

When Unions Negotiate With Governments What Should the Public Know, When Should They Know It?

By Michael Reitz

Summary: Ever wonder what determines the outcome of multi-year billion dollar employee contracts negotiated between labor unions and state government agencies? Here's what happened when one group filed a public records request to find out.

Billions of dollars are at stake each year when government officials and union representatives sit down at the negotiating table. But do members, lawmakers or the public know what happens behind closed doors? The details of one lawsuit in Washington State shed some light on the process.

Every two years, tens of thousands of state agency and higher education employees in Washington State bargain collectively with the governor's offices for wages, benefits and workplace rules. As in most states, these union negotiations are done behind closed doors, often with



An attempt in the Washington State Legislature to bypass a court ruling that opens union negotiations to public scrutiny failed last year.

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gag rules in place, and the public is given no information about the contracts until union members ratify the agreements.

At that time, the contracts are forwarded to the state legislature for an up-or-down vote on the funding of the contract. The legislature is given no authority to change the details of the agreement or make adjustments based on revenue projections or budget battles, even though these personnel costs comprise the largest single category in the state's budget.

Curious to see what issues arose during negotiations for the 2007-09 biennium, labor analysts at the Evergreen Freedom Foundation (EFF), a free-market policy or-

ganization in Olympia, filed a public records request with the state Office of Financial Management. Specifically, we asked for proposals, counterproposals and the state's bargaining notes related to the union agreements—agreements that cost \$1.6 billion. We wanted to review these documents to determine the key issues in negotiations and evaluate the offers and concessions made on each side.

Unions Fight Disclosure

The Office of Financial Management was prepared to deliver the requested documents, but a coalition of 10 unions including the Service Employees Interna-

tional Union, the Washington State Nurses Association and the Washington Public Employees Association filed suit against the state to prevent disclosure in February 2007. "The information sought is of no legitimate concern to the public and not in the public interest," stated union attorneys.

The unions alleged all manner of apocalyptic doom if negotiation records were to see the light of day: "The release of the proposals and negotiation notes will politicize the bargaining process, impede the free exchange of views, opinions and proposals, and disrupt the parties' ability to maintain the candid, open, long-term and constructive relationship necessary for future collective bargaining negotiations."

The lawsuit argued that release of these documents was a violation of employees' collective bargaining rights. "The release of the proposals and negotiation notes will undermine collective bargaining by inviting the public, the media and other non-parties into the negotiation process. Such disclosure will unduly delay and impede the unions' and the state's ability to effectively negotiate collective bargaining agreements."

Even more absurd were statements from union officials filed in support of the lawsuit. "If I knew that my comments would be available for public review, I would not be comfortable speaking until I had carefully thought through all my comments. I might decide not to speak at all," said T.J. Janssen, a home health care worker.

Editor: Patrick J. Reilly
Publisher: Terrence Scanlon
Address: 1513 16th Street, NW
Washington, DC 20036-1480
Phone: (202) 483-6900
Email: preilly@capitalresearch.org
Website: www.capitalresearch.org

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Jay Ubelhart, a deckhand with Washington State Ferries, was even more candid: "If I, in the heat of negotiations, stated I didn't give a damn about those complaining customers and it was written down by a member of the management team, the Evergreen Freedom Foundation or a media outlet would print it on the front page of any communications organ of their choosing."

intervene in the case as a co-defendant with the state.

Integrity of Bargaining Process

The plaintiff unions adamantly stated that public disclosure of the bargaining notes and proposals is contrary to the goals of the state's collective bargaining statutes. Citing the "fundamental" right to bargain collectively, the union argued

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The unions petitioned the court to permanently bar release of the bargaining records and declare the release an "unlawful interference" with employees' collective bargaining and Constitutional rights.

Under the state's Public Records Acts, third parties who would be affected by disclosure of a public document are permitted to ask a judge to seal or redact the document. The request for non-disclosure will be granted if the party can show some immediate harm as a result of disclosure. But rather than dealing with the straightforward provisions of the Public Records Act and its exceptions, the unions opposed EFF's records request with numerous broad-reaching arguments.

The unions' arguments roughly fell into three categories: They said it was essential to seal the negotiation documents 1) to preserve the integrity of the bargaining process, 2) to protect the unions' constitutional rights to free speech and free association, and 3) to safeguard the negotiating parties' internal "deliberative process," which determined the positions they adopted.

The case, *SEIU 775 v. Office of Financial Management*, had the potential for such sweeping implications that the Evergreen Freedom Foundation decided to

that the state's bargaining law promotes a cooperative and harmonious relationship between public employers and their employees, and this relationship should not be threatened by outside review. In fact, the unions argued disclosure is not in the public interest.

The unions warned that disclosure would frustrate negotiations. As David Rolf, president of SEIU 775 said: "The release of unresolved proposals will invite media scrutiny regarding the parties' bargaining positions and proposals, and impede the unions' ability to negotiate effectively during future negotiations."

Real-time review of the bargaining process would result in grandstanding, said Leslie Liddle, executive director of the Washington Public Employees Association. "It is my belief that if the public were allowed to access the proposals and bargaining notes, that non-party entities might politicize the process and hinder the nature of bargaining."

Public disclosure would reduce the willingness of rank-and-file members to participate in the bargaining process, said the unions. Several union members indicated their reluctance to volunteer if their comments were open. Without this rank-and-file input, the unions argued, it would be more difficult to bargain responsively. As bargaining member Jay Ubelhart said, "Par-

icipation would come to an end if participants thought everything they said would appear in the newspaper. As public employees in the ferry system we are in the public eye and have close daily contact with customers thousands of times each day. ... Who in public service has not heard, 'I pay your salary,' from a member of the public who is dissatisfied with the service or the job performed by the public employee?"

To Speak But Not be Heard

The plaintiff unions also argued that disclosure of negotiation records would violate the free speech and free association rights of union members under the U.S. Constitution and the Washington Constitution. The bargaining process, they argued, consists of "pure speech, both written and verbal," intended for persuading the state to take a particular course of action. Their speech in the bargaining context addresses fundamental issues of workplace dignity and rights. Furthermore, the negotiation process fell within the union's constitutional right to petition for redress of grievances. These expressions, they argued, are "protected" under the First Amendment.

The unions cited NLRB cases to argue that anything that stultifies or reduces the spontaneity of bargaining should be discouraged. Disclosure of negotiation documents would be especially harsh on individual bargaining members. These individuals make great personal sacrifices to serve on the negotiating team, said the unions, and often face "abuse and opprobrium" from immediate supervisors and members of the public.

Disclosure of negotiation documents would impose a chilling effect on the speech of bargaining members, explained WPEA negotiator Kent Stanford. "I was frequently required to express my views forcibly, occasionally very forcibly, because management adamantly opposed issues of the most importance to WPEA members. Should comments I made in the heat of negotiations be available for review by the public, I would hesitate to express myself so openly in future negotiations."

In other words, the potential that open

discussion could provoke public abuse and ridicule was sufficient to impair the union's rights to free expression and association. SEIU chief David Rolf was very direct: "We could not speak openly and honestly if we knew that anything we said could appear on the front page of the *Seattle Times*."

Interfering with Government?

The Evergreen Freedom Foundation had requested the documents at issue after union negotiations had concluded, but before the legislature and governor had

of recommendations, observations and opinions; and 4) that the materials covered by the exemption reflect the policy recommendations and opinions and not the raw factual data on which a decision is based.

The unions claimed that negotiation documents are part of the deliberative process, and that disclosure could jeopardize sensitive and confidential negotiations. The unions suggested that negotiation documents could be released *only after* the possibility of amending the agreements had expired. In other words, records

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approved funding for the agreements. Relying on the (remote) possibility that a Democratic legislature and Democratic governor could refuse the necessary funding, the unions cited a specific exemption in Washington's Public Disclosure Law, which says:

Preliminary drafts, notes, recommendations and intra-agency memorandums in which opinions are expressed or policies formulated or recommended are exempt under this chapter, except that a specific record is not exempt when publicly cited by an agency in connection with any agency action.

According to court decisions, this "deliberative process" exemption is generally intended to protect the give and take of deliberations that are necessary to formulate agency policy. In order to invoke the exemption, the party arguing for non-disclosure must show that: 1) the records contain pre-decisional opinions or recommendations of subordinates expressed as part of a deliberative process; 2) disclosure would be injurious to the deliberative or consultative function of the process; 3) disclosure would inhibit the flow

were only disclosable after the agreements were signed by the governor, fully funded by the legislature and implemented by the various public agencies.

The unions also argued that only documents related to policies actually adopted could be disclosed. Each side offers many proposals during the bargaining process, many of which are not adopted. Non-implemented ideas shouldn't be vetted by public scrutiny, and were to be protected by a permanent seal, as disclosure could reveal the unions' future priorities and strategies. The unions failed to explain *how* public disclosure of these issues could harm future negotiations when state negotiators are obviously aware of all issues covered in the bargaining process.

EFF's Arguments

The grab bag of union arguments required a clear and direct response. Addressing the union's "bargaining integrity" and First Amendment claims, we pointed out that while the right of association encompasses public employee union membership, it does not obligate public employers to collectively bargain with employees. The First Amendment does not impose any affirmative obligation on the government to listen, to re-

spond or, in this context, to recognize the association and bargain with it. After all, collective bargaining rights for public employees are conferred by statute, not the Constitution. So if the right of “expressive association” cannot bring a public employer to the negotiating table, it certainly does not restrict the public’s subsequent review of negotiation sessions.

We pointed out that even if the records we sought were disclosed, the unions and their members would still retain every right to organize, to convince other employees to associate and to express particular viewpoints. The state cannot retaliate against their exercise of these rights. But there is no First Amendment right to collectively bargain in secrecy.

We also addressed the unions’ argument that their speech would be restricted if it were actually heard by members of the public. We pointed out that free speech assumes an audience, and there is no constitutional right of “secret free speech.” Furthermore, the fact that union members might be held accountable for their statements does not amount to a constitutional violation.

The unions devoted a large portion of their brief expounding on the high value Washington places on collective bargaining, but we argued that the state’s collective bargaining laws and open government laws never require negotiation sessions and records to be sealed. The legislature could have easily settled the issue by mandating close-door sessions, but this has never been the case in Washington.

Benefits of Open Bargaining

The Evergreen Freedom Foundation obtained several collective bargaining experts and rank-and-file members who testified that the open bargaining process is not harmed by public scrutiny and member review.

James Robinson, the Superintendent of Schools for the Lebanon Community School District in Lebanon, Oregon, discussed the advantage of conducting union deliberations in public:

Based upon years of bargaining in Oregon in both open and closed for-

mats, I have observed that open collective bargaining brings a clearer and more comprehensive understanding of the issues between the unions and a school district to the media and the general public. Closed sessions more frequently lead to the selective use of information that can be spun to the advantage of either side involved in the bargaining. The intensity of the negotiations and the complexity that the issues bring are much more easily understood when bargaining is open so that the process and debate are observable. The open session environment usually assures more accurate media coverage of the bargaining.

Undercutting one of the union’s key arguments, Mr. Robinson said, “I have not experienced nor witnessed any form of harassment nor intimidation that has resulted from the open process.”

Brad Hall, a board member of the Covington Village School district in Ohio, said that accessible records improve the bargaining process. “[R]elease of the notes and proposals after a tentative agreement has been reached serves as a form of checks and balances to assure both labor and management teams bargain in good faith. Open documents also ensure that the public has full disclosure with regard to how the parties reached an agreement and how taxpayers dollars are managed. Hiding documentation of this nature from the public would obstruct the integrity of the collective bargaining process, not aid it.”

Myron Lieberman, a former union negotiator with decades of experience, testified to the benefit of openness in bargaining. “I have no doubt whatsoever that publicizing initial and subsequent offers would inject a much-needed note of realism in public sector bargaining and be beneficial for both sides.”

Lieberman said that transparent negotiations would be less polarized than those conducted in secrecy. “I have seen that many union representatives who are chief negotiators for bargaining teams composed of rank and file union members have a stake in demonstrating their toughness

at the table. Management negotiators with a team of management staff often have the same incentive. This grandstanding tends to exacerbate real but difficult bargaining issues and renders a serious, down-to-earth approach to bargaining issues much more difficult.”

Several public employees represented by the unions seeking nondisclosure said they would prefer to have their bargaining representative work in a transparent fashion. “If open collective bargaining were to exist in Washington state in some form, including the release of the bargaining notes and proposals held by the state, citizens and taxpayers could see for themselves how their elected state officials are carrying out their responsibilities,” said Ed Madden, an apprenticeship consultant for the Department of Labor and Industries. “Employees who pay mandatory fees or dues to exclusive bargaining agents could also see the value of the services the bargaining representatives claim they provide.”

Deborah Johnson with the Department of Corrections agreed: “I believe that any organization or government entity which is honestly representing their constituents’ interests would welcome transparent negotiations.”

Other States

In addition to its public policy arguments, the Evergreen Freedom Foundation reviewed the practices of other states. If transparent union negotiations would tremendously impair the bargaining process, as the unions argued, then the experiences of other states would be instructive.

We found that many states require that government negotiations with unions be subjected to some level of public accountability, by either opening the bargaining sessions up to the public, or by releasing documentation after negotiations are complete.

- Alaska law requires that school districts give the public opportunities to comment on the issues to be addressed in collective bargaining before bargaining begins. In addition, initial proposals and last-best-offer proposals are public documents.

- Collective bargaining sessions in Florida are public under the state's open meetings law, although work product developed by the public employer before or during negotiations is not subject to disclosure. A Florida appeals court ruled that all phases of the bargaining process must be open to the public, even after an impasse.

- Labor negotiations in Idaho may be closed at the request of either side, but state law requires the parties to take minutes containing "sufficient detail to convey the general subject matter" of the meetings.

- Iowa exempts bargaining sessions from its open government laws, but requires both sides to present their "initial bargaining positions" at public meetings.

- Kansas law allows the government to discuss labor negotiations in private, but the negotiations, where both sides are present, are open under Kansas open meetings law.

- Minnesota public employee negotiation sessions, including mediation sessions and hearings, are open to the public. The law allows government negotiators to strategize in executive session, but these meetings must be recorded and made available after negotiations are complete.

- Collective bargaining sessions are open to the public in Montana. The Montana Supreme Court struck down a "collective bargaining strategy exception" to Montana's open meetings law, ruling that "[the school board's] duty to supervise and control its district is not necessarily thwarted by opening its collective bargaining strategy sessions."

- Ohio law allows the government to hold closed bargaining sessions. However, the state Supreme Court held that this law did not apply to the documents from the sessions, and that a draft agreement by the state was a public record.

- Oregon law requires labor negotia-

tions to be conducted in open meetings unless negotiators for both sides request that negotiations be closed.

- Tennessee law states that "labor negotiations between representatives of public employee unions or associations and representatives of a state or local governmental entity shall be open to the public."

- In Texas, labor discussions involving local governments are open to the public. Police and firefighters may use collective bargaining instead of meet and confer methods, depending on the local government, but in either case the negotiations are open. The meet and confer statutes also state that documents prepared by the state are public, but only after the agreement is ready to be ratified.

Several states give government entities some discretion to hold closed collective bargaining sessions, including Hawaii, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Dakota and Vermont.

Other states exempt bargaining sessions from the open meetings laws, including Connecticut, Indiana, Iowa, Kentucky, Nevada, New Hampshire, New Mexico, Washington and Wisconsin.

Legislature Tries to Intervene

While this litigation progressed, the unions also hedged their bets by prevailing upon state lawmakers to introduce a bill addressing EFF's records request during the 2007 legislative session. A bill was introduced that would have created a broad new exemption to the Public Records Act and would have exempted from disclosure the exact records at issue—records related to collective bargaining, labor negotiations or grievance or mediation—that would reveal strategies or positions taken by any employer or labor organization during the negotiation proceedings. Legislative staff referenced EFF's records request during a committee hearing, and the attorney representing the unions in *SEIU v. OFM* testified in support of the bill. This bill passed out of

committee, but died after several newspapers published criticisms.

Ultimately, King County Judge Christopher Washington ruled that collective bargaining documents are public records and are subject to disclosure under the state Public Disclosure Act. The documents, however, are available only after the legislature funds the contracts during the budget process. The ruling was a victory for open, transparent government, but Washington state still has room for improvement. Taxpayers could best be served by seeing negotiation details before final funding is approved.

Recommendations for Reform

In private negotiations, both essential parties are represented—the employer and employees. But in government union negotiations, taxpayers are usually left out of the process completely. Taxpayers ultimately fund the agreements negotiated, but they are given no information about the critical issues at stake, they are not apprised of negotiation developments, and they are not consulted when a final agreement is inked.

"Sunlight is the best disinfectant," and labor reform experts interested in opening government negotiations in their state have several options: bargaining sessions can be opened to public participation or review, negotiation documents and recordings can be made available after negotiations are finalized, and union contracts can be posted on a government website. The American Legislative Exchange Council has model legislation for many of these reforms.

Michael Reitz is general counsel of the Evergreen Freedom Foundation, a public policy organization in Olympia, Washington.

Please remember Capital Research Center in your will.

Labor Notes

Labor Department Seeks Expanded Union Transparency

Labor Secretary Elaine Chao has once again announced plans to expand the scope of unions' financial disclosure reports to the federal government, to ensure that union leaders are accountable to their members. A key reform is the request for details on top employees' benefits; currently unions only report salaries and wages. According to *The New York Sun*, AFL-CIO president John Sweeney, Treasurer Richard Trumka and Vice President Linda Chavez-Thompson received a total of \$180,000 in deferred compensation and benefits in 2006. That same year, Service Employees International Union President Andrew Stern received \$47,000 in benefits, and 27 Teamsters' leaders received \$560,000 in benefits and compensation not reported on union disclosure forms. The new rules also require unions to report details about the purchase and sale of fixed assets to ensure market-rate transactions.

Unions Support Democratic Presidential Candidates

Last month the AFL-CIO held a press conference to announce its \$53 million "McCain Revealed" campaign to portray McCain as "anti-worker" and attack his support for President George W. Bush's economic policies. Unions already have spent at least \$7.3 million in independent expenditures on behalf of Senators Hillary Clinton and Barack Obama, the latter receiving \$3 million from the Service Employees International Union (SEIU) alone, according to Cox News Service. The SEIU has pledged \$150 million to support Obama in the general election.

AFL-CIO Mobilizes Against McCain Health Care Proposal

On May 17, the AFL-CIO engaged in a massive national effort to canvass 200,000 union households in opposition to Sen. John McCain's plan for strengthening health care. The labor federation's critique is based on complaints from the Campaign for America's Future, which is best known for coordinating efforts of labor unions and leftist advocacy groups to oppose the privatization of Social Security. "John McCain wants us all to buy insurance not as part of a group—like an employee group or a co-op—that can negotiate for better coverage at lower premiums, but as individuals, at the mercy of the private insurance companies," Campaign co-director Roger Hickey complained.

Federations Reunite to Oppose Colombian Trade Deal

In a rare show of solidarity, the AFL-CIO and the breakaway Change to Win Federation of labor unions joined with Colombian labor leaders on Capitol Hill last month to lobby against the Colombian Free Trade Agreement negotiated by the Bush administration. Sen. Sherrod Brown (D-OH) and Rep. Michael Michaud (D-ME) pledged to fight the trade deal, agreeing with complaints about violence against union members and favoritism to companies like Brinks, Chiquita and Coca-Cola which want greater access to the U.S. and Colombian markets. "The Colombia FTA will only provide more fuel to the multinational companies that invest in Colombia and the government who thrives on the repression of workers," said Luis Alfonso Velasquez Rico, National Executive Committee Member of the Unitary Workers Center.

Teamsters Stand in Way of Detention Center Reform

It's a classic case of union vs. progress: Earl Dunlap was hired to resolve complaints of unsanitary conditions, poor security and employee absenteeism at the Cook County Juvenile Temporary Detention Center near Chicago. Last month U.S. District Judge John Nordberg—fed up with obstacles placed in Dunlap's way by the Teamsters union—gave Dunlap authority to bypass union work rules and immediately hire 175 new employees. Dunlap continues to seek union cooperation, urging the union to establish a work group to help move employees from the night shift to the day shift. "I have no desire to jam this order down the union's throat," he told the *Chicago Tribune*. The Teamsters will have none of it and pledge to appeal Nordberg's ruling. "Teamsters, forget the legal action and work with Dunlap," pled the *Tribune's* editors in a May 14 editorial. "The alternative is to be the last obstructionists in the path of repairing the juvenile center—and the first place everyone looks if a teenager there gets hurt."