career staffed office another Federal Agency. Include in its mandate the encouragement of good government and Agency innovation.
8. Transfer the function of the Federal Service Impasses Panel to a career staffed office within another Federal Agency. Include in its mandate the encouragement of good government and Agency innovation.
9. Establish a central office of labor relations within the Office of Management and Budget or Department of Justice.

Section 2

Introduction

The Current Federal labor relations program was made effective in January of 1979 with the passage of Public Law 95-464 (short titled "Civil Service Reform Act of 1978"). This Act replaced an Executive Order scheme established by Richard Nixon and subsequently modified by Gerald Ford. The Carter "civil service reform" "was passed amid much publicity as one of the major domestic accomplishments of the Carter administration".

In addition to providing unions collective bargaining under law, the act created the current performance appraisal system, a Merit Systems Protection Board (MSPB) to make easier the removal of problem employees and poor performers, the Senior Executive Service (SES) and a now defunct merit pay system. Looking back, none of these programs performed as anticipated. Perhaps the most lauded at the time were the Senior Executive Service and a new performance appraisal system. Since 1979, it has become clear that the goal of executive mobility touted by the creation of SES never materialized; the performance system is a generally recognized failure; the MSPB became the antithesis of Congressional intent by creating a system so legalistic that most Federal managers would rather retain problem employees and poor performers than attempt to use a convoluted process which has become the sole realm of lawyers.

The 1979 labor relations provisions created:

- A three member Federal Labor Relations Authority, two of which are chosen from the current administration's political party and serve a term of office. (5 USC 7104 & 7105)
    - This FLRA primarily:
        - Hears appeals from the decisions of Administrative Law Judges on unfair labor practice cases.
        - Rules on the negotiability of union proposals.
        - Rules on appeals of decisions of arbitrators in grievance cases.
        - Makes determinations on bargaining unit issues such as whether a proposed unit (prior to an election) is appropriate as requested and what positions may or may not be included
- A "public prosecutor" in the form of the FLRA's General Counsel whose virtual sole purpose is to pursue allegations (7,000-9,000) per year made by unions and employees against Agencies. This position serves at the pleasure of the current president. (5 USC 7104(f))
- A "Management Rights" provision, a "permissive rights" provision and sections requiring Agencies to bargain within their management rights those "procedures which management officials will observe in exercising any authority in this

section" and requiring negotiation over "appropriate arrangements for employees adversely affected by the exercise of any authority under this section". (5 USC 7106(a) & (b).

- A section requiring notice to the union and a right to attend in situations similar to "Weingarten" meetings in the private sector and mandatory notice of any "formal discussion" between Agency managers and bargaining unit employees. (5 USC 7114(a)
- Binding arbitration of virtually a workplace decisions affecting bargaining unit employees (5 USC 7121)
- A Federal Service Impasses Panel which resolves bargaining impasses through a system similar to "interest arbitration" in other sectors. (5 USC 7119)
- "Official time" for federal employees otherwise in a duty status to participate in negotiations; attend FLRA (including unfair labor practice and other hearings) and Impasse Panel proceedings; and virtually unlimited amounts for employee representation, lobbying congress, trying cases before arbitrators, MSPB or the Equal Employment Opportunity Commission. (% USC 7131)

Since the passage of the law, various FLRA, arbitration and Impasse Panel decisions have substantially expanded the scope of the statute as is addressed below.

Below, the author will suggest that a number of problems have surfaced over the life of the labor relations provisions of the "Civil Service Reform Act of 1978". Some were created by the language of the law and others by the manipulation of that language by those charged with carrying out its mandate of safeguarding the public interest; contributing to the effective conduct of public business; facilitating and encouraging amicable settlement of disputes; and creating the highest standards of employee performance and the continued development of modern and progressive work practices. The foregoing is from the findings and purpose of the labor relations provisions as stated in 5 USC Section 7101. The author maintains that the law has failed miserably with regard to this mandate.

The author of this paper was employed as a career employee of the U.S. Civil Service Commission (CSC) working in labor relations at the time leading up to the passage of PL- 95-454. This law replaced the CSC with the U.S. Office of Personnel Management. It was widely known within CSC at the time that the Agency had entered into talks with the AFL-CIO which agreed to support a law reforming performance appraisal and creating Merit Pay and a Senior Executive Service only if provisions were included creating a statutory based labor relations scheme for Federal unions. Based on the history of the last 30 or so years, most would agree that AFL-CIO got the best of the deal.

Section 3

Problems in Federal Labor Relations

1. The operating funds of federal employee unions, other than official time use, are entirely subsidized by taxpayer funds. This data is not collected but could easily be millions of dollars.

   In 1978, no one could have envisioned a situation such as exists today. Much talk was evident then about the need to level the playing field in Federal labor relations. Unions, at that time, had no statute and large consolidated bargaining units were few and far between. The Federal Labor Relations Authority (FLRA) when it came into existence established a policy of bigger is better concerning bargaining units and encouraged consolidations at the national level. As this occurred, Federal unions sought to get for their local representatives consistent office space, facilities and services. This resulted in Agencies such as the Department of Veterans Affairs finding itself bargaining at the national level on such issues. Over time, as the number of concessions an Agency could make within the law diminished and if political leadership was union-friendly, DVA found itself with literally hundreds of union offices around the country for which the national union demanded furniture, computers, printers, conference space, and the like. Once given at a bargaining table, the Federal Service Impasses Panel (FSIP) wouldn't even consider a rollback. After all, it was Agency money not theirs and why upset the union? Throughout the 2,000 or so Federal bargaining units, it is likely that there are 5,000-10,000 sites in which unions have an office and equipment. If the cost of space, equipment, consumables, maintenance and cleaning is figured annually for each site, even a conservative estimate would place such costs at $250,000,000.00 per year. It is interesting to note that there are no proposals before the Congress to lower these costs in light of debt reduction needs.

2. In addition to No. 1. above, no one in government has a handle on how much "official time" Federal employees get to perform union activity. OPM estimates $130,000,000.00. The real figure is probably twice that or more.

   FLRA lists 177 cases involving official time and FSIP 148 cases on the issue. OPM admitted at the House hearings on official time that its estimate of union use of time was just that since Agencies are not required to report it. Virtually every purpose a union might consider except internal union business has been found

negotiable under the statute. Literally hundreds, perhaps thousands of Federal employees are on 100% official time, never performing any government work. I was once informed that there were in excess of 400 full time union representatives among air traffic controllers. If true, that cost is about $60,000,000.00 at that Agency alone. I know of one DVA medical center with four full time representatives. There are over 150 DVA medical centers. The truth is that no one knows the scope of union use of official time.

3. In the development of its case law, the Federal Labor Relations Authority and its General Counsel have sought to limit management rights and expand the scope of bargaining beyond the limits of the law.

   There are far too many examples of this to cite here so perhaps it is easiest to look at only a few. First, look at how the FLRA and General Counsel deal with EEO matters. Federal employees enjoy a separate EEO complaint procedure from the contractual grievance procedure under an entirely different law. Despite this, FLRA and its General Counsel have expanded the labor law to give unions a role in every stage of the EEO complaint process.
   Recently, the U.S. Circuit Court of Appeals for the D.C. Circuit reversed the FLRA because it interpreted an Agency statute in the union's favor instead of deferring to the Agency's reading of its own law. FLRA frequently has arrogated to itself the interpretation of laws other than its own. It was reversed by the Supreme Court twice, once for its interpretation of the Privacy Act and again for its failure to sustain a management right to contract out.

4. FLRA interpretation of the statute has virtually frozen any Agency initiative with which the unions disagree, because:
   a. The current statutory language allows a union to hold up any Agency initiated change for an indefinite period while it uses time consuming legalistic procedures to create leverage.
   b. The Federal Service Impasses Panel (FSIP) has a policy that an Agency wishing to change a collective bargaining agreement provision or any matter affecting a working condition must prove to a high standard its need to do so.

   The statute, at 5 USC 7106(b) (2) & (3), requires agencies to bargain procedures under which its rights will be implemented as well as "appropriate arrangements for employees adversely affected by the exercise of any authority" regarding management rights. Over the last thirty years, litigation resulting from unfair labor practice allegations has produced a system of perpetual negotiation at Federal Agencies represented by a union. A common example is a simple space move which can be held up for a year or more by any union proposal even if that proposal only addresses the location of a single phone line. In one case the FLRA found that reassigning parking spaces was mandatorily negotiable despite the

fact that "plenty" of other free spaces were available in the same garage. In another, FLRA decided that moving a water cooler obliged an Agency to engage in bargaining. In yet another, FLRA found that only one employee need be affected to require full scale bargaining. Bargaining such as this may also prompt a proposal by the union to establish ground rules under an independent bargaining obligation and finish those negotiations before the Agency can go on to bargain the original change it wanted to accomplish. It is critical to understand that the union can force an Agency to bargain such matters and go through mediation and an appearance before the Federal service Impasses Panel to finally be able to go forward. This process often takes years to complete. Failure by an Agency to bargain subjects it to an unfair labor practice allegation prosecuted by FLRA's General Counsel. This system often results in managers deciding that changes aren't worth the pain and time it takes to accomplish them.

It is axiomatic that employees resist change. Federal sector unions have capitalized on this to champion the status quo at Agencies. They are aided in this by the Federal Service Impasses Panel which sets a high bar for those Agencies seeking to change working conditions. This Panel, given a choice, will usually opt for using the language of a prior agreement unless the Agency is able to demonstrate its need overwhelmingly. The Panel also, along these lines, maintains that the language of other labor agreements with other Agencies establishes a compelling argument against change. This Panel composed of up to seven part-time political appointees often has as members arbitrators whose livelihood depends on their selection by the parties in cases other than those involving an impasse. Good government, efficiency or initiative are not considerations of the Panel but rather the maintenance of the status quo is a primary concern.

5. Because statutory language is perceived as ambiguous, the FLRA's decisions swing like a pendulum from administration to administration leaving only the courts to develop a consistent approach which they have no mandate to do and are generally loath to do so.

   Federal courts, primarily the D.C. Circuit court of Appeals hears union and Agency appeals from FLRA decisions. The circuit court has a policy of deferral to the FLRA's interpretation of the labor law. The court only sets aside decisions if it finds FLRA has misinterpreted a statute other than its own or finds that the interpretation of the federal labor law in a particular case is irrational. In a July 2011 decision the court found:

   > *"The analytical approach applied by the Authority … completely fails to take account of the fundamental distinction between the exercise of the right to bargain and the waiver of that right, a distinction which the Authority itself recognized in IRS II.* ***Because this failure is unexplained--and, indeed, inexplicable--the Authority's decisions cannot be sustained****."*

In addition to constituting an unexplained departure from the sensible analytical method adopted in IRS II, ***the "waiver" approach applied by the Authority in the cases at bar produces perverse and illogical results that cannot be squared with the policies of the FSLMRS****. This circumstance provides a second ground upon which the Authority's decisions must be reversed."* (My Emphasis)

Most readers would say that a Federal Agency around for thirty years should not get language like this from a court before which it regularly appears unless it has chosen to disregard the statute for other reasons.

6. A Federal employee union's bargaining power is entirely based on the enforcement authority of the (FLRA), the Federal Service Impasses Panel and FLRA's General Counsel not based on membership or other factor.

   In the private sector, a union's bargaining power arises from its membership and the ability to speak for the productivity of the workforce. That power goes to the company's ability to make a profit and smart union leaders are acutely aware of that. In the Federal sector, there is no profit motive with which to gain bargaining leverage. Federal labor relations Agencies such as FLRA, FSIP and the General Counsel are the leverage unions use to get what they want. If the Agency doesn't play along, it faces extensive litigation. It's interesting to note that the FLRA has decided more cases in 30 years than the National Labor Relations Board has in 75 with an organized workforce less than a tenth the size of the private sector unionized workforce.

7. Federal employee union membership is frequently less than 20 % or even 10% of employees represented while under the labor law their rights are identical to units with 90% or more members.

   The Federal government has an open shop. This means an employee is free to join or not join a union. According to the Labor Department, 26.8% of Federal employees are union members. That's about a third or 33.2% of those eligible to be members. Generally, the Agencies with the hardest missions have the highest membership numbers. Once a union gets recognition through an election, it is virtually impossible to unseat. If 30% of employees in a prospective unit want a union, they get an election and only a majority of the voters will gain the union recognition. In the recent Transportation Security Administration election, for example, two unions vied for recognition. 39% of the workforce voted and the winning union got 20.2% of the workforce's votes and recognition despite the fact that 61% of employees didn't vote at all.

8. Many, if not all, Agency representatives believe the FLRA's General Counsel has become a union advocate.

5,000 to 7,000 unfair labor practice allegations are filed each year and all but about 100 are withdrawn, dismissed or settled. Almost all are filed by employees but mostly unions against Agencies (over 99%). The rest are filed by employees against unions(less than 1%). Federal Agencies have never opted to use this system. As a result, the General Counsel's client is almost always a union. During the Clinton years, the General Counsel admitted to having a confidential litigation strategy which could not be targeted except at Agency management. The current General Counsel is formerly a general counsel for a Federal sector labor union and was instrumental in the efforts to prevent the Bush initiatives in Defense and Homeland security involving improvements in performance management and rationalizing the labor relations program in those Agencies.

9. Since the legal limits of bargaining have been reached, union-friendly administrations, like the current one, use Executive Orders to insert unions into line management decision making processes creating further delays in decision making and encouraging inertia within agencies.

   Since pay and fringe benefits including health care, retirement, leave and life insurance are off the table because they are governed by other statutes, the unions have very little to bargain about. Child care, alternate and compressed work schedules, flextime and telework were the principal concerns at bargaining over the last 30 years. These programs exist under virtually every Federal labor agreement. The unions then spent their efforts on union institutional benefits such as official time and Agency provided facilities and services. It is hard to find a contract in which the union's institutional benefits are less than extensive (see above). This has left a situation in which the FLRA has trouble finding something to give unions they don't already have.

   The Clinton and Obama Administrations rolled out collaborative labor management executive orders (Clinton EO 12871; Obama EO 13522) basically require Agencies at every level having a union representative to involve those representatives in what is called "Pre-decisional" involvement. This involvement is not limited to working conditions but includes "**all workplace matters to the fullest extent practicable**, **without regard to whether those matters are negotiable subjects of bargaining under 5 U.S.C. 7106".** As a result, Agency Heads whether political or career are required to involve Federal unions in their decision making process.

   In January of 2011, the director of the Office of Personnel Management and the Deputy Director of the Office of Management and Budget issued a memorandum reminding Agencies of the Order's requirements including:

   "During the period when Congress is considering the President's Budget proposal, pre-decisional involvement can take the form of employee representatives providing input to management on possible ways of implementing the President's proposals. Additionally, when the agency's appropriations have been enacted

into law, employee representatives may provide input to management on the use of budgetary resources to carry out its mission."
At the October 6, 2010 meeting of President Obama's National Council on Federal Labor Management Relations, John Gage, National President of AFGE, is quoted as saying "We want pre-decisional involvement on all issues." The unions have clearly said that all issues mean everything an Agency does.

10. No central management office for labor relations exists to coordinate Agency labor relations decisions.

    A substantial issue under the current scheme is that no Agency coordination body exists. This results in some cases with less sophisticated Agencies taking cases forward resulting in a government precedent set by FLRA or the FSIP. An interagency board

Section 4

Solution Options

1. Eliminate the bargaining obligation of an Agency to fund the day to day operations of a federal labor union including such things as free office space, furniture, phones, computers and internet access and the like.. Let the union pay for such things from employee dues.
2. Limit the amount of "official time" any employee union representative can spend on union duties and require that at least 75% of their work day must be spent performing official duties. Require the union to pay for the training of its representatives and any travel costs incurred in such an effort. Limit the number of union representatives to a ratio per unit employees such as one to one hundred. Require the union to use the lowest cost representative when considering travel costs and related expenses or show cause why that person cannot be used.
3. Encourage innovation by eliminating 5 USC 7106(b) and prohibiting an agency from bargaining a matter which directly effects its exercise of a management right. Allow a union to make working condition proposals but provide that the negotiation of such proposals may not delay the exercise of a matter involving a management right.
4. Create a "you want a union, you pay for it" system by requiring new elections in which 51% of employees in a bargaining unit must vote to continue union representation and under such recognition, each employee must pay a fee to cover union costs.
5. Require bargaining units to recertify every 10 years. 51% of employees in the unit should have to vote by 51% to continue union recognition.
6. Eliminate the FLRA General Counsel and require unions to charge Agencies with unfair labor practices in an adversary proceeding before an Administrative Law Judge. Each party becoming responsible for its own representation.
7. Eliminate the Federal Labor Relations Authority and transfer any functions to a career staffed office within anther Federal Agency. Include in its mandate the encouragement of good government and Agency innovation.
8. Transfer the function of the Federal Service Impasses Panel to a career staffed office within another Federal Agency. Include in its mandate the encouragement of good government and Agency innovation.
9. Establish a central office of labor relations within the Office of Management and Budget or Department of Justice. One purpose of the office is to coordinate Agency labor relations cases and impasses to minimize the pursuit of cases producing an adverse government-wide effect. Another purpose is to develop program data with which to inform the President and Congress of the state of Federal labor relations.

Section 5

Closing

In 1935, President Franklin D. Roosevelt rejected an option offered him by Senator Wagner, the author of the prospective National Labor Relations Act (NLRA), to include Federal employees under that law. President Roosevelt said in 1937 "Meticulous attention should be paid to the special relations and obligations of public servants to the public itself and to the Government....The process of collective bargaining, as usually understood, cannot be transplanted into the public service."

In 1978, what Roosevelt feared happened. A law similar to the NLRA which was intended to cover a blue color industrial workforce was applied to a largely white collar Federal workforce. PL 95-454, the Civil Service Reform Act of 1978 has been a failure in all regards but more seriously in labor relations. Interpretations of the law have resulted in a more politicized workforce than at any time since the Pendleton Act abolished the spoils system in the 1880s. This Act has also seriously impaired initiative and the making of needed change in unionized Agencies. It is time to revisit Federal labor relations with a statute that encourages good government and puts the taxpayer first.

Section 6

About the Author

Robert (Bob) J. Gilson began his Federal career with the U.S. Civil Service Commission. He has held labor and employee relations, managerial and Agency advocacy positions with OPM, Navy, Army, Treasury and the National Transportation Safety Board. He has served as chief negotiator on numerous labor agreements in the U.S. and abroad. He represented his employing agencies before the FLRA, FSIP, MSPB, EEOC and arbitrators. He was the recipient of numerous awards and commendations for his work. Bob had principal responsibility for developing adverse action cases involving conduct and performance of employees at all levels including Senior Executives. He has trained literally thousands of Federal negotiators, supervisors and managers and has been doing so for over 35 years. Bob estimates he has taught in excess of 150 sessions of two or more days of Federal Sector negotiations on-site training for Agency teams.

Bob retired from Federal service in 2001 and is currently a senior associate with a national firm. Since retiring, he has bargained for Federal Agencies as well as providing training and technical assistance.

Bob is the author or coauthor of nine books for Federal managers including *The ABCs of Federal Labor Relations Law* (LRP Publications). He writes for FedSmith.com, a web-based news site devoted to Federal issues. Agency practitioners are constrained from voicing their views for a number of generally good reasons. Since Bob no longer suffers under such constraints, his writings often provoke negative comments about them and him from Federal unions, the Federal Labor Relations Authority and the Federal Service Impasses Panel. He believes that these organizations may profit from a public airing of their activities and tries to insure they get exactly that. To see some of his current writings, visit www.fedsmith.com