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Life After Act 10?: Is There a Future for Collective Representation of Wisconsin Public Employees?

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LIFE AFTER ACT 10?: IS THERE A FUTURE FOR COLLECTIVE REPRESENTATION OF WISCONSIN PUBLIC EMPLOYEES?

MARTIN H. MALIN*

In 2011, Wisconsin largely gutted the collective bargaining rights of most public employees in the state. Wisconsin Act 10 largely replaced collective employee voice with unilateral employer control over employees' wages, hours, and terms and conditions of employment. This article addresses the future of collective employee representation in Wisconsin in the wake of Act 10. It urges employers to continue to engage with their employees through the employees' unions, demonstrating why such an approach better provides for the public interest than unilateral employer control. It looks to examples from other

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AUTHOR'S NOTE: As this issue of the *Marquette Law Review* was in press, the U.S. Court of Appeals for the Seventh Circuit affirmed the decision in *Wisconsin Education Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012), *aff'd in part, rev'd in part*, Nos. 12-1854, 12-2011 & 12-2058 (7th Cir. Jan. 18, 2013), which held that the disparate scope of bargaining for general and public safety employees was constitutional. It reversed, however, the district court's holding that the disparate treatment concerning recertification elections and dues check-off was unconstitutional. With respect to dues check-off, the court divided two-to-one. The majority did not dispute the facts as found by the district court, but held that as a matter of law the facts did not establish unconstitutional viewpoint discrimination. The majority noted, for example, that the category of public safety employees included municipal police and firefighter bargaining units represented by unions that had endorsed Governor Walker's opponent, *Wisconsin Education Ass'n Council*, Nos. 12-1854, 12-2011 & 12-2058, slip op. at 22, discounted a statement by Senate Majority Leader Fitzgerald that, if enacted, the bill would deny funds to President Obama's reelection campaign as not necessarily reflective of the intentions of the legislature as a whole, *id.*, slip op. at 25, and characterized dues check-off as a governmental subsidy of speech, opining that governments may discriminate when they subsidize speech, *id.*, slip op. at 10–13. The Seventh Circuit's decision makes the suggestion in this Article, that employers allow employees to perform representation functions on official time, even more important.

jurisdictions and presents a range of alternatives for Wisconsin public employers and unions to provide for meaningful employee voice.

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I. INTRODUCTION

Republican victories in the 2010 elections led to a dramatic upheaval in the law governing public employee collective bargaining in numerous states.¹ Nowhere was this upheaval more dramatic than in Wisconsin, where Act 10 eliminated most collective bargaining rights for most Wisconsin public employees, eliminated all collective bargaining rights for some Wisconsin public employees, and left a small group of public employees largely untouched. The change in the law was particularly poignant because Wisconsin was the first state in the country to enact a comprehensive public employee collective bargaining statute.²

Act 10 greatly increased public employers' power in dealing with their workforces. One might expect that public officials would uniformly welcome such enhanced power. This was not the case. During the debates over Act 10, numerous public officials opposed its enactment.³ As these public officials undoubtedly recognized, positive involvement by workers through a union designated or selected by a majority of the workforce adds value to the public enterprise.⁴ Worker voice and the positive contributions workers make to effective public service need not be a casualty of Act 10.

Accordingly, this Article's focus is on what avenues for collective representation of public employees in Wisconsin remain after Act 10. Although Wisconsin public employers now have the legal ability to exercise unilateral control over the terms and conditions of employment for most of their employees, this Article urges that they continue to engage with their workers through their workers' representatives and looks to other jurisdictions to provide examples of how such engagement might occur. Part II provides background to Act 10 and reviews the statute and its impact on public employee collective bargaining. Part III details why we should be concerned with the survival of public employee collective representation after Act 10. It contrasts unilateral managerial imposition, which breeds hostility and resistance, with worker involvement, which leads to creative problem

1. See generally Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. & EMP. L. 149 (2012) (discussing changes in public employee collective bargaining statutes in more than twelve states following the 2010 elections).

2. See JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962, at 158, 183–84 (2004).

3. See *infra* notes 65–66 and accompanying text.

4. See *infra* Part III.

solving and increased productivity. Part IV provides options for collective representation of public employees in light of the restrictions imposed by Act 10. Looking to the experience in other jurisdictions, particularly Tennessee where the law is clear that public employers lack authority to bargain collectively in the absence of state statutory authorization, Part IV discusses the following options: bargaining in spite of the legal prohibition, bargaining with unions with the resulting agreements only covering union members, bargaining with unions over frameworks that will facilitate union representation of their members, meet and confer sessions with unions representing the employer's workers and collaborative conferencing. Part IV also discusses union financial viability in the current hostile legal environment in Wisconsin. Part V concludes by suggesting that there may be a silver lining in Act 10's gray cloud. Freed from the constraints of the pre-Act 10 legal structure, public employers and the unions that represent their employees can create their own structures for providing worker voice in ways that add value to the public enterprise.

II. ACT 10: BACKGROUND AND OVERVIEW

A. *Background to Act 10*

The developments leading up to the enactment of Act 10 and the fallout from its enactment were particularly dramatic. On February 15, 2011, a "budget repair bill" that was the forerunner of Act 10 was introduced by the Assembly's Committee on Assembly Organization at the request of newly-elected-Wisconsin Governor Scott Walker.⁵ The proposed radical change to Wisconsin public sector collective bargaining law led to demonstrations of a magnitude not seen in Madison since the Vietnam War.⁶ Because the bill involved fiscal matters, a quorum of 60% of the State Senate was needed to take action.⁷ Taking advantage of this requirement, every Democratic senator left the state to deny the Republican majority the quorum.⁸ In response to the Democrats leaving the state and blocking the quorum, Republicans then stripped all fiscal

5. See *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 21, 334 Wis. 2d 70, 798 N.W.2d 436 (Prosser, J., concurring).

6. See Bill Glauber & Don Walker, *Protesters Deriding Bill Again Fill Capitol Square*, MILWAUKEE J. SENTINEL, Feb. 27, 2011, at B1, available at 2011 WLNR 3854294.

7. *Fitzgerald*, 2011 WI 43, ¶ 21, 334 Wis. 2d 70, 798 N.W.2d 436; see WIS. CONST. art. VIII, § 8.

8. *Fitzgerald*, 2011 WI 43, ¶ 26, 334 Wis. 2d 70, 798 N.W.2d 436.

provisions which required the super-majority quorum from the measure.⁹ On March 9, 2011, with the Democrats still absent, the Republicans called for a conference committee meeting at 6:00 p.m.¹⁰ At that meeting, they adopted the stripped-down bill as an unamendable conference committee report.¹¹ The State Senate passed the revised bill that same day and the Assembly adopted it the following day.¹² On March 11, 2011, Governor Walker signed Act 10.¹³

The signing of Act 10 did not end the drama. The Dane County District Attorney sued contending that the Legislature violated the Wisconsin open meetings law by not giving at least 24 hours' notice of the conference committee meeting, and the Dane County Circuit Court agreed and enjoined publication of the act.¹⁴ However, the Wisconsin Supreme Court, by a party-line four-to-three vote, granted the state's petition for supervisory/original jurisdiction, held that the circuit court violated the State Constitution by enjoining the legislature, and held that the legislature's interpretation of the open meetings law as applied to the legislature's own actions was not subject to judicial review.¹⁵ The court, thus, vacated the injunction, held that the legislature had not violated the open access law, and allowed Act 10 to take effect.¹⁶

The controversy spawned two rounds of recall elections.¹⁷ In the summer of 2011, nine state senators—six Republicans and three Democrats—were recalled, that is, required to stand for another election to continue in office.¹⁸ Two of the Republicans were defeated.¹⁹ In 2012, the Governor, Lieutenant Governor, and four additional Republican senators were recalled.²⁰ In 2012, all incumbents, except for

9. *Id.* ¶ 28.

10. *Id.*

11. *Id.*

12. *Id.* ¶ 29.

13. *Id.*

14. *State ex rel. Ozanne v. Fitzgerald*, No. 11-CV-1244 at 2 (Wis. Cir. Ct. Dane County May 26, 2011); *Fitzgerald*, 2011 WI 43, ¶ 1, 334 Wis. 2d 70, 798 N.W.2d 436.

15. *Fitzgerald*, 2011 WI 43, ¶¶ 5, 7–9, 13, 334 Wis. 2d 70, 798 N.W.2d 436.

16. *Id.* ¶¶ 6, 11.

17. Paul M. Secunda, *The Wisconsin Public-Sector Labor Dispute of 2011*, 27 A.B.A. J. LAB. & EMP. L. 293, 301–02 (2012). Under Wisconsin law, incumbents may be recalled only after they have been in office for at least one year since their most recent election. *Id.* at 301.

18. *Id.*

19. *See id.* (explaining that four of the targeted Republicans and all three targeted Democrats remained in office after the recall).

20. *Id.* at 302 n.42.

one senator, won their recall elections, but the change in one Senate seat gave the Democrats a majority in that body.²¹

The drama continues in federal and state court. In *Wisconsin Education Ass'n Council v. Walker*,²² the U.S. District Court for the Western District of Wisconsin upheld the constitutionality of Act 10's provision prohibiting bargaining over anything other than increases in base wages, but held that Act 10's prohibition on payment of union dues by payroll deduction and the requirement that exclusive bargaining representatives submit to annual recertification elections were unconstitutional.²³ The decision was not flattering to Governor Walker. Act 10 does not apply to those workers it characterizes as "public safety employees," and the constitutional issues before the court focused on whether this exclusion denied the other employees equal protection.²⁴ The court observed that the definition of public safety employees was gerrymandered to protect only those unions that had endorsed Governor Walker in the 2010 election, while subjecting those unions who had endorsed Walker's opponent—including unions of some law enforcement and firefighting employees—to the extreme limitations of Act 10.²⁵ The latter group—those subject to the limitations of Act 10—included Wisconsin Capitol Police, the University of Wisconsin Campus Police, state correctional officers, probation and parole officers, conservation wardens, fire crash rescue specialists, and state criminal investigation agents.²⁶ The court found that Act 10's distinction between general and public safety employees for purposes of allowing or prohibiting dues check-off lacked any rational basis and, therefore, violated the Equal Protection Clause of the Fourteenth Amendment.²⁷

21. See Alison Bauter, *Recount Affirms Lehman's Win in Senate Recall Race*, MILWAUKEE J. SENTINEL, July 2, 2012, <http://www.jsonline.com/news/statepolitics/recount-affirms-lehmans-win-in-senate-recall-race-905vroh-161095435.html> (explaining the recount in Senate candidate Lehman's recall that declared Lehman the winner and gave state Democrats a majority); Jason Stein & Patrick Marley, *Senate Dems May Have Majority*, MILWAUKEE J. SENTINEL, June 7, 2012, at 1A (noting that Republicans were declared winners in three of the four Senate recall elections).

22. *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012), *appeal filed*, 12-CV-2011 (7th Cir. 2012).

23. *Id.* at 859–60.

24. *Id.* at 866–70.

25. *Id.* at 863, 867, 873.

26. *Id.* at 864–65.

27. *Id.* at 875–77.

The court also found that it violated the First Amendment.²⁸ The court distinguished *Ysursa v. Pocatello Education Ass'n*, where the Supreme Court upheld the constitutionality of Idaho's prohibition on any check-off of monies to be used for political purposes,²⁹ on the ground that the Wisconsin enactment did not apply across the board but instead discriminated on the basis of speaker viewpoint.³⁰

The fact that *none* of the public employee unions falling into the general category endorsed Walker in the 2010 election and that *all* of the unions that endorsed Walker fall within the public safety category certainly suggests that unions representing general employees have different viewpoints than those of the unions representing public safety employees. Moreover, Supreme Court jurisprudence and the evidence of record strongly suggests that the exemption of those unions from Act 10's prohibition on automatic dues deductions enhances the ability of unions representing public safety employees to continue to support this Governor and his party.³¹

With similar reasoning, the court held that subjecting unions representing non-public safety employees to annual recertification elections while exempting unions representing public safety employees, as defined in Act 10, lacked a rational basis and was an unconstitutional denial of equal protection.³² However, with respect to the disparate permissible scope of bargaining, the court found no unconstitutional denial of equal protection.³³ Nevertheless, the court remarked on the apparent political motives behind Act 10:

While the court concludes that the carving out of public safety employees under the Act is rationally-related to a legitimate government interest in avoiding disruptions by those employees, at least facially, it cannot wholly discount evidence that the line-drawing between public safety employees and general employees was influenced (or perhaps even dictated) by whether the unions representing these employees supported Governor Walker's gubernatorial campaign. The Act's

28. *Id.* at 870, 875–77.

29. *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353 (2009).

30. *Wis. Educ. Ass'n Council*, 824 F. Supp. 2d at 872–73.

31. *Id.* at 873.

32. *Id.* at 869.

33. *Id.* at 868.

treatment of the Capital Police, who endorsed the Governor's opponent, in comparison to its treatment of state vehicle inspectors, who endorsed the Governor, best illustrates this suspect line-drawing.³⁴

To the court, however, "political favoritism is no grounds for heightened scrutiny under the Equal Protection clause."³⁵ Consequently, the court found that the disparate scope of bargaining survived rational basis scrutiny.³⁶

In *Madison Teachers, Inc. v. Walker*,³⁷ the Circuit Court for Dane County held that Act 10's provisions prohibiting bargaining over all matters except base wages, restricting increases in base wages to increases in the cost of living unless approved in a public referendum, prohibiting dues check-off and fair share fees and mandating annual recertification elections, as applied to local government employees, violated the U.S. and Wisconsin State Constitutions.³⁸ The court reasoned that Act 10 treated employees who choose to associate with a labor organization for the purpose of collective bargaining differently from other employees and treated labor organizations differently with respect to payroll deductions from all other organizations.³⁹ The court further reasoned that Act 10's prohibition on employers paying the employees' shares of pension contributions violated the City of Milwaukee's "Home Rule" authority.⁴⁰ As of this writing, both the federal and state cases are on appeal, and so the drama continues.⁴¹

B. Overview of Act 10

Act 10 effectuated a radical overhaul of Wisconsin public sector labor relations law. The Act completely stripped collective bargaining rights away from state university faculty, all employees of the University of Wisconsin Hospitals and Clinics, and day care and home health care

34. *Id.* at 867.

35. *Id.* at 868.

36. *Id.*

37. *Madison Teachers, Inc. v. Walker*, No. 11-CV-3774 (Wis. Cir. Ct. Dane County Sept. 14, 2012), *appeal filed*, (Wis. Ct. App. Sept. 18, 2012).

38. *Id.* at 27.

39. *Id.* at 17-19.

40. *Id.* at 22.

41. *Id.*; *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012), *appeal filed*, 12-CV-2011 (7th Cir. 2012).

providers.⁴² As discussed above, it divided the remaining public employees into two groups: public safety employees and general employees.⁴³ Public safety employees were exempt from the changes enacted in Act 10.⁴⁴ The regular biannual budget act added an exemption for municipal transit employees if denial of collective bargaining rights to those transit employees will result in a denial of federal funds.⁴⁵

With respect to general employees, Act 10 prohibits bargaining over all subjects except “base wages,” which expressly excludes overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions.⁴⁶ Base wages may not increase more than the increase in the Consumer Price Index as of 180 days before the expiration of the collective bargaining agreement unless authority is obtained through a voter referendum.⁴⁷

Act 10 also did away with interest arbitration for all general employees.⁴⁸ Consequently, even the permitted bargaining over increases in base wages has no end point. With no right to strike or to compel their employer to arbitrate impasses in negotiations, Act 10 leaves general public employees with very little bargaining power.

Act 10 also requires incumbent exclusive bargaining representatives to submit to annual recertification elections to maintain their status as exclusive representative.⁴⁹ In these elections, the representative is decertified unless it receives votes equal to at least 51% of the employees in the bargaining unit.⁵⁰ Thus, any employee who does not vote is counted as a vote against retaining the existing bargaining representative.⁵¹ A favorable vote from a majority of employees who vote is insufficient; the union must obtain votes from 51% of employees in the bargaining unit.⁵² Indeed, in at least one instance, an incumbent

42. 2011 Wis. Act 10 §§ 265, 279–80.

43. *Id.* § 219.

44. *Id.*

45. WIS. DEP'T OF TRANSP. OFFICE OF POLICY, BUDGET & FIN., 2011–13 BIENNIAL BUDGET HIGHLIGHTS: 2011 WISCONSIN ACT 32, at 7; *see* 2011 Wis. Act 32.

46. 2011 Wis. Act 10 § 314.

47. *Id.*

48. *Id.* § 237.

49. *Id.* § 289.

50. *Id.*

51. *See id.*

52. *See id.*

union faced decertification when it received the votes of more than 50% but less than 51% of the employees in the unit.⁵³ Such a requirement is unprecedented.

Act 10 also took aim at union treasuries. It prohibits assessment of fair share fees against employees in the bargaining unit who choose not to join the union and thereby save the cost of union dues.⁵⁴ Fair share fees are common provisions in collective bargaining agreements. Under fair share arrangements, unions may not require employees who are in the bargaining unit but are not members of the union to pay dues, but they may require them to pay their pro rata share of the costs of representation.⁵⁵ In other words, fair share fees generally amount to dues minus the percentage of dues spent on political and ideological activity not directly related to collective bargaining and representation.

Requiring non-members of the union to pay fair share fees recognizes that absent such a provision in the collective bargaining agreement, many workers who desire union representation will make the economically rational decision not to join the union and pay dues. This is because improved wages and working conditions, and most other goals sought by a union are, with respect to the workers it represents, collective goods. They cannot be withheld from workers in the bargaining unit who choose not to join the union. Absent a union security agreement requiring those who choose not to join to pay a service fee, economically rational workers will not join the union because each worker will not perceive his or her membership alone as strengthening the union and all workers will receive the benefits the union achieves regardless of whether they join and pay dues.⁵⁶

As discussed previously, Act 10 also prohibits employers from honoring voluntary requests by union members to pay their dues via

53. E-mail from Tim Hawks, Attorney, Hawks Quindel, S.C., to Paul Secunda, Assoc. Professor of Law, Marquette Univ. Law Sch. (Mar. 13, 2012, 09:00 CST) (on file with author) (discussing the support staff unit at the Elmbrook School District).

54. 2011 Wis. Act 10 §§ 219, 276.

55. *See generally* *Locke v. Karass*, 555 U.S. 207 (2009) (holding that the local union could charge nonmembers a service fee that amounted to the ordinary costs for representational activities); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) (holding that the union could charge members costs associated with state and national union affiliates); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that the agency shop provision of the collective bargaining agreement that required non-union workers to pay a fee that covered the costs of the union's collective bargaining activities was valid).

56. *See* MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 76–91 (1965).

payroll deduction.⁵⁷ Such a prohibition can have a devastating effect on a union's ability to represent employees. An example from New York illustrates these effects. New York's Taylor Law prohibits strikes by public employees in that state.⁵⁸ One penalty against a union for engaging in an illegal strike is suspension of the union's dues check-off.⁵⁹ When the United Federation of Teachers engaged in an illegal strike against the New York City Public Schools from September 9 through September 16, 1976, the New York Public Employment Relations Board (NYPERB) suspended its dues check-off.⁶⁰ Litigation over the penalty delayed its imposition until May 1, 1982.⁶¹ In the first three months of the suspension, the union's revenue from dues and agency shop fees dropped by \$1.3 million, and when the cost of dues and fee collection was considered, it had lost \$2 million.⁶² Finding that the loss in income impaired the union's ability to provide necessary representational services, the NYPERB restored the dues check-off.⁶³

Act 10 was clearly designed to replace collective representation of public sector employees with unilateral employer control. Governor Walker defended the wholesale dismantling of the existing legal regime as necessary to give public employers "the tools to reward productive workers and improve their operations. Most crucially, our reforms confront the barriers of collective bargaining that currently block innovation and reform."⁶⁴ The next section explains why the Governor is sorely mistaken.

III. WHY SHOULD WE CARE ABOUT ACT 10?

If Governor Walker was correct that Wisconsin had to dismantle collective representation of public employees to free employers from barriers to innovation and reform, one would have expected nearly unanimous support from Wisconsin public employers for the Governor's

57. See *supra* note 23 and accompanying text.

58. N.Y. CIV. SERV. LAW § 210(1) (Gould Supp. 2012).

59. *Id.* § 210(3).

60. United Fed'n of Teachers, Local 2, 15 N.Y.P.E.R.B. 3136, 3138 (1982).

61. *Id.* at 3137.

62. *Id.*

63. *Id.* For additional examples of the devastating effect loss of dues check-off can have on union finances, see Ann C. Hodges, *Maintaining Union Resources in an Era of Public Sector Bargaining Retrenchment*, 16 EMP. RTS. & EMP. POL'Y J. (forthcoming 2012).

64. Scott Walker, Op-Ed., *Why I'm Fighting in Wisconsin*, WALL. ST. J., Mar. 10, 2011, at A17.

budget repair bill. Such was not the case. During the debates over the Wisconsin Budget Repair Bill, the Wisconsin Association of School Boards reported that many of its member school boards were “gravely concerned” that the bill would “immeasurably harm the collaborative relationships that exist between school boards and teachers.”⁶⁵ Hundreds of local government officials signed an open letter to the Governor opposing the bill on similar grounds.⁶⁶

Public employers had good reason to oppose Act 10. Unilaterally-imposed terms breed resistance while collaboratively developed policies bring benefits to employees and the public. A prime example of this can be seen in conflicting approaches to teacher evaluation and discipline. The stereotype of teacher unions as defenders of the irremediably incompetent who raise the costs of terminating a teacher to the point where they make even the most nightmarish teacher fire-proof are based on teacher union actions where performance standards are developed and implemented unilaterally by management. In such circumstances, we should not fault the union for performing the job into which it has been channeled—protecting its members from management-imposed action. However, in a significant number of school districts, employers and unions have embraced peer review.⁶⁷ In such cases, management and union cooperatively develop and implement performance standards.⁶⁸ Teachers are evaluated and counseled by their peers—who are able to devote greater time than principals who may be able to perform only a few observations per teacher.⁶⁹ Union involvement in setting and implementing standards of teacher performance transforms the union into a defender of the professional standards.⁷⁰ Attrition rates for poor performing teachers tend to be higher in districts embracing peer review than in districts that follow the traditional unilateral command and control model.⁷¹

65. Letter from John H. Ashley, Exec. Dir., Wis. Ass'n of Sch. Bds., to Hon. Alberta Darling & Hon. Robin Vos, Co-chairs, Wis. Legislature Joint Comm. on Fin. (Feb. 15, 2011) (copy on file with author).

66. See Erin Richards et al., *Clash Continues: Many City Officials Think Union Limits Go Too Far*, MILWAUKEE J. SENTINEL, Feb. 27, 2011, at 1B.

67. See Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J.L. & PUB. POL'Y 885, 904 (2007).

68. See *id.* at 905.

69. See *id.* at 905, 934.

70. See *id.* at 905.

71. See *id.* at 904–06.

One of the most extensive efforts at expanded worker involvement in workplace decision-making began in 1993 when President William Jefferson Clinton issued Executive Order 12,871 which, among other things, established a National Partnership Council and called for the creation of labor-management partnerships throughout the executive branch.⁷² Shortly before President George W. Bush took office, the Heritage Foundation called on him to rescind Executive Order 12,871, viewing the partnerships as an impediment to the new administration's ability to implement its policy agenda.⁷³ Upon taking office, President Bush obliged. On February 17, 2001, he revoked the Clinton executive order and directed agency heads to "promptly move to rescind any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12,871."⁷⁴

President George W. Bush and Governor Walker appear to share a vision of workplace efficiency in which employees robotically obey commands that come down from above and are powerless to block innovations and reforms dictated by management. The record under the Clinton Executive Order, however, does not support this vision. The scope of bargaining mandated by the Federal Service Labor Management Relations Act, the statute which governs collective bargaining between federal agencies and unions representing their workers, is extremely narrow.⁷⁵ Successful partnerships under the Clinton Executive Order did not confine themselves to topics on which bargaining was legally required. They branched out into what the National Partnership Council characterized as "non-traditional issues," including: reorganizations, quality issues, improvements in customer service, re-engineering and streamlining work, impact of new technology, reductions in force, budget and staffing levels, privatization, and procurement.⁷⁶ Rather than impede workplace innovation and efficiency, labor-management partnerships under the Clinton Executive Order fostered it. Examples detailed in a report⁷⁷ from the Office of

72. Exec. Order No. 12,871, 3 C.F.R. 655 (1993).

73. Robert E. Moffit, George Nesterzuk & Donald J. Devine, Backgrounder No. 1404, *Taking Charge of Federal Personnel*, HERITAGE FOUND. (Jan. 10, 2001), <http://www.heritage.org/research/reports/2001/01/taking-charge-of-federal-personnel>.

74. See Exec. Order No. 13,203, 3 C.F.R. 761 (2001).

75. See 5 U.S.C. § 7106 (2006).

76. NAT'L P'SHIP COUNCIL, OPM-NPC-09, A REPORT TO THE PRESIDENT ON PROGRESS IN LABOR-MANAGEMENT PARTNERSHIPS 19 (1997).

77. LABOR-MANAGEMENT PARTNERSHIP: A REPORT TO THE PRESIDENT, U.S. OFF.

Personnel Management at the end of President Clinton's second term include:

- Partnering between the Internal Revenue Service and National Treasury Employees Union to modernize and restructure the IRS, resulting in measurable improvements in customer service and job satisfaction.⁷⁸

- Partnership between American Federation of Government Employees (AFGE) Local 3973 and Defense Contract Management Command's Raytheon Missile Systems facility resulted in overwhelming improvement in customer service ratings as workload increased 100% and the workforce downsized, with \$900,000 saved from the reduction in labor-management litigation.⁷⁹

- The U.S. Mint and AFGE Mint Council engaged in joint strategic planning, resulting in the U.S. Mint's consistent ranking near the top in the American Customer Satisfaction Index and its production of record numbers of coins and return of record profits to taxpayers.⁸⁰

- The Social Security Administration (SSA) and AFGE partnership reengineered practices related to SSA's toll free number, resulting in SSA outscoring all other organizations for 800 number customer satisfaction in 1995, and in a 1999 customer satisfaction rating of 88%.⁸¹

- Partnerships between the James A. Haley Veterans' Hospital and AFGE Local 547, the Florida Nurses Association and the Tampa Professional Nurses Unit reduced delivery time for critical medication from ninety-two minutes to twenty minutes, cut turnaround time for x-ray reports from eight days to one day, and reduced processing time for pension and compensation exams from thirty-one days to eighteen days.⁸²

- A National Treasury Employees Union (NTEU)-Customs Service partnership designed a seven-step strategy to increase

PERSONNEL MGMT., <http://www.opm.gov/lmr/report/index.htm> (last updated Jan. 12, 2000).

78. *Id.* § 1(2).

79. *Id.*

80. *Id.* § 2.

81. *Id.* § 3(1).

82. *Id.* § 3(2).

seizures of illegal drugs. During the six month life of the joint action plan, narcotics seizures increased by 42% and drug currency seizures increased by 74%.⁸³

- Partnership between the Defense Distribution Depot in San Joaquin and AFGC Local 1546 saved \$950,000 per year by reducing workplace accidents by 20% and ergonomic injuries by 40%, reduced overtime expenses from \$9.8 million to \$1.4 million and reduced production costs from \$25.42 per unit to \$23.48 per unit.⁸⁴

Workplaces where employees are empowered and challenged to take responsibility for the efficient operation of their agencies and the craft, artistic, or professional aspects of their work are commonly referred to as “high performance workplaces.”⁸⁵ There is evidence from the private sector that high performance workplaces are significantly more efficient and productive workplaces than traditional workplaces and that unionized high performance workplaces are even more efficient and productive than their non-unionized counterparts.⁸⁶ Economists Sandra Black and Lisa Lynch simulated a base case of a non-union manufacturer with little employee involvement.⁸⁷ They found that unionized firms with little employee involvement had productivity levels 15% lower than the base case.⁸⁸ Non-unionized firms with high employee involvement had productivity levels 10.6% higher than the base case.⁸⁹ But “adding unionization to this already high-performance workplace is associated with an impressive 20% increase in labor productivity.”⁹⁰ They then examined the actual mean characteristics of unionized and nonunionized firms in a sample of manufacturers.⁹¹ They found that the unionized firms averaged productivity 16% higher than

83. *Id.* § 3(3).

84. *Id.*

85. See Carol Gill, *Union Impact on the Effective Adoption of High Performance Work Practices*, 19 HUM. RESOURCE MGMT. REV. 39, 39 (2009) (referring to these practices as “high performance work practices”).

86. See *id.* at 42–43.

87. Sandra E. Black & Lisa M. Lynch, *The New Workplace: What Does It Mean for Productivity?*, in 1 INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING 60, 64 (Paula B. Voos ed., 1998).

88. *Id.* at 65.

89. *Id.*

90. *Id.*

91. *Id.*

the base case while the nonunionized firms' productivity averaged 11% lower than the base case.⁹² Treating unions as partners and involving them in administering employee participation programs results in positive collective employee voice and product improvement.⁹³ Unions provide independent employee voice that plays a crucial role in successfully developing and sustaining high performance workplaces.⁹⁴

In a report released in 1996, a task force of the Secretary of Labor catalogued numerous examples where workers, operating through their unions, partnered with public employers to increase efficiency and improve public services.⁹⁵ I and others have related numerous additional examples.⁹⁶ The many Wisconsin public officials who opposed Act 10 expressed concern that enactment would impede the labor-management cooperative efforts that had improved public services throughout the state.⁹⁷ But such a result is not inevitable. The next section explores ways in which parties may be able to maintain positive relationships and outcomes in spite of Act 10's dismantling of collective bargaining rights in Wisconsin.

IV. LIFE AFTER ACT 10

Achieving the types of labor-management partnerships that lead to improved public services requires considerable risk-taking on the part of managers and labor leaders. Managers must take the risk of sharing decision-making responsibility with labor, even though the legal regime gives management the right of unilateral control. Labor leaders must

92. *Id.*

93. See William N. Cooke, *Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration*, 46 *INDUS. & LAB. REL. REV.* 119, 132 (1992).

94. See Gill, *supra* note 85.

95. U.S. SEC'Y OF LABOR'S TASK FORCE ON EXCELLENCE IN STATE & LOCAL GOV'T THROUGH LABOR-MGMT. COOPERATION, WORKING TOGETHER FOR PUBLIC SERVICE (1996) [hereinafter WORKING TOGETHER FOR PUBLIC SERVICE], available at http://digitalcommons.ilr.cornell.edu/key_workplace/252/.

96. See DAVID LEWIN ET AL., GETTING IT RIGHT: EMPIRICAL EVIDENCE AND POLICY IMPLICATIONS FROM RESEARCH ON PUBLIC-SECTOR UNIONISM AND COLLECTIVE BARGAINING 16–22 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792942; Stephen Goldsmith & Mark E. Schneider, *Partnering for Public Value: New Approaches in Public Employee Labor-Management Relations*, 5 *U. PA. J. LAB. & EMP. L.* 415, 416–18 (2003); Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 *IND. L.J.* 1369, 1392–96 (2009) [hereinafter Malin, *Paradox*]; Malin & Kerchner, *supra* note 67, at 903–11.

97. See *supra* notes 65–66 and accompanying text.

risk giving up the ability to criticize management's unilateral decisions and must be willing to share in the responsibility for decisions jointly determined and the outcomes resulting from those decisions. Elsewhere, I have argued that the legal regime governing public sector collective bargaining most common in the United States channels parties away from such risk taking.⁹⁸ Taking these risks is easier where the legal regime provides a strong system of labor and management rights on which to fall back. As Clinton administration Office of Personnel Management Director Janice Lachance observed, "[P]artnership is the high wire and collective bargaining is the safety net."⁹⁹

Although Act 10 has dismantled the strong legal regime of labor and management rights that existed in Wisconsin prior to 2011, it need not take down the labor-management cooperative efforts that enhanced public services in the state.¹⁰⁰ Wisconsinites seeking examples of labor-management cooperation despite hostile state law should look to Norfolk, Virginia.

By statute, Virginia expressly prohibits all public employee collective bargaining.¹⁰¹ Nevertheless, the Norfolk Federation of Teachers, an affiliate of the American Federation of Teachers, represents teachers in the Norfolk Public School System and the parties negotiate memoranda of understanding, even though such agreements are not legally enforceable.¹⁰² Working together, the union and the school district, along with other elements of the Norfolk community transformed the school system into a model urban school district which, in 2005, received the Broad Prize for the top urban school district in the

98. See Malin, *Paradox*, *supra* note 96, at 1398–99.

99. *OPM Director Lachance Addresses Future of Federal Workforce*, 36 GOV'T EMP. REL. REP. 418, 422 (1998) (quoting American Federation of Government Employees President John Sturdivant).

100. One of the most effective partnerships begun under the Clinton Executive Order, the partnership between the National Federation of Federal Employees and the U.S. Forest Service continued throughout the Bush administration and continues today under the Obama administration. William Dougan, Nat'l President, NFFE & Hank Kashden, former Assoc. Chief, Forest Serv., Address at the National Academy of Arbitrators Conference held in connection with the Wisconsin Employment Relations Commission's Annual Conference on Wisconsin Public Sector Labor Relations (April 27, 2011).

101. VA. CODE ANN. § 40.1–57.2 (2002).

102. See Ann C. Hodges & William Warwick, *The Sheathed Sword: Public-Sector Union Efficacy in Non-Bargaining States*, 27 A.B.A. J. LAB. & EMP. L. 275, 285 (2012).

country.¹⁰³ As the Norfolk example illustrates, public employers can still engage their workers effectively through their unions in spite of laws similar to Act 10. This section now turns to strategies that may be adapted from other jurisdictions.

A. Bargain Anyway

The system of collective bargaining codified for most private sector workers in the National Labor Relations Act, and adapted to the public sector in most public employee labor relations acts, confers on a labor organization designated or selected by a majority of the employees in an appropriate bargaining unit the status of exclusive representative of all employees in the unit.¹⁰⁴ All employees in the unit are bound by the contract negotiated by the union and the employer may not bypass the union and deal directly with the employees.¹⁰⁵ The duty to bargain, however, attaches only to matters that are considered to be mandatory subjects of bargaining.¹⁰⁶

Although Act 10 expressly designates all subjects other than increases in base wages as prohibited subjects of bargaining, it adds no new mechanism for enforcing the prohibition. This is not surprising, considering that Act 10's purpose is to empower management.¹⁰⁷ Act 10, however, could have empowered management by simply designating all subjects other than increases in base wages as permissive subjects of bargaining. If a matter is a permissive subject of bargaining, management may act unilaterally.¹⁰⁸ Management has no obligation to provide the employees' exclusive bargaining representative information relevant to the subject,¹⁰⁹ and it may by-pass the exclusive representative and deal directly with individual employees or its self-selected group of

103. *Id.* at 286. The Broad Prize for Urban Education "is awarded each year to honor urban school districts that demonstrate the greatest overall performance and improvement in student achievement while reducing achievement gaps among low-income and minority students." *Overview*, BROAD PRIZE FOR URB. EDUC., <http://www.broadprize.org/about/overview.html> (last visited Nov. 30, 2012).

104. 29 U.S.C. § 159(a) (2006).

105. *See* J. I. Case Co. v. Nat'l Labor Relations Bd., 321 U.S. 322, 334–35, 339 (1944).

106. *See, e.g.*, *City of Brookfield v. Wis. Emp't Relations Comm'n*, 87 Wis. 2d 819, 829, 275 N.W.2d 723, 728 (1979); *Racine Educ. Ass'n v. Wis. Emp't Relations Comm'n*, 214 Wis. 2d 352, 359, 571 N.W.2d 887, 890 (Ct. App. 1997).

107. *See supra* note 64 and accompanying text.

108. *See, e.g.*, *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981).

109. *See, e.g.*, *Vill. of Franklin Park v. Ill. State Labor Relations Bd.*, 638 N.E.2d 1144, 1148 (Ill. App. Ct. 1994).

employees.¹¹⁰

A party who insists on its position to the point of impasse with respect to a permissive subject of bargaining commits an unfair labor practice.¹¹¹ The same rule applies to a prohibited subject of bargaining. Thus, at least as far as the collective bargaining process is concerned, legally, it makes no difference if a matter is designated as a prohibited subject of bargaining or as a permissive subject of bargaining. The critical difference between the two is that unlike a prohibited subject, a permissive subject may, by agreement, be included in the collective bargaining agreement and enforced.¹¹²

Therefore, designating matters as prohibited, rather than permissive, subjects of bargaining further empowers management by allowing it to walk away from any agreements it reaches with respect to those subjects. When a public employer agrees with an exclusive bargaining representative concerning a matter on which it had no legal authority to agree, the agreement is legally unenforceable.¹¹³ Thus, Act 10's designation of all subjects other than increases in base wages as prohibited subjects of bargaining renders agreements between an employer and an exclusive bargaining representative unenforceable.

In states where collective bargaining is prohibited, negotiations nevertheless occur and agreements are reached. Although the agreements are legally unenforceable, they are usually complied with out of mutual respect and cooperation.¹¹⁴

One of the most prominent examples of a public employer engaging in collective bargaining and abiding by collective bargaining agreements despite the absence of legal authority to do so is the City of Memphis,

110. See, e.g., *Corpus Christi Fire Fighters Ass'n v. City of Corpus Christi*, 10 S.W.3d 723, 728 (Tex. Ct. App. 1999).

111. See *Nat'l Labor Relations Bd. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

112. THE DEVELOPING LABOR LAW 1480 (John E. Higgins, Jr., ed., 6th ed. 2012).

113. See, e.g., *Cnty. of Chautauqua v. Civil Serv. Emps. Ass'n Local 1000*, 869 N.E.2d 1, 4 (N.Y. 2007); *In re City of New York v. Uniformed Fire Officers Ass'n Local 854*, 739 N.E.2d 719, 724 (N.Y. 2000). Even an agreement to arbitrate alleged violations of unilaterally promulgated employer policy with respect to prohibited subjects of bargaining may be unenforceable. See *Chi. Teachers Union Local No. 1 Am. Fed'n of Teachers v. Ill. Educ. Labor Relations Bd.*, 778 N.E.2d 1232, 1239 (Ill. App. Ct. 2002) (enforcing arbitration award after finding that issue fell outside the scope of statutorily prohibited subjects of bargaining).

114. See *Hodges & Warwick*, *supra* note 102, at 285; Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 748, 752 (2009).

Tennessee. Although no statute expressly prohibits public employee collective bargaining in Tennessee, the courts have held that—absent express statutory authorization—units of local government lack authority to engage in collective bargaining and enter into collective bargaining agreements.¹¹⁵ Nevertheless, Memphis has contracts with thirteen unions covering twenty-four bargaining units.¹¹⁶

Many of the Memphis contracts purport to be negotiated with the union as exclusive bargaining representative of all employees in a designated bargaining unit.¹¹⁷ Most prominent among these are memoranda of understanding between the City of Memphis and AFSCME Local 1733. The Memphis-AFSCME collective bargaining relationship dates to 1968 when Memphis sanitation workers struck for recognition.¹¹⁸

The principal AFSCME-Memphis memorandum of understanding (MOU) covers a bargaining unit consisting of designated job classifications in the “Public Works Division, Division of Public Services and Neighborhoods, General Services Division, Engineering, Police Services Division, Fire Services Division, Park Services and the [municipal] Judicial System.”¹¹⁹ In the memorandum, the City expressly recognizes the union “as the sole and exclusive bargaining agent for all employees” in the specified bargaining unit and provides that “no other labor organization shall be recognized unless they are designated

115. See *Local Union 760 of the Int'l Bhd. of Elec. Workers v. City of Harriman*, No. E2000-00367-COA-R3-CV, 2000 WL 1801856, at *3 (Tenn. Ct. App. Dec. 8, 2000); *Weakley Cnty. Mun. Elec. Sys. v. Vick*, 309 S.W.2d 792, 804 (Tenn. Ct. App. 1957). Prior to enactment of the Virginia statute, the Virginia Supreme Court had held similarly. See *Commonwealth v. Cnty. Bd. of Arlington Cnty.*, 232 S.E.2d 30, 44 (Va. 1977).

116. See *Union MOU's*, CITY OF MEMPHIS, www.cityofmemphis.org/framework.aspx?page=1344 (last visited October 17, 2012) (listing and providing links to City of Memphis memoranda of understanding with thirteen unions representing its employees).

117. See, e.g., *Memorandum of Understanding Between City of Memphis and American Federation of State, County and Municipal Employees AFL-CIO, Local 1733: Solid Waste Management, Public Works Division, Public Works Division, Public Service Division, Police Services Division, Fires Services Division, Park Services, Engineering, Public Works Division, Judicial System*, art. 1 (May 3, 2011) [hereinafter *AFSCME-Memphis Main Contract*], available at www.cityofmemphis.org/pdf_forms/MOU/Main.pdf; *Memorandum of Understanding Between City of Memphis and Communications Workers of America, Local 3806*, art. 1 (Apr. 19, 2011) [hereinafter *CWA-Memphis Contract*], available at http://www.cityofmemphis.org/pdf_forms/MOU/CWA.pdf.

118. See Earl Caldwell, *Sanitation Strike in Memphis Ends*, N.Y. TIMES, Apr. 17, 1968, at 1. Martin Luther King Jr. was in Memphis supporting the striking workers when he was assassinated. *Id.*

119. AFSCME-Memphis Main Contract, *supra* note 117, art. 1.

by a majority of the non-supervisory employees of the appropriate unit.”¹²⁰ Identical exclusive recognition is provided to AFSCME Local 1733 in separate memoranda of understanding covering a secretarial and general clerical bargaining unit;¹²¹ a bargaining unit within the Division of Community Enhancement, Code Enforcement;¹²² a bargaining unit of employees in the Police Property, Evidence, and Photo Lab;¹²³ and a bargaining unit of employees in the Engineering Division Survey Service Center.¹²⁴

All of the AFSCME-Memphis memoranda purport to govern wages; longevity pay; retirement; job classifications; discipline and discharge; holidays; vacations; sick leave; employee assistance programs; leaves of absence; time off due to a death in the employee’s immediate family; hours of work, reporting, call-back, and standby pay; health and safety; overtime; shift work; insurance; health care plans; training; subcontracting; payroll deduction of union dues; and a no strike agreement.¹²⁵ Although they are not legally enforceable, they provide

120. *Id.*

121. Memorandum of Understanding Between City of Memphis and American Federation of State, County and Municipal Employees AFL-CIO, Local 1733: Secretary B and C, and General Clerk A and B, art. 1 (May 3, 2011) [hereinafter AFSCME-Memphis Clerical Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Secretary_General_Clerk.pdf.

122. Memorandum of Understanding Between City of Memphis and American Federation of State, County and Municipal Employees AFL-CIO, Local 1733: Housing and Community Development Code Enforcement, art. 1 (May 3, 2011) [hereinafter AFSCME-Memphis Code Enforcement Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/HCD_Code.pdf.

123. Memorandum of Understanding Between City of Memphis and American Federation of State, County and Municipal Employees AFL-CIO, Local 1733: Police Property & Evidence and Photo Lab, art. 1 (May 3, 2011) [hereinafter AFSCME-Memphis Crime Lab Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Property_Evidence_Photo_Lab.pdf.

124. Memorandum of Understanding Between City of Memphis and American Federation of State, County and Municipal Employees AFL-CIO, Local 1733: Survey Service Center, art. 1 (May 3, 2011) [hereinafter AFSCME-Memphis Survey Service Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Survey_Service_Center.pdf.

125. *See* AFSCME-Memphis Main Contract, *supra* note 117; AFSCME-Memphis Clerical Contract, *supra* note 121; AFSCME-Memphis Code Enforcement Contract, *supra* note 122; AFSCME-Memphis Crime Lab Contract, *supra* note 123; AFSCME-Memphis Survey Service Contract, *supra* note 124. Governor Walker would regard such bargaining as an impediment to innovation and reform, *see* Walker, *supra* note 64, but that does not appear to be the case in Memphis. For example, AFSCME and the City of Memphis recently agreed to replace its fleet of trash collection trucks which require two to three workers per truck with modern automated trucks that require only one worker. *See* Editorial, *AFSCME, City Find*

for enforcement through grievance procedures culminating in arbitration.¹²⁶ Although arbitration is final and binding with respect to suspensions and discharge, on all other matters it is advisory to the City.¹²⁷

Memphis Police radio dispatchers are represented by Local 3806 of the Communication Workers of America (CWA).¹²⁸ The memorandum of understanding between the City and CWA covers topics comparable to those covered in the AFSCME memoranda and also covers internal investigation procedures, personnel file review, residency, secondary employment, uniform allowances, career development, and tuition reimbursement.¹²⁹ As with the AFSCME memoranda, the CWA memorandum provides that the City recognizes the union “as the sole and exclusive bargaining agent for all permanent full-time Police Radio Dispatchers.”¹³⁰ As with the AFSCME memoranda, the CWA memorandum is enforceable through a grievance procedure culminating in arbitration and arbitration is final and binding with respect to suspensions and discharge but advisory with respect to all other matters.¹³¹

Local 369D of the International Union of Operating Engineers (IUOE) represents City of Memphis employees in six bargaining units.¹³²

Common Ground, COM. APPEAL, Aug. 23, 2012, at 4A. The new trucks reportedly enhance worker safety, provide a basis that may lead to the City bringing refuse collection that had been contracted out back in-house and could save the City between \$2 million and \$4 million per year. *Id.*

126. See AFSCME-Memphis Main Contract, *supra* note 117, art. 5; AFSCME-Memphis Clerical Contract, *supra* note 121, art. 5; AFSCME-Memphis Code Enforcement Contract, *supra* note 122, art. 5; AFSCME-Memphis Crime Lab Contract, *supra* note 123, art. 5; AFSCME-Memphis Survey Service Contract, *supra* note 124, art. 5.

127. AFSCME-Memphis Main Contract, *supra* note 117, art. 6; AFSCME-Memphis Clerical Contract, *supra* note 121, art. 6; AFSCME-Memphis Code Enforcement Contract, *supra* note 122, art. 6; AFSCME-Memphis Crime Lab Contract, *supra* note 123, art. 6; AFSCME-Memphis Survey Service Contract, *supra* note 124, art. 6.

128. CWA-Memphis Contract, *supra* note 117, art. 1.

129. *Id.* (see table of contents for a complete list of topics covered by this memorandum).

130. *Id.*

131. *Id.* arts. 10–11.

132. Memorandum of Understanding Between City of Memphis and International Union of Operating Engineers, Local 369D: Animal Shelter (Mar. 25, 2011) [hereinafter IUOE-Memphis Animal Shelter Contract], available at http://www.cityofmemphis.org/pdf_forms/MOU/Animal_Shelter.pdf; Memorandum of Understanding Between City of Memphis and International Union of Operating Engineers Local 369D: Construction Inspectors (Mar. 25, 2011) [hereinafter IUOE-Memphis Construction Inspectors Contract], available at <http://www>.

In memoranda of understanding in effect in five of those units, the City recognizes the union as the “sole bargaining agent” for all regular, full-time employees in the union and grants “exclusive recognition to the Union.”¹³³ As with the AFSCME and CWA memoranda, the Animal Shelter memorandum is enforced through a grievance and arbitration procedure that culminates in arbitration that is final and binding with respect to suspensions and discharges but advisory with respect to all other matters.¹³⁴ Under the other four IUOE memoranda, arbitration is final and binding with respect to all matters.¹³⁵

In some other Memphis bargaining units, the memoranda of understanding are not as explicit with respect to whether recognition of the union is exclusive to the bargaining unit. Three memoranda of understanding cover employees represented by the International Association of Machinists. In each, the City recognizes the union “as the designated representative” for employees in the defined bargaining units and provides that “no other labor organization shall be recognized unless they be recognized by a majority of the non-supervisory

cityofmemphis.org/pdf_forms/MOU/CONSTRUCTION_INSPECTORS.pdf; Memorandum of Understanding Between City of Memphis and International Union of Operating Engineers, Local 369D: Dispatchers, Public Works Division, Engineering Division (Mar. 25, 2011) [hereinafter IUOE-Memphis Public Works Dispatchers Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/DISPATCHERS.pdf; Memorandum of Understanding Between City of Memphis and International Union of Operating Engineers, Local 369D: Stoppage Operator/Sewer Environment (Mar. 25, 2011) [hereinafter IUOE-Memphis Stoppage Operators Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/STOPPAGE_OPERATOR.pdf; Memorandum of Understanding Between City of Memphis and International Union of Operating Engineers: Treatment Plants, Sewer Stations, Flood Control Facilities, Pollution Control (Mar. 25, 2011) [hereinafter IUOE-Memphis Treatment Plants Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/TREATMENT_PLANTS.pdf; Memorandum of Understanding Between City of Memphis and International Union of Operating Engineers, Local 369: Heavy Equipment Operators (Mar. 25, 2011) [hereinafter IUOE-Memphis Heavy Equipment Operators Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Heavy_Equipment_Operators.pdf.

133. IUOE-Memphis Animal Shelter Contract, *supra* note 132, art. 2; IUOE-Memphis Construction Inspectors Contract, *supra* note 132, art. 2; IUOE-Memphis Public Works Dispatchers Contract, *supra* note 132, art. 2; IUOE-Memphis Stoppage Operators Contract, *supra* note 132, art. 2; IUOE-Memphis Treatment Plants Contract, *supra* note 132, art. 2.

134. IUOE-Memphis Animal Shelter Contract, *supra* note 132, art. 6.

135. IUOE-Memphis Construction Inspectors Contract, *supra* note 132, art. 6; IUOE-Memphis Public Works Dispatchers Contract, *supra* note 132, art. 6; IUOE-Memphis Stoppage Operators Contract, *supra* note 132, art. 6; IUOE-Memphis Treatment Plants Contract, *supra* note 132, art. 6.

personnel of the appropriate classification.”¹³⁶ Unlike the other memoranda of understanding, the Machinists’ memoranda do not expressly state that the union is the representative for all bargaining unit employees and do not use the adjective “exclusive” to characterize the recognition. As with most of the other bargaining units, the Machinists’ memoranda provide for enforcement through grievance procedures that culminate in arbitration that is binding for suspension and discharge cases but advisory as to all other matters.¹³⁷ An agreement with the Memphis Police Association recognizes that union as “designated bargaining representative” for police officers below the rank of lieutenant.¹³⁸ The agreement does not use the words “all” to modify employees or “exclusive” to modify representative and does not contain language found in the Machinists’ memoranda precluding the City from recognizing another labor organization. It is unclear whether the Memphis recognition of the Police Association is exclusive or limited to its members. Interestingly, the police agreement provides for binding arbitration over all matters.¹³⁹ As developed in the next section, Memphis also has several bargaining units in which it has recognized unions as representatives of their members only.

Prior to 2011, public school teachers in Tennessee had statutory rights to organize and bargain collectively under the Education

136. Memorandum of Understanding Between City of Memphis, Division of Fire Services and Desoto Lodge No. 3 International Association of Machinists and Aerospace Workers AFL-CIO, art. 2 (May 17, 2011) [hereinafter IAWA-Memphis Fire Services Contract], available at http://www.cityofmemphis.org/pdf_forms/MOU/Fire_Services.pdf; Memorandum of Understanding Between City of Memphis, Division of Police Services and Desoto Lodge No. 3 International Association of Machinists and Aerospace Workers AFL-CIO, art. 2 (May 17, 2011) [hereinafter IAWA-Memphis Police Services Contract], available at http://www.cityofmemphis.org/pdf_forms/MOU/Police_Services.pdf; Memorandum of Understanding Between City of Memphis, Division of General Services and Desoto Lodge No. 3 International Association of Machinists and Aerospace Workers AFL-CIO, art. 2 (May 17, 2011) [hereinafter IAWA-Memphis General Services Contract], available at http://www.cityofmemphis.org/pdf_forms/MOU/General_Services.pdf.

137. IAWA-Memphis Fire Services Contract, *supra* note 136, art. 7; IAWA-Memphis Police Services Contract, *supra* note 136, art. 7; IAWA-Memphis General Services Contract, *supra* note 136, art. 7.

138. Agreement Between Memphis Police Association and the City of Memphis, art. 2 (Mar. 25, 2011), available at http://www.cityofmemphis.org/pdf_forms/MOU/MPA.pdf.

139. *Id.* art. 12. Article 12 of this Agreement suggests that the agreement covers all bargaining unit members, not just members of the Police Association, because it expressly provides for non-members to process their own grievances individually and that the association is not responsible for non-members’ arbitration costs. *Id.*

Professional Negotiations Act.¹⁴⁰ Other public school employees, however, lacked any statutory right to bargain collectively. Despite the absence of express statutory authority the Board of Education of the Memphis Public Schools has recognized AFSCME as exclusive representative for two bargaining units: one consisting of administrative and clerical employees,¹⁴¹ and another consisting of custodial, warehouse, cafeteria and nutrition service center employees.¹⁴² Both provide for enforcement through grievance procedures culminating in arbitration.¹⁴³ The clerical employees' memorandum provides that the arbitrator's decision is binding unless the parties determine that it usurps the Board of Education's authority under the laws of Tennessee,¹⁴⁴ while in the other unit the determination of whether the arbitrator's decision usurps Board authority is left to the Board.¹⁴⁵

Some ambiguity exists in the recognition the Memphis City Schools has accorded Service Employees International Union (SEIU) Local 205 in a bargaining unit of building engineers, nutritional services managers, and driver education operations managers.¹⁴⁶ Their memorandum of understanding merely "recognizes the Union as the bargaining representative" without describing the recognition as "exclusive" and using the word "certain" rather than "all" in describing the employees in

140. See 2011 Tenn. Pub. Acts 378 (repealing the Education Professional Negotiations Act); see also TENN. CODE ANN. § 49-5-601 (2009) (the former "Education Professional Negotiations Act").

141. Memorandum of Understanding Between the Memphis City Schools and Local 1733 of the American Federation of State, County, and Municipal Employees AFL-CIO, art. 3 (Dec. 18, 2009) [hereinafter AFSCME-Memphis Office Professionals Clerical Unit Contract], available at http://www.mcsk12.net/forms/AFSCME%20Local%201733%20_Clerical_%20Contract%20%202009%20-%202012.pdf.

142. Memorandum of Understanding Between the Memphis City Schools and Local 1733 of the American Federation of State, County, and Municipal Employees AFL-CIO, art. 3 (Nov. 1, 2010) [hereinafter Memphis City Schools-AFSCME Blue Collar Contract], available at <http://www.mcsk12.net/HR/docs/AFSCME%20Local%201733%20Contract%20010-2013.pdf>.

143. See AFSCME-Memphis Office of Professionals Clerical Unit Contract, *supra* note 141, art. 8; Memphis City Schools-AFSCME Blue Collar Contract, *supra* note 142, art. 7.

144. AFSCME-Memphis Office of Professionals Clerical Unit Contract, *supra* note 141, art. 8.

145. Memphis City Schools-AFSCME Blue Collar Contract, *supra* note 142, art. 7.

146. See Memorandum of Understanding Between Memphis City Schools and Service Employees International Union, Local 205: Building Engineers and Nutrition Services Managers Unit (August 2010), available at <http://www.mcsk12.net/eagenda/Board%20Work%20Session-August%2009,%202010%20on%20Monday,%20August%2009,%202010/BEC05D46-730E-472F-9CF5-5624446350F1.pdf>.

the bargaining unit.¹⁴⁷ The recognition appears to be exclusive, as the memorandum provides that only the union may process grievances beyond the second step of the grievance procedure and only the union may take grievances to arbitration.¹⁴⁸ As with one of the AFSCME memoranda, the SEIU memorandum provides for enforcement through a grievance procedure culminating in arbitration, but also provides that the arbitrator's award is not binding if the Board of Education determines that it usurps Board authority.¹⁴⁹

The Memphis City Schools have recognized the UAW and a coalition of craft unions using virtually identical cautious language: "While affirming its legally constituted authority to take independent action on matters pertaining to wages, hours, and working conditions, the Board hereby recognizes the Union as the (certified) representative of certain employees" in the designated bargaining unit.¹⁵⁰ Both memoranda of understanding provide for grievance procedures culminating in advisory arbitration, but the arbitrator's decision is effective unless the Board of Education affirmatively rejects it.¹⁵¹

Thus, despite the absence of express statutory authority to do so, and clear case law that holds that doing so in the absence of statutory authority is *ultra vires*, the City of Memphis and the Memphis City Schools have for quite some time engaged in traditional collective bargaining with a number of different unions representing their employees. The memoranda of understanding all provide for enforcement through grievance and arbitration procedures but they differ on the extent to which the arbitrator's decision is final and binding. Those differences, to a certain extent, are irrelevant. Because the memoranda of understanding are not legally enforceable, no

147. *Id.* art. 6.

148. *Id.* art. 9.

149. *Id.*

150. Memorandum of Understanding Between the Memphis City Schools and Local 3036 and United Automobile, Aerospace and Agricultural Implement Workers on America UAW, art. 1 (effective Jan. 17, 2009) [hereinafter Memphis-UAW Contract], available at <http://www.mcsk12.net/HR/forms/uaw%20contract%202009%20-%202013.pdf>; Memorandum of Understanding Between the Memphis City Schools and Memphis Board of Education Craft Employees Association AFL-CIO, art. 3 (effective Jan. 16, 2010) [hereinafter Craft Employees Association Contract], available at <http://www.mcsk12.net/form%20s/CRAFT%20Contract%20%202007%20-%202010.pdf>. The latter memorandum omits the word "certified." *Id.*

151. Memphis-UAW Contract, *supra* note 150, art. 7; Craft Employees Association Contract, *supra* note 150, art. 7.

arbitrator's decision is truly final and binding despite what the agreement provides because the employer may always walk away from it with legal impunity. Enforcement depends on continued positive relationships between the parties.

What lessons might the Tennessee examples offer Wisconsin? Act 10 gutted collective bargaining rights in two different ways. For one group of workers, Act 10 exempted them from the state's employment relations acts.¹⁵² Although for these employees there is no statutory right to organize and bargain collectively, there is also no statutory prohibition. There would appear to be no legal impediment to the employer voluntarily recognizing a union designated or selected by a majority of employees in one of these groups. All of these workers, however, are employed by the State of Wisconsin. As long as the Governor is hostile to collective bargaining, voluntary recognition will not occur. However, a future Governor more receptive to public employee voice could voluntarily recognize employees' representatives. Tennessee authority suggests that such recognition may only be lawful where authorized by statute, but the weight of authority from other jurisdictions is to the contrary.¹⁵³ There is a rich history of the extension of collective bargaining rights in the absence of statute by gubernatorial executive order.¹⁵⁴

The majority of public employees under Act 10 nominally remain covered by the state's public sector collective bargaining statutes, but bargaining on all subjects other than base wages is prohibited.¹⁵⁵ Because an employer may legally walk away from any contract provision other than base wages, public employers would appear to have minimal legal risk in bargaining with the employees' exclusive representative despite the statute.¹⁵⁶ The principal risk Wisconsin public employers would face would be political. Opponents of public

152. See *supra* note 42 and accompanying text.

153. See, e.g., *Am. Fed'n of State, Cnty. and Mun. Emps. v. City of Benton*, 513 F.3d 874 (8th Cir. 2008) (applying Arkansas law); *City of Phx. v. Phx. Emp't Relations Bd.*, 699 P.2d 1323 (Ariz. Ct. App. 1985); *Littleton Educ. Ass'n v. Arapahoe Cnty. Sch. Dist.*, 553 P.2d 793 (Colo. 1976); *Chi. Div. of Ill. Educ. Ass'n v. Bd. of Educ.*, 222 N.E.2d 243 (Ill. App. Ct. 1966); *La. Teachers Ass'n v. Orleans Parish Sch. Bd.*, 303 So. 2d 564 (La. Ct. App. 1974).

154. See MARTIN H. MALIN, ANN C. HODGES & JOSEPH E. SLATER, *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* 288–89 (2d ed. 2011).

155. 2011 Wis. Act 10 §§ 245, 314.

156. Perhaps the principal legal risk would be that an employee covered by the contract who is opposed to representation may file an unfair labor practice charge with the Wisconsin Employment Relations Commission.

employee collective bargaining could be expected to generate considerable political heat for public officials who opt to negotiate prohibited subjects. Act 10 was extremely polarizing politically and the polarization remains. In such a political environment, it is probably unrealistic to expect public employers to negotiate prohibited subjects of bargaining even though they may walk away from any agreements reached at any time.

B. Members Only Bargaining

Although Act 10 prohibits collective bargaining with a union serving as exclusive representative over anything other than base wages,¹⁵⁷ it does not prohibit negotiations between public employers and individual employees. Nor would it seem to prohibit negotiations between public employers and two or more employees. Before the Major League Baseball Players Association gained the right to collectively bargain for major league baseball players, Sandy Koufax and Don Drysdale, the two aces of the Los Angeles Dodgers' pitching staff, held out together and were able to negotiate better deals than they could have individually.¹⁵⁸

Koufax and Drysdale apparently were advised by the same attorney during their holdout.¹⁵⁹ Public employers reluctant to negotiate with an exclusive representative on behalf of an entire bargaining unit over prohibited subjects of bargaining may be more amenable to negotiating with a union serving as a common agent for the union's members.

The City of Memphis has several members-only collective bargaining relationships. Although most of the City's memoranda of understanding with IUOE Local 369D recognize the union as exclusive representative for bargaining unit employees, the memorandum with Local 369D covering heavy equipment operators recognizes the union "as the collective bargaining agency of its present members and those becoming such in the future individually and collectively."¹⁶⁰ The agreement is enforced through a grievance procedure culminating in final and binding arbitration.¹⁶¹

157. See 2011 Wis. Act 10 §§ 245, 314.

158. See Associated Press, *Holdout Twins Look Like Money in the Bank in Drills*, N.Y. TIMES, Apr. 3, 1966, at S1.

159. Bill Becker, *Koufax and Drysdale Agree to One-Year Contracts Totaling Over \$210,000*, N.Y. TIMES, Mar. 31, 1966, at 47.

160. IUOE-Memphis Heavy Equipment Operators Contract, *supra* note 132, art. 1.

161. *Id.* art. 11.

The memorandum of understanding covering Memphis firefighters also appears to be a members-only contract. The memorandum accords the union recognition “as a designated representative for certain employees of the Division of Fire” and adds that “[t]he term ‘certain employees’ . . . places no limitations or restrictions on the right of an employee to belong to and be represented by the Union.”¹⁶² As with the IUOE memorandum, enforcement is through a grievance procedure culminating in binding arbitration.¹⁶³ Similar recognition provisions are found in memoranda of understanding between the City and various building trades unions.¹⁶⁴ Enforcement is through a grievance procedure which culminates in arbitration that, like the AFSCME memoranda, is final and binding only with respect to suspensions and discharge and is advisory with respect to all other matters.¹⁶⁵

A strong argument can be made that an agreement negotiated by a union on behalf of its members only, rather than as exclusive

162. Agreement Between City of Memphis and the International Association of Fire Fighters Local 1784, art. 1 (Sept. 22, 2011), *available at* http://www.cityofmemphis.org/pdf_forms/MOU/IAFF.pdf.

163. *Id.* art. 8.

164. Memorandum of Understanding Between City of Memphis and the International Brotherhood of Electrical Workers Local 474, art. 1 (Mar. 25, 2011) [hereinafter Memphis-Electrical Workers Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/IBEW.pdf; Memorandum of Understanding Between City of Memphis and the IUPAT, Painters Union Local 49, art. 1 (Mar. 25, 2011) [hereinafter Memphis-IUPAT Contract], *available at* http://www.memphistn.gov/pdf_forms/MOU/Painters_Union.pdf; Memorandum of Understanding Between City of Memphis and the Plumbers Union Local 17, art. 1 (Mar. 25, 2011) [hereinafter Memphis-Plumbers Union Contract], *available at* http://www.memphistn.gov/pdf_forms/MOU/Plumbers_Union.pdf; Memorandum of Understanding Between City of Memphis and the Roofers Union Local 115, art. 1 (Mar. 25, 2011) [Memphis-Roofer's Union Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Roofer_s_Union.pdf; Memorandum of Understanding Between City of Memphis and the Cement Masons Union Local 908, art. 1 (effective July 1, 2011) [hereinafter Memphis-Cement Masons Union Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Cement_Masons_Union.pdf; Memorandum of Understanding Between City of Memphis and the Carpenters Union Local 345, art. 1 (effective July 1, 2011) [hereinafter Memphis-Carpenters Union Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Carpenters_Union.pdf; Memorandum of Understanding Between City of Memphis and the Bricklayers Union Local 5, art. 1 (Mar. 25, 2011) [hereinafter Memphis-Bricklayers Union Contract], *available at* http://www.cityofmemphis.org/pdf_forms/MOU/Bricklayers_Union.pdf.

165. Memphis-Electrical Workers Contract, *supra* note 164, art. 18; Memphis-IUPAT Contract, *supra* note 164, art. 18; Memphis-Plumbers Union Contract, *supra* note 164, art. 18; Memphis-Roofer's Union Contract, *supra* note 164, art. 18; Memphis-Cement Masons Union Contract, *supra* note 164, art. 18; Memphis-Carpenters Union Contract, *supra* note 164, art. 18; Memphis-Bricklayer's Union Contract, *supra* note 164, art. 18.

representative for all employees in a bargaining unit, would be enforceable. The argument would be even stronger if the agreement is implemented with a series of identical individual contracts with each member employee.¹⁶⁶ Members-only negotiations might also shield public officials from some of the political risk they would run if they negotiate with a union as exclusive bargaining representative with respect to prohibited subjects of bargaining.

C. *Negotiated Frameworks for Union Representation*

Under the First Amendment, public employees' freedom of speech and association protects their right to form and join labor unions.¹⁶⁷ That is where First Amendment protection for public employees' union organizing activity starts and ends. Employees have no First Amendment right to union representation, even as individuals resorting to their employers' unilaterally promulgated internal grievance procedure.¹⁶⁸

Perhaps recognizing the limitations of constitutional law as a source of representational rights, SEIU Local 205 has negotiated memoranda of understanding with local governmental authorities in Nashville and Davidson County that provide what I will call a framework for union representation of employees.¹⁶⁹ For example, the memorandum of understanding between Local 205 and the Government of Metropolitan Nashville provides for recognition of the union as the "exclusive authorized Representative . . . of all Civil Service General Government employees," but further declares that "the purpose of this MOU is to allow the UNION to represent all employees who desire to be

166. The case for the legality of members-only contracts is not an open-and-shut one. Because Wisconsin law prohibits employers from discriminating to encourage membership in a labor organization, employers may feel compelled to extend the terms of members-only contracts unilaterally to other employees in the bargaining unit. This may fuel an argument that the claim that members-only bargaining is consistent with Act 10's prohibitions elevates form over substance.

167. See, e.g., *Am. Fed'n of State, Cnty., and Mun. Emps. v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1077 (W.D.N.C. 1969).

168. See *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979).

169. See generally Memorandum of Understanding Between Tennessee Healthcare and Public Service Workers Union, Service Employees International Union, Local 205 and Metropolitan Government of Nashville and Davidson County (effective July 1, 2012) [hereinafter SEIU-Nashville Contract], available at http://www.seiu205.org/admin/Assets/AssetContent/ea195743-16b7-4754-a0be-31445ef2a83d/546bfa9e-94e2-495f-9d30-54cc81f55e47/7c eaa87d-463f-4c94-9ab2-34f4f2fbde15/1/Metro_MOU_-_2012-2014.pdf.

represented in the above-described represented unit.”¹⁷⁰ The memorandum does not establish substantive terms and conditions of employment.¹⁷¹ It adopts by reference the Nashville Civil Service Rules and Pay Plan.¹⁷² Employees have a right to be represented by the union in Civil Service proceedings provided that they authorize such representation in writing.¹⁷³ The memorandum essentially establishes the infrastructure for such representation by providing for the recognition of stewards, release time for employees performing representational functions, union access to employer facilities and bulletin boards, voluntary payment of union dues by payroll deduction, and a right to meet and confer regarding changes in employer policies with respect to terms and conditions of employment and the pay plan.¹⁷⁴ The model is followed in memoranda of understanding that Local 205 has with the Metropolitan Action Commission of Nashville and Davidson County, the Hospital Authority of the Metropolitan Government of Nashville and Davidson County, and the Metropolitan Housing and Development Authority.¹⁷⁵ These memoranda provide a model that public employers and unions in Wisconsin may adopt to facilitate union representation of employees who desire it. They may ensure that employees who are union members may be represented by their unions in investigatory interviews and in employer internal grievance and civil service proceedings. They may also provide for union access to employees at the workplace for purposes of representation and union access to information relevant to member representation.

170. *Id.* art. 1.

171. *See* SEIU-Nashville Contract, *supra* note 169.

172. *Id.* arts. 8–10, 14.

173. *Id.* art. 8.

174. *See id.* arts. 4–6, 11, 13, 16.

175. Proposed Memorandum of Understanding Between Service Employees International Union and Metropolitan Action Commission of Nashville and Davidson County (Nov. 2, 2011); Memorandum of Understanding Between Tennessee Healthcare and Public Service Workers Union, Service Employees International Union, Local 205 and the Hospital Authority of the Metropolitan Government of Nashville and Davidson County (effective July 1, 2008–June 30, 2011) [hereinafter SEIU-Nashville Hospital Contract]; Memorandum of Understanding Between Tennessee Healthcare and Public Service Workers Union, Service Employees International Union, Local 205 and Metropolitan Development and Housing Agency (effective Oct. 1, 2001) [hereinafter SEIU-MDHA Contract], available at <http://seiu205.org/Assets/AssetContent//ea195743-16b7-4754-a0be-31445ef2a83d/546bfa9e-94e2-495f-9d30-54cc81f55e47/e1916551-173b-40dc-a0c6-1b98da71f551/1/MDHA.pdf>.

D. Meet and Confer and Consultation

Employers looking for a structure to ensure positive employee input in workplace decision-making after Act 10 have looked to provide for meet and confer sessions with employees' unions. For example, Milwaukee requires its Department of Employee Relations to "[m]eet and confer with employees and employee groups, including currently and previously-certified employee groups, for the purpose of communicating, soliciting and exchanging information, views, ideas and interests concerning wages, hours, and other conditions of employment."¹⁷⁶ Established examples exist of what a meet and confer or consultation system might look like.

Minnesota requires its public employers to meet and confer with representatives of their professional employees with respect to matters relating to public services that are not mandatory subjects of bargaining. Such meet and confer sessions must take place at least once every four months.¹⁷⁷ The statute defines meet and confer as "the exchange of views and concerns between employers and their employees."¹⁷⁸

Greater structure for such employee input in employer decision-making is found in the Federal Service Labor Management Relations Statute. The statute provides that in agencies where no union has exclusive recognition on an agency-wide basis, unions that are exclusive representatives of a substantial number of agency employees are entitled to national consultation rights.¹⁷⁹ National consultation rights include rights to be informed of any proposed substantive changes in conditions of employment, to be permitted reasonable time to present views and recommendations, to have views considered before the agency takes final action, and to receive a written statement of reasons for the final action.¹⁸⁰

For meet and confer to be more than mere window dressing, several elements should be present. Most importantly, there should be notice to the employees' representative and an opportunity for involvement before a decision is made. There should also be a sharing of relevant information concerning the matters under discussion. Employers should

176. MILWAUKEE, WIS., CODE OF ORDINANCES § 340-3(2)(a) (2011), available at <http://city.milwaukee.gov/ImageLibrary/Groups/ccClerk/Ordinances/Volume-3/CH340.pdf>.

177. MINN. STAT. ANN § 179A.08(2) (2006).

178. *Id.* § 179A.03-(10).

179. 5 U.S.C. § 7113(a) (2006).

180. *Id.* § 7113(b).

consider the union's representations in good faith and should respond to them by, at a minimum, indicating how those representations were considered and, if they were rejected, the reasons for the rejection.

E. Collaborative Conferencing

In 2011, Tennessee repealed its statute which granted teachers collective bargaining rights and replaced it with the Professional Educators Collaborative Conferencing Act.¹⁸¹ The Act provides an intriguing model for employers and employees seeking to provide for employee representation in a system that operates outside the confines of Act 10. The Act replaces exclusive representation with proportional representation, with each representation option that receives at least 15% of the vote getting a seat at the table.¹⁸² The collaborative conferencing committee remains in effect for three years after which the election process is repeated.¹⁸³

The Act defines collaborative conferencing as “the process by which [the parties] . . . meet at reasonable times to confer, consult and discuss and to exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving.”¹⁸⁴ Because collaborative conferencing is not collective bargaining, Act 10's prohibition on bargaining should not apply. But, Wisconsin parties attracted to this approach should not copy the Tennessee statute wholesale. The Tennessee act contains provisions that are likely to poison, rather than facilitate, a positive and collaborative atmosphere. These include a provision authorizing the director of schools to bypass the employees' representatives and deal directly with individual employees,¹⁸⁵ and a provision prohibiting conferences with respect to a lengthy lists of subjects including differential pay plans and incentive compensation, expenditure of grants or awards, evaluations, staffing decisions, personnel decisions concerning assignment of professional employees, and payroll deductions for political activities.¹⁸⁶

181. 2011 Tenn. Pub. Acts 378.

182. TENN. CODE ANN. § 49-5-605(b)(4) (Supp. 2012).

183. *Id.* § 49-5-605(b)(6)(A).

184. *Id.* § 49-5-602(2).

185. *Id.* § 49-5-608(c).

186. *Id.* § 49-5-608(b).

F. Union Financial Viability

None of the alternatives to Act 10 for vehicles for collective worker voice will be effective if the workers' representative is not financially viable. As discussed previously, Act 10 dealt a potentially devastating blow to union financial viability by prohibiting voluntary payment of dues by payroll deduction.¹⁸⁷ The U.S. District Court decision holding the prohibition unconstitutional removes an enormous roadblock to union financial viability.¹⁸⁸ But, even if the Seventh Circuit affirms the decision, the litigation will only remove the prohibition of employer deduction of dues from employees' paychecks. Employers must still agree to make such deductions.¹⁸⁹

Wisconsin employers, once freed from Act 10's prohibition, have every reason to agree to allow employees to voluntarily authorize payroll deductions to pay their union dues. Financially-viable unions are critical to constructive independent collective employee voice in workplace decision-making, and employee voice contributes to improvements in public services. Indeed, every memorandum of understanding in Tennessee examined for this Article expressly provides for employees to pay their union dues by payroll deduction.

But dues check-off goes only so far in ensuring union financial viability. Under Act 10, Wisconsin, except for public safety employees, is now an open shop and it is likely that many employees will opt to avoid the cost of union dues altogether. Models exist, however, for ameliorating the effects of such free riding.

The federal government is also an open shop. The Federal Service Labor Management Relations Statute affords union representatives a right to use "official time" when engaged in collective bargaining

187. See *supra* note 23 and accompanying text.

188. See *supra* notes 23–31 and accompanying text.

189. In the federal litigation, the unions have argued that the State of Wisconsin is required to reinstitute dues check-off for all state employees who authorize it. See Reply Brief in Support of Plaintiffs' Motion for Summary Judgment at 18, *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856 (W.D. Wis. 2012). The unions argue that pre-Act 10 state law provided for dues check-off for all employee organizations regardless of whether they were exclusive bargaining representatives. See *id.* at 17; *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985) (holding limitation on participation in the Combined Federal Campaign to not-for-profit organizations that provide direct health and welfare services to needy persons is facially valid but allowing excluded legal defense funds an opportunity on remand to establish that their exclusions were based on the viewpoints they advocate).

negotiations.¹⁹⁰ In other words, such union representatives have a right to be released from their regular duties but continue in paid status when engaged in collective bargaining. Unions and agencies frequently agree in collective bargaining to supplement the statutory entitlement with additional official time for the performance of other representational duties.¹⁹¹ Similarly, the SEIU memoranda of understanding with governmental authorities in Nashville provide for blocks of paid release time for employees performing representational functions.¹⁹² Every memorandum of understanding in Tennessee examined for this Article provides for union representatives to be released from their regular duties to investigate and present grievances without loss of pay. Similarly, Wisconsin public employers should consider allowing union representatives to perform some representational functions “on the clock.”

V. A SILVER LINING IN THE GRAY CLOUD OF ACT 10

As far back as 1989, a Labor Department report identified legal doctrine concerning the scope of bargaining as a barrier to labor-management cooperation in the public sector.¹⁹³ Seven years later, a Secretary of Labor task force elaborated on how disputes over the scope of bargaining inhibit constructive labor-management efforts to improve public services:

Because it affects the capacity of an agency or jurisdiction to improve service, the clearest need is for workers, managers, and union leaders to be able to discuss the full range of issues affecting the service they are working to improve. In a traditional labor-management relationship characterized by formal or legalistic approaches, such discussion often is precluded by concerns over setting precedents that might lead to giving up prerogatives.¹⁹⁴

190. 5 U.S.C. § 7131(a) (2006).

191. See generally *id.* § 7131(d); *Bureau of Alcohol, Tobacco and Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 90–91 (1983).

192. See SEIU-Nashville Contract, *supra* note 169, art. 11; SEIU-Nashville Hospitals Contract, *supra* note 175, art. 17; SEIU-MDHA Contract, *supra* note 175, art. 21.

193. Robert B. Moberly, *Legal Impediments to Labor-Management Cooperation in State and Local Government*, in U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION: FINAL REPORT 1, 19–22 (1989).

194. WORKING TOGETHER FOR PUBLIC SERVICE, *supra* note 95, at 65.

Act 10 preempted such fights in Wisconsin by declaring everything other than base wages to be prohibited subjects of bargaining.¹⁹⁵ Act 10 thus forces employers and employee representatives to work outside the established legal structure to devise mechanisms for independent positive collective employee voice. This Article has provided a range of alternatives for Wisconsin public employers and unions to consider. Each of these models depends on positive relationships between workers' unions and their employers. However, the opposition of many public employers to Act 10¹⁹⁶ indicates that many such positive relationships already exist. Further indication of such positive relationships can be found in the numerous employers who agreed to new collective bargaining agreements or to extend existing contracts before Act 10 took effect to delay the application of Act 10 to their workplaces.¹⁹⁷

For Wisconsin public employers to retain the benefits of independent collective employee voice, they and their workers' unions have to work outside the existing legal structures. Such a move outside the post-Act 10 legal framework can be liberating. As Professor Hodges has observed, when parties move outside a legal structure that focuses on whether a matter is a mandatory subject of bargaining, resulting agreements "can be virtually unlimited in their scope."¹⁹⁸ The challenge for Wisconsin public employers and unions is to devise their own models for effective independent worker voice and demonstrate that Governor Walker is wrong—that labor-management collaboration is a superior method to unilateral command and control for providing effective and efficient public services.

195. See 2011 Wis. Act 10 § 245.

196. See *supra* notes 65–66 and accompanying text.

197. Editorial, *A Triple Play on Local Taxpayers*, WIS. ST. J., Sept. 27, 2012, at A13.

198. Hodges & Warwick, *supra* note 102, at 285.